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CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

**SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"**

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

VOL. LXVIII

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,
LAW PUBLISHERS AND LAW BOOKSELLERS,
1899.

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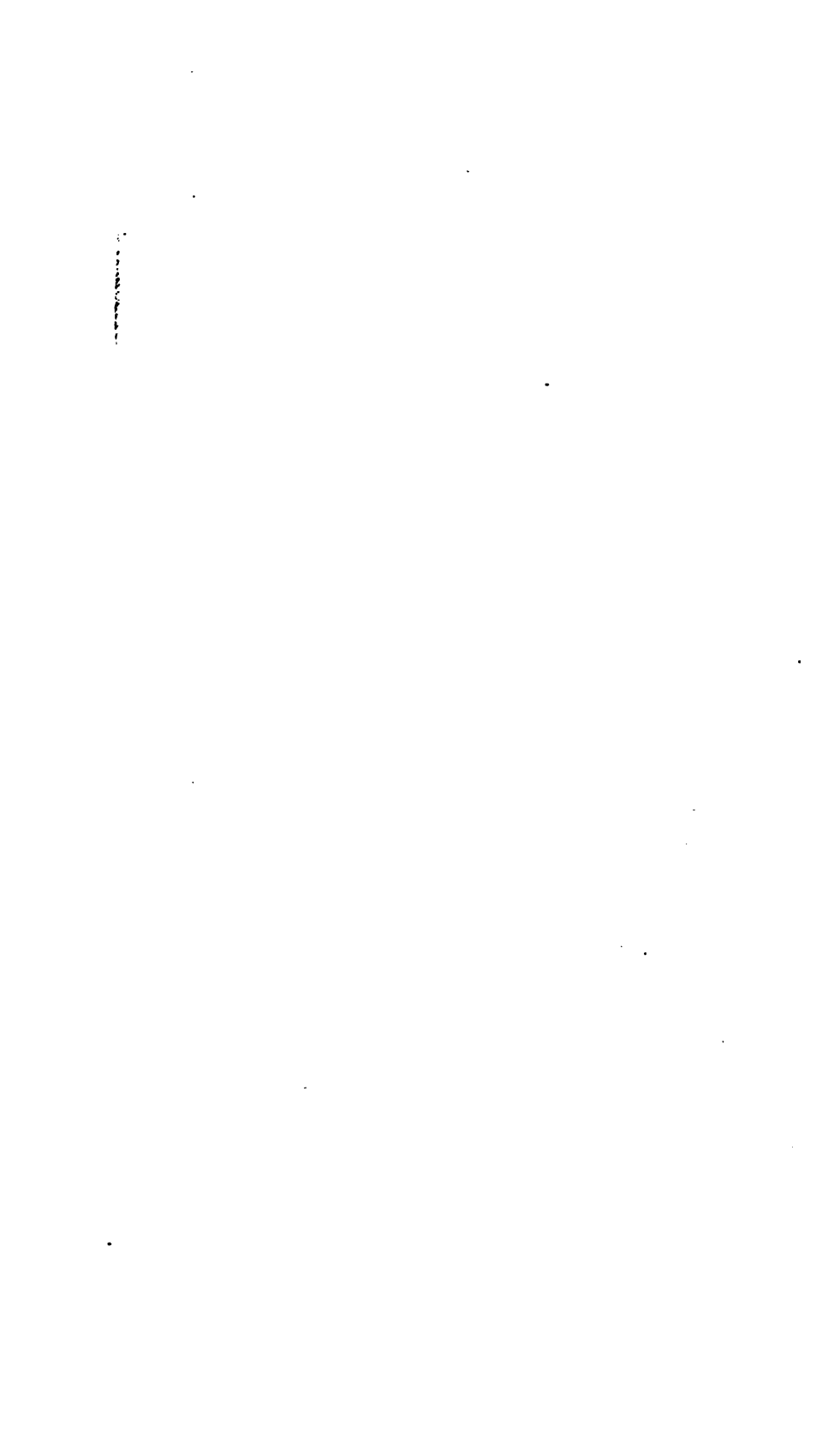
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AMERICAN STATE REPORTS.
VOL. LXVIII.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

DENNIS v. BINT.

[122 CALIFORNIA, 89.]

EXECUTORS AND ADMINISTRATORS—SALE OF LAND—COLLATERAL ATTACK.—If letters of administration purporting to be sealed are issued to a regularly appointed administratrix, who takes oath, gives bond, and claims to hold valid letters of administration, and is repeatedly recognized as administratrix by the court in its orders reciting that she is such, a conveyance made by her as such administratrix after confirmation of a sale of land ordered by the court cannot be collaterally attacked by the heirs of the deceased on the ground that such letters of administration were void because they did not bear upon their face the impress of the seal of the court.

EXECUTORS AND ADMINISTRATORS—SALE OF LAND—STATUTE OF LIMITATIONS.—If matters relied upon to impeach an administrator's sale of land are patent of record, and there has been adverse possession since such sale, mere ignorance of the facts without some valid excuse therefor is not sufficient to stay the running of the statute of limitations.

STATUTE OF LIMITATIONS—EXECUTOR'S FAILURE TO PROCURE SETTLEMENT OF ACCOUNTS CANNOT PROLONG. Though a statute provides that an action to recover property sold by an executor or administrator shall not be maintained unless commenced within three years after the settlement of his final account, the time cannot be prolonged indefinitely by his failure to file such account and obtain its settlement. The statute must in such a case be deemed to commence running after the lapse of a reasonable time in which to present and procure a settlement of such account.

T. E. Gibbon and C. O. Whittemore, for the appellants.

McLachlan and Cohrs, A. R. Metcalf, W. E. Arthur, and W. S. Wright, for the respondents.

40 THE COURT. When this case was in Department the opinion hereto attached was prepared by Mr. Commissioner Britt. After full consideration of the appeal in Bank we are satisfied with that opinion and with the conclusion there reached, and for the reasons therein given the judgment and order appealed from are affirmed.

BRITT, C. Action to recover possession of a tract of land in Los Angeles county, and to set aside a sale thereof made in probate. Defendants, more than a hundred in number, deraign, through one Turner, who was the purchaser at said sale. Plaintiffs assert title as heirs of their father, Charles J. Dennis, who owned the land at the time of his death; against the validity of the sale they claim that the person who was appointed administratrix of the estate of said deceased sold the land without having qualified as administratrix and without right to act in that capacity; also that the petition and notice on which the court ordered the sale were insufficient to confer jurisdiction to make the order. There is no charge of actual fraud in the sale; it appears that the purchaser paid full value for the property. Defendants, in whose favor judgment passed below, rely on several lines of defense; our examination of the case leads us to doubt whether any of them has much merit, excepting only their plea of the statutes of limitation, and to this alone we shall direct our attention.

41 The action was begun February 8, 1893; afterward an amended complaint was filed, to which a demurrer was sustained as to the plaintiffs Frank H. Dennis and Kitty N. Whittemore, and as concerns them the question argued by counsel is whether, on the showing made by their pleading, the action was barred by lapse of time. It appears from said complaint that Charles J. Dennis died December 2, 1881, and that on January 9, 1882, on the petition of his surviving wife, Clotilda J. Dennis, mother of the plaintiffs, the superior court of said county ordered that letters of administration of his estate issue to her "upon her taking the oath and filing a bond according to law." It seems that she filed a bond, but it is alleged that she failed "to take and subscribe the oath required by law and the said order of the court." There is an averment that "no letters of administration upon the estate have been issued"; there is, however, annexed to the complaint as an exhibit, and made part thereof, a copy of a document filed in the court in the matter of the estate of said deceased purporting to be letters of administration issued to said

Clotilda on February 1, 1882, signed by the clerk, and in the form prescribed for such letters by section 1362 of the Code of Civil Procedure, except that the seal of the court was not impressed thereon. Similarly, a copy of the petition for an order to sell the land, wherein said Clotilda made oath that letters of administration on the estate had been duly issued to her, is exhibited with the complaint; also several orders of the court are set out reciting acts done by her as such administratrix. Altogether, the allegations and exhibits of the complaint show that letters, such as they were, did issue to said Clotilda, and that she acted as administratrix thereunder. Upon her petition the court made an order on May 15, 1883, purporting to authorize her to sell the land. For present purposes we may allow that this order was void for want of the notice required in such proceedings by sections 1538 and 1539 of the Code of Civil Procedure. However, pursuant thereto the administratrix sold the land, and on August 27, 1883, after obtaining an order confirming the sale, she executed a deed to the purchaser; he and those claiming under him thenceforward had possession of the premises. There has been no settlement of the final account of the administratrix. When the action was begun, both the plaintiffs ⁴² Frank H. Dennis and Kitty N. Whittemore were more than four, but less than five, years past the age of majority; plaintiff Willard W. Dennis was still a minor some five months under that age. There is an allegation in the complaint in general terms that the grounds of the action and the facts alleged concerning the invalidity of the sale were not known or discovered by any of the plaintiffs until within one year of the commencement of the action.

The special statute of limitations contained in the chapter of the Code of Civil Procedure relating to sales of property of decedents is as follows:

"Sec. 1573. No action for the recovery of any estate sold by an executor or administrator, under the provisions of this chapter, can be maintained by any heir or other person claiming under the decedent, unless it be commenced within three years next after the settlement of the final account of the executor or administrator. An action to set aside the sale may be instituted and maintained at any time within three years from the discovery of the fraud, or other grounds upon which the action is based."

"Sec. 1574. The preceding section shall not apply to minors or others under any legal disability to sue at the time the right

of action first accrues; but all such persons may commence an action at any time within three years after the removal of the disability."

It is contended that, according to the allegations of the complaint, the land was never sold by an executor or administrator, and hence that said section 1573 can have no application. The question is in effect whether the heirs can be permitted to say in this collateral proceeding that there was no administration of their father's estate at all. It is clear that the court had jurisdiction of the estate of the deceased, and to appoint the administratrix. Therefore, if the letters issued had been duly attested, it is unquestionable that, as against any collateral attack, they would have been conclusive evidence of her due qualification, and of her authority to act as administratrix: *Westcott v. Cady*, 5 Johns. Ch. 342, 343; 9 Am. Dec. 306; *Moreland v. Lawrence*, 23 Minn. 84; *Minnesota etc. Co. v. Beebe*, 40 Minn. 7, 11; *Du-son v. Dupre*, 32 La. Ann. 896; *Mutual etc. Ins. Co. v. Tisdale*, 43 91 U. S. 243; *Woerner on Administration*, sec. 266; 1 *Williams on Executors*, 7th Am. ed., 676, note; *Ryan v. American Freehold etc. Co.*, 96 Ga. 322. This seems to have been conceded in one of the cases most relied on by appellants (*Pryor v. Downey*, 50 Cal. 399; 19 Am. Rep. 656): "The letters of administration may indeed, when issued, be evidence of the regularity of the previous proceedings," et cetera.

The purpose of the seal is to authenticate the document, show that it actually emanated from the court; here the letters recited that the seal was affixed, and Mrs. Dennis acted as administratrix, claiming to hold valid letters; the court recognized her as administratrix and repeatedly made orders reciting that she was such; the authenticity of the letters having been thus postulated and presumed in the quarters where duty and interest combined to require the truth of the matter to be known, it would seem that the presumption should be deemed conclusive against the present attack; and, in our opinion, the absence from the letters of the impress of the seal does not impair their effect, in this action, as evidence of her authority as administratrix. In *Whyler v. Van Tiger* (Cal., Aug. 31, 1887), 14 Pac. Rep. 846, this court upheld, against the suit of a minor, a lease of lands made by one who had been appointed his guardian and had given bond as such, but who had taken no oath and had not received letters of guardianship. That case well illustrates the tendency of the law to discountenance the collateral impeachment of the authority of such officers, but it has not the controlling importance sup-

posed by respondents, because of differences in the statutes concerning the qualification, et cetera, of guardians and administrators: See, further, *Gamahl v. Soher*, 68 Cal. 95; *Gallagher v. Holland*, 20 Nev. 167; *Baldwin v. Standish*, 7 Cush. 207; *People v. Dunning*, 1 Wend. 16; *Ambler v. Leach*, 15 W. Va. 677; *Van Fleet on Collateral Attack*, sec. 353. We have given careful attention to the cases urged by plaintiffs upon the attention of the court (*Pryor v. Downey*, 50 Cal. 399; 19 Am. Rep. 656; *Staples v. Connor*, 79 Cal. 14) in which it was held that a sale of lands made in probate by one who, although acting as administrator, had not qualified by taking the oath and filing a bond, was void and might be successfully impeached by the heirs in an action like the present. But in those cases, as well as in *Estate of Hamilton*, 44 34 Cal. 464, there had been no issuance of letters of administration; and we are not satisfied that their doctrine is so clearly salutary that it should be extended beyond the facts on which it rests.

It is further claimed that the case is taken from the operation of the statute by the averment that the grounds of the action were discovered within one year next before the commencement of the suit. Aside from other considerations which may bear on this point, the statement of the complaint is insufficient for the purpose claimed because unaccompanied by any explanation of the failure to acquire knowledge earlier; so as regards the adult plaintiffs at least. The matters relied on to impeach the sale were patent of record, and there was adverse possession of the land; mere ignorance of the facts, therefore, without some valid excuse for ignorance, was of no consequence: *Hecht v. Slaney*, 72 Cal. 363; *Moore v. Boyd*, 74 Cal. 167; Code, 1872, sec. 1573, commissioners' note. The minor plaintiff is in no better position for reasons presently to appear.

Lastly, it is insisted that because there has been no settlement of the final account of the administratrix the statute has never begun to run. Formerly said section 1573, which was drawn from section 190 of the probate act of 1851, required an action to recover estate sold by an executor or administrator to be brought within three years next after the sale; and following it then as now was the provision of section 1574—section 191 of the probate act—that the preceding section should not apply to minors or others under legal disability, who might sue within three years after removal of the disability. The result of the cases involving or illustrating the effect of these sections, in their original form, is that if the administrator failed to sue to

recover the land or set aside the sale within three years next following the sale—the administration so long continuing—then the heirs as well as himself were barred, even though the heirs were minors; this on the ground that under our system the administrator represents the heirs; he the trustee, they the cestuis: *McLeran v. Benton*, 73 Cal. 329, 342; 2 Am. St. Rep. 814; *Staples v. Connor*, 79 Cal. 14; *Patchett v. Pacific etc. Ry. Co.*, 100 Cal. 505; *Meeks v. Olpherts*, 100 U. S. 564; *Meeks v. Vassault*, 3 Saw. 206; *Cunningham v. Ashley*, 45 Cal. 485. But in 1880 section 1573 ⁴⁵ was amended so as to provide that the action cannot be maintained unless commenced within three years next after the settlement of the final account, and the question is whether under the amendment the representative may, by refraining from procuring the settlement of his final account, indefinitely postpone the running of the statute. It may simplify the view somewhat to consider the case as it would have been presented had the administratrix brought the action, as she had the power to do: *Meeks v. Olpherts*, 100 U. S. 564. The complaint shows that there were no debts of the deceased, and that by the sale of the land now in dispute the administratrix received in the month of August, 1883, funds sufficient several times over to pay the expenses of administration and the allowance made by the court for the support of the family. The estate was then in condition to be finally closed, and it was her duty to proceed to a final account and to obtain a settlement thereof (Code Civ. Proc., sec. 1652); our whole scheme for settling the estates of decedents “looks to a speedy close of administration”: *Maddock v. Russell*, 109 Cal. 423. In our opinion the administratrix was allowed under the amendment of 1880 a reasonable time in which to obtain settlement of her final account, and that, failing in this, the statute began to run, and were she the plaintiff here it could be pleaded against her with effect; what is such reasonable time must depend in general on the circumstances of each estate; but here it is apparent that much more than a reasonable time expired more than three years prior to the commencement of the action. There is no novelty in this proposition; it follows from the principle of quite extensive application that one cannot avoid the statute of limitations by delay in taking action incumbent upon him; thus it was held that an executor of a will probated in Illinois, who had unreasonably delayed to take out ancillary letters of administration in New York, was not entitled to the benefit of a statute of the latter state which excepted from the general statute of limitations

a certain period "after the granting of such letters": Kirby v. Lake Shore etc. R. R. Co., 120 U. S. 130. And see Bauserman v. Blunt, 147 U. S. 647, approving Bauserman v. Charlott, 46 Kan. 480; Mickle v. Walraven, 92 Iowa, 423; Thomas v. Pacific Beach Co., 115 Cal. 136. If this be not the correct view of the statute, and if the ⁴⁶ right to sue can be preserved to the administrator and those whom he represents for ten years by failure—without excuse—to settle his final account, then it may be preserved in like manner for fifty years or indefinitely. "The statute of limitations is intended, not for the punishment of those who neglect to assert their rights, but for the protection of those who have remained in possession under color of title believed to be good" (Marshall, C. J., quoted in Tynan v. Walker, 35 Cal. 641; 95 Am. Dec. 152); the policy of the statute is to quiet titles to real estate sold by order of the probate courts: Harlan v. Peck, 33 Cal. 521; 91 Am. Dec. 653; and we do not feel at liberty to say that the legislature intended to withhold such protection indefinitely from purchasers at probate sales at the option of the representative or of those who might compel him to account.

The principle above stated is illustrated in the opinion of this court in Meherin v. San Francisco Produce Exchange, 117 Cal. 217, 218. While the facts there were different from those here, the rule there declared seems to be applicable to the case at bar. That was an action by plaintiffs to have it adjudged that they were members in good standing of the defendant—the defendant having suspended them about eight years before the commencement of the action. The lower court held that the action was barred, and the judgment was affirmed. This court, in discussing the question whether the statute commenced to run before a demand had been made by plaintiffs for reinstatement, said as follows: "In such a case, a party cannot extend the statute of limitations indefinitely by failing to make a demand: Opinion by Beatty, C. J., in Bills v. Silver King Min. Co., 106 Cal. 21; Prescott v. Gonser, 34 Iowa, 179; Baker v. Johnson Co., 33 Iowa, 151; Codman v. Rodgers, 10 Pick. 119. In the case last cited the court say: 'A party must not be permitted to sleep over his rights to the prejudice of the party to whom he makes the claim, who, by the delay, may be deprived of the evidence and means of effectually defending himself. A demand must be made within a reasonable time; otherwise the claim is considered stale, and no relief will be granted in a court of equity. What is to be considered a reasonable time for this purpose does

not appear to be settled by a precise rule. It must depend on circumstances. If no cause for delay be shown, it would seem ⁴⁷ reasonable to require the demand to be made within the time limited by the statute for bringing the action. There is the same reason for hastening the demand that there is for hastening the commencement of the action; and, in both cases, the same presumptions arise from delay.' ”

Since, therefore, the administratrix could not maintain the action because of lapse of time, it follows, in accordance with the authorities already cited, that the plaintiffs cannot maintain it, and the demurrer was properly sustained to the complaint of Frank H. Dennis and Kitty N. Whittemore. A like conclusion applies to the case of Willard W. Dennis; for although as to him the demurrer was overruled and the case went to trial, yet the plea of the statute was again interposed against him by answer and was sustained by the findings of the court; he is included in the effect of the bar of the statute against the administratrix, and the findings are sustained. If it be objected that he is placed thus in worse position than if the administratrix had in due time obtained the settlement of her final account, the answer is, that this is the logical outcome of the system which clothes the administrator with the right of action in such cases and makes him the representative and trustee of the heirs; the laches of the trustee, while he holds office as such, must be imputed to the beneficiary, and the remedy of the heir is against the administrator: *Wheeler v. Bolton*, 54 Cal. 302; *McLeran v. Benton*, 73 Cal. 343; 2 Am. St. Rep. 814. The judgment and order denying a new trial should be affirmed.

Temple, J., Harrison, J., and Henshaw, J., dissented.

EXECUTORS AND ADMINISTRATORS—APPOINTMENT OF AND SALES BY—COLLATERAL ATTACK.—Jurisdiction to grant letters of administration by a probate court cannot be collaterally attacked: *Abbott v. Coburn*, 28 Vt. 663; 67 Am. Dec. 735. Nor can the appointment of an administrator be impeached collaterally: *Riser v. Snoddy*, 7 Ind. 442; 65 Am. Dec. 740; *Bradley v. Missouri etc. Ry. Co.*, 51 Neb. 653; 66 Am. St. Rep. 473, and note. If a probate court have jurisdiction of the estate of a decedent, mere irregularities or unsupplied omissions in its proceedings in granting letters of administration or orders of sale, do not invalidate the letters or orders: *Giddings v. Steele*, 28 Tex. 733; 91 Am. Dec. 336. In collateral proceedings involving the title to land sold by an administrator, it will be presumed that the probate court which appointed the administrator had before it proof of the facts necessary to authorize it to make such appointment, and to give it power to act in the case, although on a direct appeal or writ of error from the probate proceeding it would be held irregular and set aside: *Schnell v. Chicago*, 38 Ill. 382; 87 Am. Dec. 304. See *Withe*—

Patterson, 27 Tex. 491; 86 Am. Dec. 643, and note. But a void administrator's sale may be collaterally attacked, notwithstanding its confirmation by the probate court: *Townsend v. Tallant*, 33 Cal. 45; 81 Am. Dec. 617.

RISDON IRON AND LOCOMOTIVE WORKS v. CITIZENS' TRACTION COMPANY.

[122 CALIFORNIA, 94.]

ATTACHMENT—APPEALABLE ORDER.—An order of court for the release of attached property on the ground that it is not liable to seizure under the writ is, in effect, an order dissolving the attachment and may, therefore, be appealed from.

EXEMPTIONS—FRANCHISES—ROLLING STOCK.—The exemption from attachment or execution which pertains to the franchise of a street railway company does not extend to its cars, trucks, iron safes, or other movables, although they may be proper or even necessary to its operation under its franchise. Such property does not emanate mediately or immediately from the state, and has no character of a personal trust. It is subject to attachment or execution in like manner as other property not exempt by statute.

Withington & Carter, for the appellant.

J. B. Mannix, for the respondent.

96 BRITT, C. Respondent is a street railroad corporation organized under the laws of this state, and on January 9, 1897, in virtue of certain franchises to it granted by the city of San Diego, it was engaged in operating a line of street railway in said city for the transportation of passengers, electricity being used as the motive power. This is an action by appellant, which is also a corporation, on a promissory note of respondent; on the day aforesaid appellant caused a writ of attachment, issued in the action, to be levied on certain cars, trucks, electric goods and supplies, fire-proof safes, et cetera, the property of respondent, then used and necessary to be used in and about the business of operating said line of street railway. Thereupon respondent moved the court to discharge the attachment on the ground (we state it generally) that, considering the nature of respondent's business as a carrier of passengers, and the uses of the attached property in that behalf, the same was not subject to attachment for respondent's debt. The court ordered that "said attachment be discharged in respect of said property." Plaintiff appealed from the order.

Respondent makes the point that no appeal lies from said order. Section 963 of the Code of Civil Procedure provides that

an appeal may be taken from an order (among others mentioned) "dissolving or refusing to dissolve an attachment." It is argued that this applies only to orders made under section 556 of the code, which provides for discharging the writ of attachment where "the same was improperly or irregularly issued"; respondent claims that an order for the release of attached property on the ground that it is not liable to seizure under the writ is not an order dissolving the attachment. To us, however, it seems that as regards the property released the attachment is as effectually dissolved by such an order as if the writ were quashed. The provision of section 963, giving the right of appeal, is in terms directed to an order dissolving an attachment; the words "an attachment" in this connection are quite broad enough to include seizure and custody under the writ as well as the writ itself. Thus, it is common to say that final judgment for defendant has the effect to dissolve a prior attachment; an ⁹⁷ expression which has no regard to any question whether the writ was properly or regularly issued. We think the order was appealable.

As to the merits of the order, in our opinion the quality of the exemption from execution which pertains, except when otherwise provided by statute, to the franchise of a corporation such as the respondent (*Gregory v. Blanchard*, 98 Cal. 311), does not extend also to property of the kind attached in this action, although it may be proper or even necessary to operations under the franchise. Such property does not emanate mediately or immediately from the state like the privileges embraced in a franchise; it has no character of personal trust as in the case of the franchise, and in our opinion it is subject to attachment or execution in like manner as other property not exempt by statute: *Code Civ. Proc.*, secs. 540, 688, 690; *Lathrop v. Middleton*, 23 Cal. 257; 83 Am. Dec. 112; *Humphreys v. Hopkins*, 81 Cal. 551; 15 Am. St. Rep. 76; 1 *Freeman on Executions*, sec. 146 a; *Coe v. Railroad Co.*, 10 Ohio St. 372; 75 Am. Dec. 518; *State v. Rives*, 5 Ired. 297, 307. There are respectable authorities which hold a different doctrine, but we are disposed to think they are not supported by the better reason: See *Hart v. Burnett*, 15 Cal. 593. Whether the rule of liability to attachment or execution should extend to sections of railway lines, or to parts of other similar aggregation of property susceptible of use only as a unit, need not be decided. The cars, trucks, iron safes, and other movables seized under the writ in this action

are not such property. The order appealed from should be reversed.

Chipman, C., and Belcher, C., concurred.

For the reasons given in the foregoing opinion the order appealed from is reversed.

McFarland, J., Temple, J., Henshaw, J.

APPEAL—WHAT DETERMINATIONS ARE REVIEWABLE.—An order discharging a writ of attachment after a full hearing is appealable either before or after judgment upon the main issue in the case. Such an order is conclusive of all matters adjudicated thereby: *Hall v. Harris*, 1 S. D. 279; 36 Am. St. Rep. 730, and note. See extended note to *Davie v. Davie*, 20 Am. St. Rep. 173.

EXECUTION — EXEMPTIONS — FRANCHISES — ROLLING STOCK.—An execution cannot be levied on corporate franchises and rights or on property essential to the enjoyment thereof: *Susquehanna Canal Co. v. Bonham*, 9 Watts & S. 27; 42 Am. Dec. 315. This is an established doctrine of the common law, and is sustainable only upon the theory that the franchise is granted for the furtherance of certain objects which the granting power considers so important that it will neither tolerate private interference with the franchise, nor with other property without which the objects sought could not be accomplished: Extended note to *Ammant v. Turnpike Road*, 15 Am. Dec. 595, 596. Rolling stock of a railroad corporation is not included within the exemption: *Boston etc. R. R. v. Gilmore*, 87 N. H. 410; 72 Am. Dec. 336.

CUNHA v. HUGHES.

[122 CALIFORNIA, 111.]

COMMUNITY PROPERTY.—A surviving widow takes her share of the community property by succession from her husband, and whatever right she may have in the estate of which he died seized is to be ascertained by the same means, as is the right of any claimant to his estate, whether by succession or by will.

ESTATES OF DECEDENTS—RIGHTS OF WIDOW—COMMUNITY PROPERTY—DECREE OF DISTRIBUTION—EFFECT OF.—The rights of the surviving widow in the community property are determined and concluded by the decree of distribution of her husband's estate, unless such decree is reversed, set aside, or modified on appeal, whether she has elected to take her one-half of such property, or to take a life estate in the whole under her husband's will.

ESTATES OF DECEDENTS—DECREE OF DISTRIBUTION—EFFECT OF.—The final decree of distribution in an estate is conclusive of the rights of all persons.

PARTITION—ALLOTMENT OF COMMUNITY PROPERTY. The community character of property purchased by a husband is not changed by a subsequent decree in partition allotting it to him and his wife.

HOMESTEADS—DECLARATION BY WIFE—WHEN FACTUALLY DEFECTIVE.—A declaration of homestead made by a wife,

which fails to contain a statement "showing that her husband has not made such declaration, and that she therefore makes the declaration for their joint benefit," is ineffective to impress the land with the incidents of a homestead.

J. C. Black, for the appellant.

J. Hatch and E. M. Rosenthal, for the respondent.

¹¹¹ HARRISON, J. The plaintiff seeks by this action to quiet his title to an undivided half of a certain tract of land against the claim of the defendant. Judgment was rendered in his favor, and the defendant has appealed therefrom and from an order denying a new trial. The land in question is a part of the Milpitas rancho, and was conveyed in 1855 and 1856 to Michael Hughes, the father of the defendant and husband of Ellen ¹¹² Hughes. Upon the conveyance of the land to him he and his said wife entered thereon, and continued in possession until his death. By his last will and testament he gave to his wife, Ellen Hughes, all of his property for her use during life, with a remainder in fee in the lands described in the complaint herein to two of his grandchildren. February 25, 1887, the superior court of Santa Clara county made its decree of distribution of his estate, by which it distributed the land in question to Ellen Hughes, his surviving widow, for the term of and during her life, with remainder in fee to Willie Hughes, and Allie Hughes, the grandchildren of Michael named in his will. Thereafter Willie Hughes conveyed his interest in the land to the plaintiff, and subsequently the defendant received a conveyance of the same land from Ellen Hughes, the surviving widow, and the two grandchildren, Willie and Allie. The court finds that the land was the community property of Michael and Ellen Hughes, and it is contended by the defendant that for that reason one-half of it descended to Ellen immediately upon the death of her husband, without power in the husband to make any testamentary disposition of the same.

As the surviving widow took her share of the community property by "succession" from her husband (Estate of Burdick, 112 Cal. 387), whatever right she may have in the estate of which he died seised is to be ascertained by the same means as is the right of any claimant to his estate, whether by succession or by will. Upon an application for the distribution of an estate, the entire world is notified to be present at the hearing, and to make known their claims, if any they have, to the estate of the decedent or any portion thereof, and the decree of distribution becomes a

judicial determination of their claim, which, unless reversed, set aside, or modified upon appeal, is conclusive of their rights, the same as is a final judgment in any other action or proceeding. By giving the notice in the manner prescribed by the statute, the court acquires jurisdiction over all persons entitled to assert any claim to the estate, and, whether they appear and present their claim for adjudication, or fail to appear and suffer default, the judgment is conclusive upon them. The decree of distribution becomes the measure of the rights of all claimants to the estate, ¹¹³ and their rights are to be determined by the terms of this decree: *William Hill Co. v. Lawler*, 116 Cal. 359; *Matter of Treasony's Trust*, 119 Cal. 568; *Jewell v. Pierce*, 120 Cal. 79. Upon the hearing before the superior court on the application for distribution of the estate of Michael Hughes, his surviving widow could have presented her claim for an undivided half of his estate, and, if the court had erroneously refused to allow the claim, she could have appealed from the decree, and had the error corrected upon appeal. Her failure to do so renders the decree "conclusive" as to her right now to assert such claim: *Code Civ. Proc.*, sec. 1666. It was within her privilege to elect to take in accordance with the will, rather than to claim her right as surviving widow to the one-half of the estate, and for the purpose of sustaining the decree of distribution, it may be assumed that she made such election: See *Noe v. Splivalo*, 54 Cal. 207. The cases cited by the appellant in support of his contention were direct appeals from the decree of distribution.

The community character of the property was not changed by reason of the decree in the suit in partition brought after its purchase by the husband, wherein the land in question was allotted to Michael Hughes and Ellen Hughes jointly. That judgment conferred no new or additional title, but merely ascertained and allotted to the parties to the suit their respective interests in the land: *Wade v. Deray*, 50 Cal. 376; *McBrown v. Dalton*, 70 Cal. 89.

August 31, 1874, while Michael and his wife Ellen were residing upon the land, she filed in the recorder's office a declaration of homestead thereon, in which she stated that she was married to and the wife of Michael Hughes, and at the time of making the declaration resided with her family upon the land (describing it), and also stated its cash value, and that she selected and claimed the same as a homestead. Section 1263 of the Civil Code, which was in force at that time, declares that when the declaration of homestead is made by the wife it must

contain a statement "showing that her husband has not made such declaration, and that she therefore makes the declaration for their joint benefit." The declaration of Mrs. Hughes did not contain this statement, and it was therefore ineffective to impress¹¹⁴ the land with the incidents of a homestead, so as to give to her the right of survivorship: *Booth v. Galt*, 58 Cal. 254.

The judgment and order are affirmed.

Garoutte, J., and Van Fleet, J., concurred

Hearing in Bank denied.

HUSBAND AND WIFE—COMMUNITY PROPERTY—RIGHT OF SURVIVING WIFE.—A husband cannot, by devise or will, defeat his wife's right to one-half of the community property under the California statute, which gives the husband entire control of the community property with absolute power to dispose of it, but provides that upon the dissolution of the community by the death of the husband or wife, one-half the community property shall go to the survivor: *Beard v. Knox*, 5 Cal. 252; 63 Am. Dec. 125. A wife, by accepting a legacy under the will of her husband, which assumes to dispose of the whole community property, is not estopped to claim one-half of the community property: *Beard v. Knox*, 5 Cal. 252; 63 Am. Dec. 125. For a discussion of community property, see monographic note to *Cooke v. Bremond*, 86 Am. Dec. 629.

DISTRIBUTION—DECREES OF—EFFECT.—In California, decrees of the probate court on distribution are conclusive as to the rights of heirs, legatees, and devisees, subject to be reversed, set aside, or modified on appeal: See monographic note to *Green v. Creighton*, 48 Am. Dec. 746.

LATTA v. TUTTON.

[122 CALIFORNIA, 279.]

JUDGMENTS FOR DEFICIENCY ON FORECLOSURE—SERVICE BY PUBLICATION.—A personal deficiency judgment against a nonresident rendered in foreclosure proceedings and based upon service of summons by publication is void, and no valid sale can be had under an execution issued thereon.

JUDGMENTS—PRESUMPTION AS TO JURISDICTIONAL FACTS.—The presumption which the law implies in support of judgments of courts of general jurisdiction arises only with respect to jurisdictional facts concerning which the record is silent.

JUDGMENTS.—RECITALS IN JUDGMENTS AS TO DUE SERVICE OF SUMMONS apply as well to service by publication as to personal service, and the recital must be presumed to refer to the mode of service which the record affirmatively discloses.

MORTGAGES—FORECLOSURE—VOID SALE—PLEDGE TO MORTGAGEE.—A sale under execution upon a void deficiency judgment of bonds pledged to the mortgagee as collateral security for the mortgage debt confers no title. After their purchase by the mortgagee, the pledgor may tender him the remainder of the mortgage debt, and demand a return of the bonds.

MORTGAGE—FORECLOSURE—DEFICIENCY JUDGMENT—TENDER—WAIVER OF OBJECTION—EXTINCTION OF LIEN.

A tender by the pledgor of the amount of a deficiency judgment in foreclosure with legal interest to the pledgee, who makes no objection to the amount, but does not surrender the pledge nor accept the tender, extinguishes the lien of the pledge, and amounts to a wrongful conversion, even though the tender is in fact less than the amount that may be due the pledgee.

PLEDGE—ABANDONMENT OF.—The lien of a pledge held as collateral security for a mortgage debt is dependent upon possession by the pledgee. If he surrenders it to the sheriff so that he may purchase it at execution sale upon foreclosure of the mortgage, such lien is abandoned and lost, though the sheriff's sale is void, and the pledgee cannot then rely upon his original claim of lien.

CLAIM AND DELIVERY—STATUTE OF LIMITATIONS.—An action of claim and delivery brought by the pledgor within three years after claim of title to pledged property is made by the pledgee, and after tender and demand for its return, is not barred by limitation.

The only fact necessary to state in addition to those referred to in the opinion is that the judgment-roll in the foreclosure proceeding mentioned in such opinion shows an order for the publication of summons on Ida B. and W. C. Latta, and also an order that a copy of the summons and complaint be forwarded to them through the United States mail, directed to them and to each of them separately, at their place of residence in the town of Rito Quemado, in the county of Sorocco, in the territory of New Mexico. Such judgment-roll also shows a compliance with such orders of the court. Judgment for the plaintiff, and the defendant appealed.

Parrish & Mossholder, and Puterbaugh & Puterbaugh, for the appellant.

Gibson & Titus, J. C. Hizar, and Mills & Hizar, for the respondent.

²⁸⁰ **CHIPMAN, C.** Claim and delivery of certain five bonds of the Linda Vista Irrigation District of the value of five hundred dollars each. Defendant denies the ownership of plaintiff and claims ownership in himself, and sets up the statute of limitations. ²⁸¹ The pleadings are verified. The trial was by the court, and the findings of fact are: That plaintiff was the owner of the property on November 12, 1892, and ever since has been such owner as her separate property; that on the day last named W. C. Latta, husband of plaintiff, delivered the property to defendant as a pledge, with the knowledge and consent of plaintiff, as part of the security for a loan of two thousand five hundred dollars, evidenced by a note executed by plaintiff and her husband, due three years after date, secured by mortgage on certain

real estate; that defendant foreclosed said mortgage upon said real estate, and it was sold thereunder, leaving a deficiency of five hundred and twenty-three dollars and twenty-eight cents; that plaintiff, at the city of San Diego, on January 7, 1897, prior to the commencement of this suit, offered in writing to pay defendant said sum, with legal interest, the amount she claimed to be due defendant on said indebtedness, and demanded possession of said bonds; that defendant made no objection to the amount of the offer in anywise, or at all, and refused to accept said offer or deliver the property; that defendant received such pledge in good faith, in the ordinary course of business, and for value, and without any knowledge that plaintiff owned or claimed said bonds, and believing that her said husband was the owner thereof; that the agreement of pledge was not in writing, and by its terms was not to be performed within one year from the making thereof; that the cause of action is not barred; that defendant on September 29, 1894, claimed to be the owner of said bonds, and has since claimed ownership of them, "but defendant [should be plaintiff] had no knowledge of said claim until said demand was made."

As conclusions of law from the facts and from the admissions of the pleadings the court found the plaintiff to be the owner of the property and entitled to its possession or value thereof, and that the cause of action is not barred, and gave judgment accordingly. The appeal is from the judgment and from the order denying motion for new trial, and comes here on bill of exceptions.

1. Defendant claims title by virtue of a levy of execution on his deficiency judgment and sale thereunder to him of October 20, 1894. The validity of this purchase is drawn in question ²⁸² and arises on the judgment in the foreclosure proceedings. The only service on the defendants in that action shown by the record was by publication of summons, and this appears from the judgment-roll. The judgment was by default, and contains the following recital: "It appearing to the satisfaction of the court that said defendants, W. C. Latta, Ida B. Latta, and James F. Brooks, have, and each of them has, been regularly and duly summoned to answer unto the plaintiff's complaint herein, and said defendants have, and each of them has, made default in that behalf, and that the default of each of said defendants for not appearing and answering unto plaintiff's complaint has been duly made and regularly entered herein," et cetera.

We are asked to presume personal service from the recitals found in the judgment alone, although the judgment-roll shows what service was in fact made, and that it was made by publication. The presumption which the law implies in support of judgments of courts of general jurisdiction only arises with respect to jurisdictional facts concerning which the record is silent: *Galpin v. Page*, 18 Wall. 350. Here the record is not silent. The recital in the judgment applied as well to service by publication as to personal service, and the recital must be presumed to refer to such service as the record affirmatively discloses: *Belcher v. Chambers*, 53 Cal. 635. A judgment void upon its face is one that appears to be void by an inspection of the judgment-roll: *People v. Harrison*, 84 Cal. 607; *Jacks v. Baldez*, 97 Cal. 91; *Whitney v. Daggett*, 108 Cal. 232. The deficiency judgment was void: *Anderson v. Goff*, 72 Cal. 65; 1 Am. St. Rep. 34; *Blumberg v. Birch*, 99 Cal. 416; 37 Am. St. Rep. 67.

2. Much attention is given by counsel to the question whether there was a sufficient tender to and demand made upon defendant by plaintiff before the action was brought. Plaintiff alleged a demand and refusal to surrender possession, and that at the time of the demand "plaintiff offered to pay defendant the sum of five hundred and twenty-three dollars and twenty-eight cents, with interest thereon from September 29, 1894, at seven per cent per annum; that defendant refused to accept said offer and refused to deliver said property to plaintiff, and claimed to be the owner thereof." This is admitted by failure to deny. Defendant ²⁸³ sets up a pledge to himself of the property and alleges ownership of it since November 12, 1892, the date of the pledge. The only evidence of ownership in defendant is his purchase from the sheriff under the void deficiency judgment, to accomplish which he surrendered possession of the bonds to the sheriff in order that the execution might be levied and the sale made, and at the sale he became the purchaser. When the tender was made to him he made no objection to the amount. The effect of the tender was to release the bonds from any further claim of defendant by reason of his lien: *Haile v. Smith*, 113 Cal. 656.

We think that when a tender is made to a pledgee, and he makes no objection to the amount, but does not surrender the pledge nor accept the tender, the result is to extinguish the lien and amounts to a wrongful conversion, even though the tender in fact is less than the amount that may be due the pledgee. It is his duty to make known his objections, and, failing to do so,

the tender must be deemed to have been the full amount due, and his refusal to surrender the property is a wrongful conversion: *Loughborough v. McNevin*, 74 Cal. 250; 5 Am. St. Rep. 435; citing Civ. Code, sec. 2910; *Jones on Pledges*, sec. 543.

Whether the demand was sufficient need not be decided, for, being admitted by failure to deny and defendant claiming ownership in himself by his answer, no demand was necessary: *Cobbey on Replevin*, sec. 447 et seq.; *Wells on Replevin*, sec. 374; *Jones v. Spears*, 47 Cal. 20.

Defendant's original possession as lienor was lawful and was dependent upon possession (Civ. Code, sec. 2988); but when he surrendered that possession and became a purchaser under a void sale he no longer could be said to be in the lawful possession, nor that he came into possession lawfully. He was thenceforward in the position of any purchaser without right under void sheriff's sale, and having lost his lien, no tender was necessary; it is therefore immaterial whether the tender was good or not. It was held in *Wingard v. Banning*, 39 Cal. 543, that if a common carrier sues out and procures to be levied a writ of attachment against property on which he has a lien for freight, he thereby abandons and forfeits his lien. No more do we think a pledgee can surrender the pledge to be sold on an execution and afterward be allowed to fall back on his original ²⁸⁴ claim of lien in the event his purchase at sheriff's sale proves abortive: *Jones on Pledges*, secs. 328-330. It was so held in *Jacobs v. Latour*, 5 Bing. 130, and that the subsequent possession must have been acquired under the sale: *Jones on Pledges*, sec. 1014.

3. The action was not barred by the statute of limitations. The court found that defendant claimed ownership September 29, 1894, and has ever since, but that plaintiff had no knowledge of such claim. The sheriff's sale of the bonds was October 20, 1894. The tender and demand were made shortly before complaint was filed. In any case the action was in time: *Code Civ. Proc.*, sec. 338, subd. 3.

We discover no error and therefore recommend that the judgment and order be affirmed.

Haynes, C., and Belcher, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

Temple, J., McFarland, J., Henshaw, J.

JUDGMENT—PERSONAL ON SERVICE BY PUBLICATION.—

A personal judgment cannot be rendered against a nonresident who has not been served with process within the state: *Griffith v. Milwaukee Harvester Co.*, 92 Iowa, 634; 54 Am. St. Rep. 573, and note. A personal judgment rendered upon service of summons by publication, and the record not disclosing that any property has been attached, is void: *Willamette Real Estate Co. v. Hendrix*, 28 Or. 485; 52 Am. St. Rep. 800.

JUDGMENT—PRESUMPTION AS TO JURISDICTION.—A recital in a judgment of the service of process imports absolute verity, and must be so treated for all proper purposes until in some proper way the action of the court shall be successfully impeached: *Harrison v. Hargrove*, 120 N. C. 96; 58 Am. St. Rep. 781, and note. But legal presumptions do not come to the aid of the record, except as to acts or facts as to which the record is silent; when the record states what was done, it will not be presumed that something different was done: *Hahn v. Kelly*, 34 Cal. 391; 94 Am. Dec. 742, and note; *Barber v. Morris*, 37 Minn. 194; 5 Am. St. Rep. 836.

PLEDGE—CONVERSION BY PLEDGEE.—A pledgee is guilty of conversion if he declines to accept a valid tender of the amount due him, and thereafter refuses a demand made on him to surrender the pledged property to the person entitled thereto. This conversion, being wrongful, extinguishes the pledgee's lien: *Loughborough v. McNevin*, 74 Cal. 250; 5 Am. St. Rep. 435. See monographic note to *Moynahan v. Moore*, 77 Am. Dec. 489.

PLEDGE—RETENTION OF POSSESSION ESSENTIAL.—At law, the lien incident to a pledge depends upon possession: *Coleman v. Shelton*, 2 McCord Eq. 126; 16 Am. Dec. 639. The pawnee, by giving up possession of the thing pawned, though for a special purpose, loses his lien: *Bodenhammer v. Newson*, 5 Jones, 107; 69 Am. Dec. 775. See *Moors v. Reading*, 107 Mass. 322; 57 Am. St. Rep. 460; *First Nat. Bank v. Caperton*, 74 Miss. 857; 60 Am. St. Rep. 640, and note.

SIMONS v. BEDELL.

[122 CALIFORNIA, 341.]

ESTATES OF DECEDENTS—DISTRIBUTION—EQUITY JURISDICTION.—Although, strictly speaking, it is within the jurisdiction of the superior court sitting in probate to determine who is entitled to the distribution of the estate of a deceased person, yet, if such issue is tried in such court sitting as a court of equity, and no objection is made to the jurisdiction, the subject matter must be treated on appeal as properly within the equity jurisdiction of the court.

ESTATES OF DECEDENTS—DISTRIBUTION—SUFFICIENCY OF BILL IN EQUITY.—A bill in equity by the husband of a decedent praying for a distribution of her estate, and alleging that the deceased expressed a desire to will land in California to him and land in New York to her mother, and that it was agreed between them that if the deceased would make no will, and would deed the land in New York to her mother, the latter and her husband would convey the California land to the plaintiff, and that the decedent complied with her part of such agreement, although not specifically alleging that she refrained from making such will in consideration of the promise of her parents, is not subject to general demurrer for want of such allegation, nor for violation of the rule that only ultimate and not evidentiary facts should be pleaded.

ESTATES OF DECEDENTS—AGREEMENT AND CONVEYANCE BY MARRIED WOMAN—AGENCY.—In an action by a husband to recover land or its proceeds, when his wife, on her father's inducement, made no will, but conveyed certain land to her mother on condition that her parents convey the land in question to her husband after her death, it is not necessary to allege and prove that her father was agent for her mother in inducing the action taken, because the mother cannot accept the conveyance and keep the land without performing the conditions of the agreement.

ESTATES OF DECEDENTS—AGREEMENT TO MAKE CONVEYANCE—STATUTE OF FRAUDS.—An oral agreement by a decedent's parents to obviate the necessity of making a will and as a condition for the conveyance of certain land made to the mother of the decedent, to the effect that her parents would convey certain other land to the husband of the decedent upon her death, is not within the statute of frauds, requiring trusts in land to be in writing.

SPECIFIC PERFORMANCE—AGREEMENT TO CONVEY LAND.—A statute providing that an agreement "to perform an act which the party has not the power lawfully to perform," or to procure the act or consent of the wife of the contracting party, or of any third person, cannot be specifically enforced, has no application, where a wife, though she could not be compelled in the first instance to carry out the terms of an agreement made by her husband, has accepted a conveyance made in pursuance of such agreement and as the consideration therefor, and has retained its benefits. In such case she must either restore the benefits received or perform the conditions of the agreement.

SPECIFIC PERFORMANCE—RATIFICATION OF AGREEMENT TO CONVEY LAND.—A person's acceptance and retention of the benefits of a conveyance, made to him in consideration of an agreement made in his behalf to convey land to his grantor, is a ratification of such agreement, and such grantee cannot retain its benefits and repudiate its obligations. On the contrary, equity may compel the performance of such obligations.

SPECIFIC PERFORMANCE AGAINST MARRIED WOMAN—UNACKNOWLEDGED AGREEMENT.—A statute providing that no estate passes in the real property of a married woman, unless by grant separately acknowledged by her, does not apply to prevent specific performance of her agreement to convey, when she has accepted a voluntary conveyance made to her on condition that she convey to the grantor's husband other land to which she shall succeed as the grantor's heir.

ESTATE OF DECEDENTS—SALE OF LAND—DISTRIBUTION OF PROCEEDS.—If an heir of an estate is entitled to a conveyance from the other heirs of the land of such estate, which has been sold by order of the probate court, such court may, if it still retains control of the proceeds, make a decree in the alternative directing payment to such heir, or that he is entitled to the distribution of such proceeds subject to the payment of debts, charges, and expenses of the estate.

ESTATES OF DECEDENTS—AGREEMENT TO CONVEY LAND—DECLARATIONS OF DEFENDANT AS EVIDENCE.—If a decedent's mother conveyed her daughter land in contemplation of the latter's marriage, and the latter, before her death, conveyed part of it back to the mother on condition that the mother and decedent's father should convey to the decedent's husband another part of the wife's realty upon her death, a conversation regarding such property, had with the mother before her daughter's marriage, is admissible in an action by the husband to compel a conveyance of the promised land.

DEEDS—DECLARATIONS AS EVIDENCE.—If a father induces his daughter to convey land to her mother on condition that her parents will convey other land to her husband after her death, to which they will succeed as her heirs, her declarations made at the time of such inducement are admissible in an action by her husband, after her death, to compel such conveyance from her parents, although the mother was not present when the promise was made.

W. E. Cox, for the appellant.

C. C. Wright, for the respondent.

343 **CHIPMAN, C.** Plaintiff brought this action to obtain the judgment of the court that he was entitled to certain funds in the hands of the administrator of his deceased's wife estate. Plaintiff prevailed in the action, and this appeal is from the judgment in his favor and from the order denying motion for a new trial, and is presented by statement. A general demurrer to the complaint was overruled. The complaint and a supplementary amended complaint allege and the court found: That defendants Otis T. and Jane Bedell were husband and wife and **344** the parents of deceased, Jennie R. Simons; July 10, 1890, one Julius Collins conveyed to said Jennie R. (before her marriage to plaintiff) lot 9 of the Abbott Kinney tract in the city of Los Angeles for the consideration of two thousand five hundred dollars, which was paid by the said Jane Bedell; thereafter, to wit, about January 1, 1892, and in contemplation of the marriage between the said Jennie and plaintiff, in addition to whatever right she had derived by said deed, Mrs. Bedell gave to her said lot 9; soon thereafter, to wit, about January 18, 1892, in contemplation of said marriage, said Jane executed and delivered to her said daughter Jennie a deed conveying to her certain real property in the city of New York of the value of about fifteen thousand dollars; thereafter, to wit, about February 15, 1892, the said Jane informed her said daughter Jennie that it was not just to her sister that she, Jennie, should have both the New York city and the Los Angeles property, and it was thereupon agreed between the said Jane and her daughter Jennie that the latter should execute and deliver to said Jane her obligation for two thousand five hundred dollars secured by mortgage on the New York property, and that by such execution of said obligation she, the said Jennie, would subsequently become the owner of said properties by free and unincumbered title; the note and mortgage were accordingly executed about February 15, 1892; on March 18, 1892, plaintiff and the said Jennie inter-

married; the said Jennie paid on account of said indebtedness the sum of four hundred dollars and all interest to March 1, 1893; during the summer of 1892 she became afflicted with consumption and died on April 18, 1893; after plaintiff's said marriage he conveyed to his said wife certain real property situated in the city of Los Angeles, being certain lots in block C, Thomas tract; prior to the death of the said Jennie she "exhibited much solicitude and anxiety concerning the disposition of her property, and expressed the desire to said defendants Bedell to make a will and bequeath said lot 9 and said lots in block C to this plaintiff, and said New York property to her mother, the said defendant Jane"; the said Otis, father of deceased, represented to her that it was unnecessary to make a will and that it would incur unnecessary cost and expense and delay in its probate, and that if she would execute and deliver a deed to her mother of ³⁴⁵ said New York property it would accomplish the same object, to which the said Jennie replied that she wanted plaintiff to have the Los Angeles property, to which the said Otis replied that if she would make a deed to her mother of the New York property, they, the defendants, Bedell, would convey to plaintiff the Los Angeles property; relying upon the said representations of her father, she, on February 15, 1893, did make and deliver to him a deed conveying the New York property to her mother, and he agreed to hold the said deed during the lifetime of the said Jennie, and relying upon said promises of her said father she made no will; shortly after the death of the said Jennie (which occurred April 18, 1893) the said Otis delivered said deed to the said Jane, and she accepted the same; the court found, though it is not alleged in the complaint, that she was fully informed of said agreement made by the defendant Otis, as aforesaid. It was alleged and found that both she and said Otis have ever since the death of said Jennie refused and neglected to execute to plaintiff a deed to said Los Angeles property, though often requested so to do. It further appears from the complaint and the findings that plaintiff was appointed administrator of his wife's estate November 27, 1893, and that as such administrator he sold, under order of the court in 1895, all the said Los Angeles real property, the subject of the estate, and received the consideration paid; that in July, 1896, he resigned his trust, and defendant Bonebrake was appointed administrator; that plaintiff paid over to defendant Bonebrake the funds received for the sale of said property, who now holds the same as such administrator. The judgment of the court was "that all

the funds in the hands of the said administrator . . . derived from the sale of property described in the complaint, is the sole and separate property of plaintiff, deducting first therefrom all debts which have been duly presented and allowed against the estate of said Jennie R. Simons, deceased, and all costs and expenses to which said fund may be legally subjected during the course of administration," et cetera. It is conceded by defendants, and found by the court, that plaintiff and defendants Bedell are the sole heirs at law of deceased. There is much conflicting evidence, and upon certain facts found the court might have reached a different conclusion. But we ³⁴⁸ think there was evidence tending to justify the findings, and we cannot say that the court erred in its adoption of the facts as found.

1. Defendants contend that the demurrer should have been sustained, as no cause of action was stated. The question was not presented by the demurrer, nor is it argued in the briefs as to the right of plaintiff to go into a court of equity to determine who is entitled to distribution—a question which it seems to us was clearly within the powers of and should have been determined by the court sitting in probate: *Siddall v. Harrison*, 73 Cal. 560. We are not prepared to say, however, that the court was without jurisdiction, and as all parties seem to have treated the matter as properly brought before the court we shall so treat it. Defendants urge that there is nothing in the complaint to show that said Jennie "intended to and would have made a valid will bequeathing to plaintiff all her interest in the Los Angeles property" had it not been for the action of her parents; nor "that she would have bequeathed any part of her property to plaintiff if she had made a will"; that the complaint states the evidence instead of the ultimate facts, and that "evidentiary facts cannot be substituted in a pleading for an allegation of the facts to be put in issue": Citing *Green v. Palmer*, 15 Cal. 415; 76 Am. Dec. 492; *Thomas v. Desmond*, 63 Cal. 426; *Feeney v. Howard*, 79 Cal. 525; 12 Am. St. Rep. 162; *Harris v. Hillegass*, 54 Cal. 463. It is not distinctly alleged that the said Jennie abstained from making a will devising her Los Angeles property to plaintiff in consideration of the promise made to her by her father, that he and her mother would convey their interest in that property to plaintiff should she die, but we think it sufficiently appears from the complaint that the parties so regarded the agreement, and that she conveyed the New York property upon the understanding that her parents were to convey their interest in the Los Angeles property to plaintiff. We do not

think that the rule with regard to pleading ultimate facts instead of the evidence of those facts is so far violated as to bring the pleading within the cases cited and to make it obnoxious to a general demurrer.

2. It is objected that there is no finding of fact that Otis T. was the agent of his wife Jane, nor is there any allegation of ³⁴⁷ such agency in the complaint; and it is claimed that the finding that she was fully informed of the agreement made by Otis is not a finding that she had such knowledge when she accepted the deed to the New York property, and the finding is outside any issue raised in the pleading. It is not disputed that Mrs. Bedell was at her home in New York when the alleged agreement was made in Los Angeles, and that the knowledge came to her after the death of her daughter, plaintiff's wife. And Mrs. Bedell testified that her husband did not communicate to her the agreement as it is testified to by plaintiff and found by the court, but that the agreement was subject to her approval. There was evidence tending to support the finding as to the agreement, and the question is, Could the mother retain the title to the property and refuse to carry out the agreement under which it was conveyed? We do not see that it was at all necessary to allege or prove an agency in the husband from his wife. The New York property had been conveyed to plaintiff's wife by her mother. So, also, had the Los Angeles property been conveyed by her direction, and plaintiff had conveyed to her some property. In anticipation of death plaintiff's wife desired that the New York property should, in that event, go back to her mother and the Los Angeles property should go to her husband. Her father was there with her during her last illness, and to him she communicated her wishes and to him she committed their execution. It was his duty to correctly inform his wife of the conditions upon which his daughter had made the deed, and he could not deprive plaintiff of the benefits of the agreement by misrepresenting its conditions to the grantee of the deed. If she did not know the conditions at its delivery she did later, which was the same in contemplation of law, and it was her duty either to comply with them or surrender the property conveyed. We think the foregoing views are sustained by ample authority. Some of the cases will be found in notes to the text in Devlin on Deeds, sections 1073, 1074, 1077: See, also, *Lady Superior etc. v. McNamara*, 3 Barb. Ch. 375; 49 Am. Dec. 184.

8. It is claimed by appellant that the agreement upon which

plaintiff relies is void under the statute of frauds, not having been in writing: Citing *Wittenbrock v. Cass*, 110 Cal. 1. It ³⁴⁰ is also urged that, even if Otis T. could make such agreement for himself, he could not bind his wife: Citing Civ. Code, sec. 3390. The case cited was where a resulting trust not in writing was set up. Mrs. Cass had purchased the property with her own money and taken the title in her own name. Her agreement was to make a deed to her son and leave it in escrow until her death, in consideration of certain things to be done by him. It was held that no such trust arose. We do not think that case similar to the one here. Plaintiff's wife executed her deed, of property owned by her, to the mother without consideration, and delivered it in escrow to her father, to be delivered upon certain conditions and agreements. The condition of delivery happened, to wit, her death. She omitted to make provision for her husband by will and made no conveyance of the Los Angeles property to him, relying upon the conditions being performed upon which she made the conveyance to her mother. She owned both properties, and in fact conveyed to her mother property worth fifteen thousand dollars, subject to a mortgage to secure two thousand one hundred dollars, the amount then due; reserving to her husband lot 9, of the value of two thousand five hundred dollars, and the lots conveyed to her by him, which were sold at probate sale for the mortgage lien on them. The section of the code above referred to has no application to such a case, for there was here neither an obligation "to perform an act which the party had not the power lawfully to perform," nor "an agreement to procure the act or consent of the wife of the contracting party, or of any third person," in the sense there understood. It may be conceded that Mrs. Bedell could not be compelled to carry out the agreement, but she accepted the benefits and retained them, and equity will compel her to comply with the terms upon which such benefits were bestowed. She cannot profit by the act of one party to the agreement and repudiate her own obligation in respect of it. Her acceptance and retention of the consideration, after learning all the facts, was a ratification of the agreement by which it was paid. Equity and good conscience demand that the defendants Bedell either convey the New York property to the estate of Jennie Simons, deceased, or relinquish all claim upon the proceeds of the Los Angeles property.

³⁴⁰ 4. It is further urged that under section 1093 of the Civil Code Mrs. Bedell cannot be compelled to convey her interest

because she did not execute and acknowledge any instrument as prescribed by section 1186 and section 1191 of the same code: Citing *Jackson v. Torrence*, 83 Cal. 521, where it was held that "specific performance cannot be compelled of an unacknowledged executory contract of a married woman to convey her separate property"; *Olson v. Lovell*, 91 Cal. 508, is cited where *Jackson v. Torrence*, 83 Cal. 521, is commented upon. The governing principles of those cases are so obviously dissimilar from the principles underlying the case before us that we deem it unnecessary to say more than that the sections of the code and the cases cited do not apply. Had this action been brought for specific performance, and before the Los Angeles property was sold by the probate court, we cannot see that any essential element would have been lacking. The contract was concluded, certain, unambiguous, mutual, and for valuable consideration; it was fair in all its parts, free from misrepresentation or misapprehension, fraud, or mistake, imposition or surprise; it was neither an unconscionable nor hard bargain, nor was its performance oppressive upon the defendants; and it was such contract as was capable of execution through a decree of the court: *Pomeroy's Equity Jurisprudence*, secs. 1404, 1405, and notes. It is true that the Los Angeles property was sold by the probate court, and a conveyance by the Bedells to plaintiff of their interest could not well be decreed; but the proceeds of the sale remain within the control of the court, and it is within its power to make the alternative decree directing payment to plaintiff or that he is entitled to distribution thereof subject to the payment of debts, charges, and expenses of the estate.

5. The only errors claimed in the admission of testimony are two: 1. A witness was called by plaintiff to relate a conversation she had with Mrs. Bedell at Los Angeles about the property just before the marriage of her daughter. The ground of the objection was that "it had no relevancy to the case and the nature of the conversation was not shown." We think the question was relevant. 2. A witness was asked to state what plaintiff's wife said in the presence and hearing of her father with relation to the property matters between herself and her husband. ³⁵⁰ The objection made at the trial was that the question was incompetent and immaterial. The objection now made is that Mrs. Bedell was not present. Mr. Bedell was present. The testimony was admissible as tending to prove the conditions upon which Mrs. Simons made the deed to her mother, even though the latter was not present. Counsel falls into error here

as elsewhere in assuming that the previous knowledge and consent of Mrs. Bedell were necessary to bind her.

We discover no error in the judgment or order of the court, and therefore advise that they be affirmed.

Haynes, C., and Belcher, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

McFarland, J., Harrison, J., Garoutte, J., Van Fleet, J.

Beatty, C. J., dissented.

MR. JUSTICE TEMPLE dissented and held that, conceding the validity of the contract in suit, the plaintiff was not entitled to the property claimed or its proceeds until the final distribution of the estate. He said: "As Mrs. Simons owned the Los Angeles property, and under the contract was expected to die such owner, the title which defendants were to convey was what they would inherit from their daughter. Had they conveyed this to plaintiff, their deed would not have authorized plaintiff to recover the property from the administrator. He would take as heir, and an heir cannot recover the property from the administrator before distribution. Bone-break is administrator and holds the property as such. The estate has not yet been distributed: *McDaniel v. Pattison*, 98 Cal. 86; *Siddal v. Harrison*, 73 Cal. 560. After the death of his wife, plaintiff was appointed administrator, and had the Los Angeles property sold and then resigned. A successor was appointed, and this suit was brought. In a suit for specific performance, which this is, it seems clear to me that the money must take the place of the real estate. Such it was when the alleged contract was made, and it seems quite obvious to me that, even conceding that Otis T. was authorized to contract for his wife, the contract was within the statute of frauds. *Wittenbrock v. Cass*, 110 Cal. 1, seems altogether in point, except that this is a much plainer case than that was. There is not and cannot be a pretense of part performance here. Supposing, therefore, that Mrs. Bedell did ratify the agreement by accepting the deed, the contract is void. Nor do I think there is any evidence to sustain the finding that Mrs. Bedell accepted the deed with full knowledge of the alleged contract. To the contrary, all the evidence upon the subject is to the effect that she was told that her husband had only told Mrs. Simons that they would convey the property if his wife, Mrs. Bedell, approved of it, subject to a mortgage for the amount of the debt on the New York property. Plaintiff's testimony and his letters all tend to show this. I also think the case is, in principle, within the decision in *Jackson v. Torrence*, 83 Cal. 521, and that there was grave error in the admission in evidence of the statements of plaintiff's wife—not made at the time of the alleged contract but subsequent thereto—as against Mrs. Bedell. It is assumed that the property had all belonged to Mrs. Bedell as her separate property." Mr. Justice Henshaw concurred in the dissenting opinion.

EXECUTORS AND ADMINISTRATORS—EQUITY JURISDICTION.—Courts of equity have concurrent jurisdiction with courts of probate in all matters of guardianship, and the settlement of estates of deceased persons: *Trotter v. Mutual etc. Life Assn.*, 9 S. Dak. 506; 62 Am. St. Rep. 887, and note. Most of the general powers of the probate court belong peculiarly and originally to the court of chancery, which still retains all of its jurisdiction: *Clarke v. Perry*, 5 Cal. 58; 63 Am. Dec. 82; *Deck v. Gerke*, 12 Cal. 423; 73 Am. Dec. 555, and extended note. See *Grattan v. Grattan*, 18 Ill. 167; 65 Am. Dec. 726.

SPECIFIC PERFORMANCE—CONTRACT TO CONVEY REALTY.—A unilateral or optional contract to convey land or renew a lease, without any covenant or obligation to purchase or accept, and without any mutuality of remedy or consideration, will not be enforced in equity; but if made upon proper consideration, or if the consideration forms part of the contract or lease, it may be enforced: *Hawralty v. Warren*, 3 C. E. Green, 124; 90 Am. Dec. 613, and note. Payment of the consideration, possession, and the making of improvements will take a case out of the statute of frauds, and are sufficient for a decree of specific performance: *Wetmore v. White*, 2 Calnes Cas. 87; 2 Am. Dec. 323. Compare *Johnson v. Hubbell*, 10 N. J. Eq. 332; 66 Am. Dec. 773; *Maddox v. Rowe*, 23 Ga. 431; 68 Am. Dec. 535; *Manning v. Pippen*, 86 Ala. 357; 11 Am. St. Rep. 46; *Carmichael v. Carmichael*, 72 Mich. 76; 16 Am. St. Rep. 523, and note.

PEOPLE v. TUPPER.

[122 CALIFORNIA, 424.]

JURY TRIAL—ABSENCE OF JUDGE FROM COURTROOM.

The fact that during the trial of a criminal case the judge of the court absented himself from the courtroom, so as to be out of sight and hearing of the proceedings going on therein, is ground for a new trial.

COURT—ABSENCE OF JUDGE—PROCESS OF LAW.—The judge is a component part of the court, and all that is done in the way of court proceedings during the absence of the judge is in fact done in the absence of the court. A defendant convicted on a trial when the judge of the court has been absent during any part of the proceedings has been deprived of his liberty without due process of law, and is entitled to a new trial.

B. L. Mills, for the appellant.

W. F. Fitzgerald, attorney general, and C. H. Jackson, deputy attorney general, for the respondent.

⁴²⁵ GAROUTTE, J. Defendant was convicted of a felony, and as ground for a new trial he alleged by affidavit, which was not contradicted, that during the argument of the case to the jury the judge absented himself from the courtroom for the period of twenty minutes. It was also alleged by the affidavit that during such absence the judge was out of sight and hearing of the proceedings going on within the courtroom. The forego-

ing facts being undisputed, we are fully satisfied they demand a retrial of the defendant. The argument of the case to the jury is as much a part of the trial as the introduction of evidence. And evidence may be introduced before the jury, in the absence of the judge, if the practice here pursued may be held justified within the law. It is hardly necessary to present either argument or authority to show that neither of these practices can be justified. The judge is a component part of the court. There can be no court without the judge. And all that was done in the absence of the judge was in fact done in the absence of the court. A defendant convicted under such circumstances has been deprived of his liberty without due process of law. As fully supporting these views we cite *O'Brien v. People*, 17 Colo. 561; *Turbeville v. State*, 56 Miss. 793; *State v. Beuerman*, 59 Kan. 586.

The judgment and order are reversed and cause remanded for a new trial.

Van Fleet, J., and Harrison, J., concurred.

NEW TRIAL — ABSENCE OF JUDGE DURING CRIMINAL TRIAL.—The question raised in the principal case is discussed in *State v. Beuerman*, 59 Kan. 586. Upon an appeal, the objection was made, among others, that during the argument in behalf of the defendant the judge left the bench and passed into an adjoining room, closing the door behind him, and that he remained there about ten minutes, out of sight and hearing of the jury and counsel, and where he could exercise no control over the proceedings in the courtroom. The conclusion already reached by the appellate court rendered it unnecessary to determine whether the interests of the defendant were prejudicially affected by such absence, or whether such absence constituted reversible error, but upon the general proposition that a judge should be visibly present every moment of the actual progress of a criminal trial before him, the Kansas court agrees with the opinion expressed in the principal case: Citing, in addition, *Meredith v. People*, 84 Ill. 479; *Thompson v. People*, 144 Ill. 378; *State v. Smith*, 49 Conn. 876; *Palin v. State*, 38 Neb. 862. "The fact that the court may not see or hear everything occurring in the courtroom," says the court, "or that he may step into an adjoining room, but not out of hearing of the proceedings, is not necessarily prejudicial to the interests of the defendant in every case; but the presiding judge cannot safely absent himself from the trial or relinquish control over the proceedings during the trial."

BRENNAN v. BRENNAN. .

[122 CALIFORNIA, 440.]

NEGOTIABLE INSTRUMENTS—PROOF OF NONPAYMENT.—In an action on a note, the production of the note by plaintiff, with no indorsement of any payment on it, is sufficient *prima facie* proof of nonpayment.

NEGOTIABLE INSTRUMENTS.—POSSESSION of a note by the attorney of a party is the possession of that party.

F. R. Wehe, for the appellant.

F. D. Soward, for the respondent.

440 McFARLAND, J. Action on a promissory note alleged to have been made by Thomas Brennan, deceased, to the plaintiff. **441** The defendant in her answer upon want of information and belief denied that Thomas Brennan executed the note; and on the same ground denied that the whole or any part thereof had not been paid, but averred upon information and belief that the sum of six hundred dollars thereof had been paid in coin, and the sum of two hundred dollars in board and lodging.

At the trial plaintiff's attorney introduced the note sued on in evidence, which had no indorsement whatever of payment, and introduced a witness, William Ryan, who testified that the note was in the handwriting of the deceased. This evidence was introduced without objection. Plaintiff then rested; whereupon defendant moved for a nonsuit upon the ground that the evidence on the part of the plaintiff was not sufficient to show that the note had not been paid. The motion was denied; and, defendant declining to offer any evidence, judgment was rendered for plaintiff as prayed for in the complaint. Defendant appeals from the judgment.

The only point insisted upon by appellant here is, that there was not sufficient proof of nonpayment of the note. At common law, and in many of the American states, payment is an affirmative plea on the part of the defendant, and the burden of proving it rests upon him: 2 Greenleaf on Evidence, sec. 516. If a different rule prevails in California, still it is the law here that the production of the note by plaintiff in such an action, with no indorsement of the payment on it, is sufficient *prima facie* proof of nonpayment: *Frisch v. Caler*, 21 Cal. 71, and *Farmers' etc. Bank v. Christensen*, 51 Cal. 571. The possession of the attorney for plaintiff was the possession of plaintiff.

The judgment is affirmed.

Temple, J., and Henshaw, J., concurred.

Hearing in Bank denied.

NEGOTIABLE INSTRUMENTS—ACTIONS UPON—EVIDENCE OF NONPAYMENT.—Possession and the production of a note uncanceled and unextinguished by indorsement of payments, or otherwise, is prima facie evidence that the holder is the owner and that the note is unpaid: *Perot v. Cooper*, 17 Colo. 80; 31 Am. St. Rep. 258, and note.

NEGOTIABLE INSTRUMENTS—POSSESSION BY ATTORNEY OF OWNER.—Possession of a negotiable promissory note indorsed in blank by the attorney of a party is possession by the party himself: *Kunkel v. Spooner*, 9 Md. 462; 66 Am. Dec. 332.

McFALL v. BUCKEYE GRANGERS' WAREHOUSE ASSOCIATION.

[12 CALIFORNIA, 468.]

PLEADINGS—JUSTICES' COURTS.—In an action by a bank on a note in a justice's court, a copy of such note is a sufficient complaint, without alleging therein that such bank is a corporation.

JUDGMENTS—JUSTICES' COURTS—COLLATERAL ATTACK.—A defendant in an action by a bank on a note in a justice's court who fails to avail himself of the right to plead, by demurrer or answer, the want of legal capacity in the plaintiff to sue waives such right, and neither he nor third persons can assert it in a collateral attack on the judgment rendered in such action.

JUDGMENTS—JUSTICE'S COURTS—COLLATERAL ATTACK.—A judgment of a justice of the peace in favor of a bank is not void, although the record fails to affirmatively show the corporate capacity of the bank. The judgment cannot be collaterally attacked on that ground to avoid a sale under execution.

PLEDGE—SHARES OF STOCK—CHANGE OF POSSESSION.—As between the parties to a pledge of shares of corporate stock, the pledge may be effected by indorsement and transfer of the stock certificates, but when that mode of creating a pledge is adopted, it is subject to the rules governing the pledging of other instruments. It must, as against creditors, be accompanied by delivery and a continued, as distinguished from momentary, change of possession.

CORPORATIONS—TRANSFER OF STOCK.—A marginal note made by the secretary of a corporation on the stubs of stock certificates does not amount to a transfer of the stock on the books of the corporation, when no transfer is authorized by either of the parties thereto, and it is contrary to the express desire of one of them.

EXECUTION—LEVY, WHEN UNNECESSARY.—If property is held under an attachment to satisfy a judgment, no levy of execution beyond giving notice of sale is necessary.

R. Clark and C. Michaelson, for the appellants.

P. Bruton and C. W. Thomas, for the respondents.

460 **BRITT, C.** McFall, the plaintiff in this action, was the purchaser at a sale under execution of fourteen shares of stock in

the Buckeye Grangers' Warehouse Association, a corporation, one of the defendants here; the ultimate question on appeal is whether property in the stock passed by virtue of such sale; the court below held that it did. One Schautz owned the stock originally, and held certificates therefor issued by said warehouse association; Schautz was sued in a justice's court by the Bank of Winters, a corporation, on a promissory note wherein he promised to pay a specified sum of money to "the Bank of Winters, at its office in Winters"—the payee not being further described; the complaint in that action was a copy of such note; the justice issued a writ of attachment, under which the constable of the township attached the said shares of stock as the property of Schautz in the manner prescribed by section 542, subdivision 4, of the Code of Civil Procedure. Afterward, Schautz having made no defense, judgment was rendered in said justice's court against him and in favor of said bank, and an execution issued for the enforcement thereof; thereunder the constable made the sale which gave rise to the present dispute. At the trial there was evidence that some time before the levy of the said writ of attachment Schautz indorsed the stock certificate—two in number—and delivered them to Michaelson, one of the appellants in this case, "as security for two hundred and fifty dollars." Michaelson held them in his hand for an instant and returned them to Schautz, and Schautz kept them among his own papers "for Michaelson" until after said attachment, when he delivered them again to Michaelson; forthwith after said indorsement to Michaelson, Schautz gave notice of the fact to the president and secretary of said warehouse association, but said he did not want a transfer of the shares to appear on the books, ⁴⁷⁰ and he continued thereafter to draw dividends on the stock; the secretary, however, without authority from any source, made an entry on the margin of the stubs of the certificates as follows: "C. Michaelson holds as security for money loan." In his return of the execution the constable did not in terms set forth a levy of the writ, but stated that after due and legal notice he sold the stock by virtue thereof, and that the property thus sold had been previously held under said attachment.

Appellants urge that all proceedings in the justice's court were void for the reason that the complaint in the action of Bank of Winters v. Schautz—consisting merely of a copy of the note sued on—did not show the plaintiff to be a corporation. It was, however, in fact a corporation; and in a justice's court a copy of a note "upon which the action is based" is a good com-

plaint by express provision of the statute: Code Civ. Proc., sec. 853. The defendant in that case, if he deemed that the plaintiff had no legal capacity to sue, or that the complaint was uncertain in that particular, might have presented the objection by demurrer or answer; failing to do so, he waived the right to object, and certainly other persons cannot assert the right in a collateral attack on the judgment: See *Montgomery v. Superior Court*, 68 Cal. 407.

As between the parties to a pledge of shares of corporate stock, the pledge may be effected by indorsement and transfer of the stock certificates: *Spreckels v. Nevada Bank*, 113 Cal. 272; 54 Am. St. Rep. 348, and cases cited; but when that mode of creating such a pledge is adopted it must be subject to the same rules which govern the pledging of other instruments; the transfer, to avail against creditors, must be accompanied by delivery and continued change of possession, and it is too plain for discussion that the transaction between Schautz and Michaelson, by which the latter received momentary possession of the certificates in question and at once returned them to Schautz, constituted no valid pledge as against creditors of Schautz: Civ. Code, secs. 2988, 3440; *Colebrook on Collateral Securities*, secs. 9, 13. The note made by the secretary of the warehouse association on the margin of the stubs did not amount to a transfer of the stock on the books of the corporation, for the reason—among others which might be assigned—that no transfer was⁴⁷¹ authorized by either Schautz or Michaelson, and was indeed contrary to the express desire of the former.

A further point is that it does not appear that the constable levied the writ of execution on the stock. The property having been held under attachment to satisfy the judgment, we doubt whether any levy of the execution, beyond giving notice of sale, was a necessary step in the proceedings: Code Civ. Proc., sec. 550; *Lehnhardt v. Jennings*, 119 Cal. 192. But however that may be, the title of the purchaser of the stock is not affected by the failure of the officer to show in his return that he levied before selling: *Hibberd v. Smith*, 67 Cal. 564; 56 Am. Rep. 726, and cases cited. The judgment and order denying a new trial should be affirmed.

Haynes, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

McFarland, J., Temple, J., Henshaw, J.

JUDGMENTS OF JUSTICE OF THE PEACE—COLLATERAL ATTACK.—When there is general jurisdiction of a subject, although vested in an inferior tribunal, its judgment cannot be collaterally attacked: *Turner v. Conkey*, 132 Ind. 248; 32 Am. St. Rep. 251, and note. If the facts touching the acquisition of jurisdiction are fully disclosed, judgments of justices of the peace, so far as collateral attack is concerned, are regarded no less favorably than those of courts having more extensive powers: *Leonard v. Sparks*, 117 Mo. 103; 38 Am. St. Rep. 646. But ordinarily, nothing is presumed in favor of the jurisdiction of a justice of the peace; it must be affirmatively shown: *Note to Hambel v. Davis*, 50 Am. St. Rep. 48.

PLEDGE—CORPORATE STOCK.—Transfer on the books of a corporation is not essential to the validity of a pledge of its stock: *Spreckels v. Nevada Bank*, 113 Cal. 272; 54 Am. St. Rep. 348; *Gemmel v. Davis*, 75 Md. 546; 32 Am. St. Rep. 412. To constitute a valid pledge there must be an actual or symbolical delivery of the thing pledged, and to preserve the pledge, the pledgee must retain possession: *Franklin Nat. Bank v. Whitehead*, 149 Ind. 560; 63 Am. St. Rep. 302, and note.

CORPORATIONS—TRANSFERS OF STOCK.—Corporations must see that no unauthorized transfers of their stock are made: *Marbury v. Ehlen*, 72 Md. 206; 20 Am. St. Rep. 467. A transfer of stock by a corporation in the absence of the original certificate is made at its peril, and the real owner of the stock evidenced by such certificate is not prejudiced thereby: *Supply Ditch Co. v. Elliott*, 10 Colo. 327; 3 Am. St. Rep. 586. See monographic note to *Victor G. Bloede Co. v. Bloede*, 57 Am. St. Rep. 388, discussing the transfer of shares of stock.

PEOPLE v. DOLE.

[122 CALIFORNIA, 486.]

FORGERY—UNCERTIFIED CHECK.—An information charging the defendant with forgery in raising a certified check, forging certain indorsements, and, knowing its fictitious character, passing it on a certain named corporation with intent to defraud the latter, although it does not show that the bank upon which it was drawn had any legal existence, or that the person certifying it had any authority therefor, sufficiently charges the forgery of an uncertified check which is as much the subject of forgery as a certified check.

FORGERY—SEVERAL INDORSEMENTS ON CHECK—SINGLE OFFENSE.—An information for forgery which alleges that after raising a check, the defendant forged certain indorsements thereon with intent to defraud a named corporation, does not charge more than one offense, and is not objectionable on that ground.

FORGERY—EVIDENCE—CROSS-EXAMINATION.—A person charged with the forgery of a check, who testifies in his own behalf as to the manner in which he became the owner of such check, may be compelled on cross-examination to state whether he related how he came into possession of the check to the arresting officer, or to the officers in whose custody he was placed, or to the person who informed him of the particulars of the charge against him.

CRIMINAL LAW—EVIDENCE—CROSS-EXAMINATION.—If an accused person testifying in his own behalf has offered an explanation of circumstances tending to incriminate him, he may be asked on cross-examination whether he has not done, or omitted to

do, something which it might be thought he would probably have done, or omitted to do, if his explanation were true.

CRIMINAL LAW—WITNESSES—CROSS-EXAMINATION. Any fact may be called out on cross-examination which the jury may deem inconsistent with the direct testimony of a witness. An accused person testifying in his own behalf is, in this respect, put upon the same plane with other witnesses.

FORGERY—EXPERT EVIDENCE—MEANS OF REMOVING WRITING.—If, on a trial for forgery, it is part of the case of the prosecution to prove that writing on a check has been removed and other writing substituted in its place, expert evidence is admissible to show that there is a fluid by means of which writing may be removed from paper without first showing that a solvent fluid has been used, and that the defendant is conversant with its use.

CRIMINAL LAW—AIDING AND ABETTING CRIME—INSTRUCTIONS.—An instruction in a criminal case to the effect that if the "jury believe from the evidence, beyond a reasonable doubt, that the defendant committed the offense charged, or aided, abetted, or assisted any other person or persons to commit the same," they "should find the defendant guilty," is erroneous in using the words "aid or abet" instead of "aid and abet." Such error is cured by another instruction, from which the jury cannot fail to understand that merely aiding or assisting in the commission of a crime, without guilty knowledge, is not criminal.

EVIDENCE—ERRONEOUS INSTRUCTION.—An instruction that "where weaker evidence is produced when in the power of the party to produce higher, it is presumed that the higher evidence would be adverse if produced," is erroneous in substituting the word "weaker" for the word "inferior" used in the statute, and especially when such instruction is based upon the mere nonproduction of witnesses by a party to corroborate his testimony, as it implies that such other witnesses engaged in the same business would be higher and stronger evidence than that of the party testifying.

CRIMINAL LAW—INSTRUCTIONS ON CIRCUMSTANTIAL EVIDENCE.—An instruction that "where the evidence is entirely circumstantial, yet it is not only consistent with the guilt of the defendant, but inconsistent with any other rational conclusion, the law makes it the duty of the jury to convict, notwithstanding such evidence may not be as satisfactory to their minds as the direct testimony of credible eye-witnesses would have been, though incorrect and illogical, is not sufficient ground for reversal of the judgment.

CRIMINAL LAW.—IN CASES OF CIRCUMSTANTIAL EVIDENCE. facts should be proved which are not only consistent with the guilt of the defendant, but inconsistent with any reasonable hypothesis of innocence, and every single fact from which the deduction of guilt is to be drawn must be proved by evidence which satisfies the minds of the jury to the same extent that they are required to be satisfied of the fact in issue in cases where the evidence is direct.

TRIAL—INSTRUCTIONS, WHEN PROPERLY REFUSED. Requested instructions, which are substantially given in other instructions, or which are upon the weight and effect of evidence, or which inform a juror that he has more right to vote not guilty than he has to vote guilty against his conscientious conviction, are properly refused.

CRIMINAL LAW—INSTRUCTIONS ON REASONABLE DOUBT.—A requested instruction that "if, after consideration of the whole case, any juror should entertain a reasonable doubt of the

guilt of the defendant, it is the duty of such juror not to vote for a verdict of guilty, nor to be influenced in so voting, for the single reason that a majority of the jury should be in favor of a verdict of guilty," is a correct statement of the duty of a juror, and should be given.

FORGERY—INSTRUCTIONS.—If there is no theory upon which a defendant, charged with the forgery of a check, can be convicted unless the check was raised as charged in the information, a requested instruction that if the jury entertain a reasonable doubt as to whether the check was thus raised, it is their duty to acquit, is correct, and should be given.

FORGERY—CROSS-EXAMINATION OF ACCUSED.—If a person charged with forgery has not testified on his direct examination as to obtaining money on the alleged forged check, it is error to compel him to testify on cross-examination as to whether he has thus obtained money, as he cannot be compelled to be a witness against himself.

FORGERY—EVIDENCE.—AN ALLEGED FORGED CHECK is admissible in evidence on a trial for forgery, if there is no material variance between it and the paper set out in the information.

FORGERY—EVIDENCE.—On a trial for the forgery of a check, the teller of the bank at which the check was presented and passed is a competent witness to testify that he has examined the books of such bank to ascertain whether the accused had any account at the bank at the time when the check was presented and paid, and that he had no account there at that time.

FORGERY—EVIDENCE OF EXISTENCE OF CORPORATION.—On a trial for the forgery of a check, it is competent and sufficient to prove by parol that the bank at which such check was presented and cashed is a de facto corporation, but this fact must be proved by reputation, and not by the direct statement of the witness.

H. T. Gage, W. Bordwell, and W. J. Foley, for the appellant.

W. F. Fitzgerald, attorney general, and H. E. Carter, deputy attorney general, for the respondent.

489 **BEATTY, C. J.** The defendant appeals from a judgment convicting him of forgery, and from an order denying a new trial.

The specific charge in the information is that the defendant, having in his possession a certified check for two dollars and fifty cents, raised it to eight hundred and fifty dollars, forged certain indorsements on it, and, knowing its fictitious character, passed it on the State Loan and Trust Company, a corporation, all with intent to defraud said corporation.

A demurrer to this information was overruled, and this ruling is the first error assigned in support of the appeal.

The most serious objection to the information is, that it does not show that the Exchange Bank, upon which the check was drawn, had any existence, corporate or otherwise, or that the person whose name was signed to the certification had any au-

thority to certify. It may be conceded that this criticism is just, but it does not follow that the information is therefore bad. An uncertified check is as much the subject of forgery as a certified check, and if it does not appear from this information that the check was certified it remains true that the defendant is well charged with the forgery and utterance of a check uncertified. Another objection to the indictment is that it charges more than one offense. The objection is based upon an allegation that defendant, after raising the check, forged several indorsements on the back of it. This part of the charge is not well laid in the information because the words "falsely and feloniously" are omitted, and there is, therefore, nothing to negative the authority of defendant to make the indorsements. But even if the charge had been sufficient in itself, it would not have specified a distinct offense. The intent to defraud is the essential element of the crime of forgery, and the whole series of acts charged against defendant is alleged to have been done with the single intent to defraud the State Loan and Trust Company. But one offense, therefore, was charged, and the court did not err in overruling the demurrer.

It is next contended that the court erred in overruling defendant's objections to certain questions asked him on cross-examination. He had testified in his own behalf that he had won the check in a game of poker from one Adams in the rooms *** of one King, at Los Angeles. He was soon after arrested in San Francisco by an officer from Los Angeles, and it appeared from his own statements that at the time of his arrest, or shortly thereafter, he was informed that the charge against him was the forgery of this check—i. e., the raising of a check for two dollars and fifty cents to eight hundred and fifty dollars. He was then asked whether he stated the manner in which he became possessed of the check to the arresting officer, or to the officers in whose custody he was subsequently placed, or to the person who informed him of the particulars of the charge against him. Being compelled against his objection to answer these questions, he admitted that he had not stated to any of the persons mentioned anything in regard to the manner in which the check came into his possession.

It is contended that evidence of the silence of defendant while under arrest and in the presence of his keepers would not have been competent evidence against him if offered by the state as part of its case in chief, and that a fortiori the fact could not be drawn out of him on cross-examination.

Whether silence under accusation of crime amounts to an admission of guilt, or whether the failure of a person accused to dispute an incriminating statement made in his presence amounts to a tacit admission of the truth of such statement, depends upon circumstances, and undoubtedly there is very high authority for holding that the silence of the accused cannot be given in evidence against him without first showing that the circumstances of the accusation or incriminating statements were such that he would feel at full liberty to reply, and would be called upon to reply. Accordingly, it has been held that the silence of a prisoner in the presence of the arresting officers or jailers was incompetent as evidence of guilt: *Commonwealth v. McDermott*, 123 Mass. 440; 25 Am. Rep. 120, and cases there cited. But upon this point the authorities are not uniform, and the decisions of this court do not furnish us a precedent. None of the cases cited by appellant are clearly in point, and the one upon which he principally relies (*People v. Elster*, 3 West Coast Rep. 35) is rather against him. In that case the court was discussing instructions to the jury, not rulings upon the admission of evidence, and the error pointed out ⁴⁹¹ was not in the admission of the evidence—as to which no question seems to have been made—but in the inference of guilt which the trial court assumed was to be drawn from the silence of defendant. What this court said with respect to this was: "If such an inference could be drawn at all from the conduct or statements of the defendant, it was for the jury to draw it; they only could determine whether the conduct of the defendant on the occasion of his arrest was contrary to the ordinary behavior of a person charged with crime, or attributable to his mental characteristics, or evinced guilt or innocence." From this expression it would seem that the court decided, not that evidence of this character is incompetent, but merely that the weight of such evidence must be left for the jury to determine, unaffected by any intimation from the court that it tends to prove the guilt of the defendant.

It is not necessary, however, to decide in this case whether the silence of the accused, while in custody, can be given in evidence against him by the people as a part of their case in chief. The question here is a very different one, viz, whether, when an accused person, testifying in his own behalf, has offered an explanation of circumstances tending to incriminate him, he may be asked on cross-examination whether he has not done, or omitted to do, something which it might be thought he would

probably have done, or omitted to do, if his explanation was true. Such was the course pursued in this case. Defendant testified that he won the check from Adams in the presence of King, and he was asked if he stated that fact to the arresting officer, or to the officers of the prison. He admitted that he did not, and it was for the jury to determine whether or not his conduct was consistent with his testimony. Counsel for appellant contend for the extreme proposition that because he did not testify on his direct examination in regard to his conduct at the time of and subsequent to his arrest, therefore he could not be cross-examined as to that matter. But the rule of cross-examination is not so restricted. Any fact may be called out on cross-examination which a jury might deem inconsistent with the direct testimony of a witness, and a defendant testifying in his own behalf is in this respect put upon the same plane with other witnesses: *People v. Gallagher*, 100 Cal. 475. The superior court did not err in this matter.

⁴⁹² Nor did the court err in admitting the evidence of Logan that there is a fluid by means of which writing may be removed from paper. It was a part of the case of the prosecution to prove that certain writing on the check had been removed and other writing substituted in its place, and certainly it was proper to prove that there is a known means by which this may be accomplished. The point of this objection, however, seems to be that evidence of this character is inadmissible until a foundation for it has first been laid by showing that a solvent fluid has been used, and that the defendant is conversant with its use. We know of no such rule with respect to such evidence. Each of these facts is independent of the others, and has some tendency to prove the fact in issue. All them being proved, the case would certainly be stronger than if only one or two of them are proved, but neither is to be excluded because the others are wanting. As to the competency of the witness, his testimony showed that he had made use of the fluid in question, and was in fact an expert, and the matter to be proved was the subject of expert evidence.

The trial court in submitting the case to the jury, gave the following instruction: "If you believe from the evidence, beyond a reasonable doubt, that the defendant committed the offense charged in the information, or aided, abetted, or assisted any other person or persons to commit the same, then you should find the defendant guilty." This construction is clearly erroneous. Aside from the person who directly commits a criminal

offense, no other is guilty as principal unless he aids and abets: Pen. Code, sec. 31, 971. A person may aid in the commission of an offense by doing innocently some act essential to its accomplishment, and this is especially true in regard to the crime of forgery, for he may pass the forged instrument without knowing that it is forged. The word "aid" does not imply guilty knowledge or felonious intent, whereas the definition of the word "abet" includes knowledge of the wrongful purpose of the perpetrator and counsel and encouragement in the crime. The error in the instruction is, therefore, clear, and it cannot be held that it is harmless error to instruct a jury that they must convict upon proof of a fact which does not necessarily imply guilt. It was certainly possible for the jury to have found ⁴⁹³ consistently with the evidence in this case that defendant did not forge or raise the check himself, but that it was forged by some other person, and that his only connection with it was to pass it to the Loan and Trust Company after winning it from the forger, and without any knowledge of its spurious character, in which case he would have been innocent of any crime. But the court, at the request of the defendant, instructed the jury as follows: "If the evidence does not establish beyond a reasonable doubt that the defendant made or altered or forged or counterfeited the check in question, or any part thereof, with intent to defraud another, and if the evidence does not establish beyond a reasonable doubt that the defendant uttered or published or passed, or attempted to pass, as true and genuine the said check, knowing the same to be false or altered or forged or counterfeited, with intent to prejudice or damage or defraud any person, then the mere possession by the defendant of the said check, and his indorsing and negotiating the same, is not sufficient standing alone to convict, for proof of the mere possession and negotiating of a forged check is insufficient to convict a defendant of forgery in the absence of a guilty intent or guilty knowledge."

This specific instruction on the precise point affected by the error above noted in the charge of the court, we think, cured the error. For, construing the two instructions together, the jury could not have failed to understand that merely aiding or assisting in the commission of a crime, without guilty knowledge, is not criminal. In other words, they could not, in view of this instruction, have taken the charge as to aiding or assisting in its narrow and literal sense.

At the request of the prosecution the court instructed the jury as follows: "Where weaker evidence is produced when in

the power of the party to produce higher, it is presumed that the higher evidence would be adverse if it had been produced."

The giving of this instruction was error for two reasons: In the first place, because the word "weaker" is substituted for "inferior," a word of different meaning: Code Civ. Proc., sec. 1963, subd. 6; and, in the second place, because it was wholly inapplicable to the evidence in the case. The defendant did not introduce inferior evidence—i. e., evidence of the lower class—upon any point as to which he could be supposed to have had ^{any} higher evidence in his power. The use made of the instruction seems to have been to found an argument against the defendant upon the ground that he had not hunted up and called as witnesses the men Adams and King, from one of whom he claimed to have won the check at poker. But the evidence of Adams and King would have been of no higher class than his own evidence, and, besides, they could not have exonerated the defendant without criminating themselves. All the evidence in regard to King and Adams contained in the record is to the effect that King was a frequenter of the racetrack and poolrooms of Los Angeles; that Adams was a "sure-thing" confidence man, and a companion of King; that King proposed the game in which defendant claims to have won the check; that defendant won from them about one hundred and fifty dollars less than the face of the check, and paid them the difference when it was transferred to him, after which they disappeared from Los Angeles. All this may have been a fiction, and the jury may have been justified in so considering it; but it was certainly an error, and a highly prejudicial error, in the court to instruct the jury not only that they were to presume that the evidence of King and Adams would have been adverse if they had been called as witnesses, but that it would have been higher and stronger evidence than that of the defendant.

The objection to instructions 1 and 2 (folios 480-482) are removed by an amendment to the record, and instruction 3 (folio 483) is a correct statement of law applicable to the case.

In charging the jury concerning circumstantial evidence, the trial judge used the following language: "Where the evidence is entirely circumstantial, yet it is not only consistent with the guilt of the defendant, but inconsistent with any other rational conclusion, the law makes it the duty of the jury to convict, notwithstanding such evidence may not be as satisfactory to their minds as the direct testimony of credible eye-witnesses would have been."

This language is quoted literally from the opinion of Justice Sanderson in *People v. Cronin*, 34 Cal. 202, and since the decision of that case has been repeated in hundreds of criminal trials in this state. It is, nevertheless, not a correct and logical statement of the law, and has been repeatedly criticised in later ⁴⁹⁵ decisions of this court, though it has never been deemed a sufficient ground of reversal.

In cases of circumstantial evidence, facts should be proved which are not only consistent with the guilt of the defendant but inconsistent with any reasonable hypothesis of innocence, and every single fact from which the deduction of guilt is to be drawn must be proved by evidence which satisfies the minds and consciences of the jury to the same extent that they are required to be satisfied of the fact in issue in cases where the evidence is direct. It is, therefore, inexact and illogical to say that a conviction may be had on less satisfactory evidence where it is circumstantial than would be required when it is direct. The vice of this instruction, however, is generally corrected, as it was in this case, by special instructions to the effect that every fact essential to sustain the hypothesis of guilt and to exclude the hypothesis of innocence must be fully proved.

The court did not err in giving section 470 of the Penal Code as a definition of forgery. It certainly was law, and although parts of it were superfluous in this case, we cannot see how the jury can have been misled by it.

Nor did the court err in refusing instructions 6, 9, and 10 asked by defendant (folios 501, 502, 505-507). They were substantially given in instructions 19 and 20 (folios 465-467).

Instruction 5 was properly refused because it was a request to the judge to instruct the jury not as to a matter of law, but as to the weight and effect of evidence.

Among other instructions requested by defendant and refused by the court was the following: "If, after consideration of the whole case, any juror should entertain a reasonable doubt of the guilt of the defendant, it is the duty of such juror so entertaining such doubt not to vote for a verdict of 'guilty,' nor to be influenced in so voting, for the single reason that a majority of the jury should be in favor of a verdict of 'guilty.'" This is a correct statement of the duty of a juror, and should have been given. If any juror needed an instruction upon this point, it was harmful to refuse it; if no juror needed the instruction, it would have been harmless to give it.

Instruction 7 (folios 504, 505) was properly refused. Against

his conscientious convictions a juror has no more right to vote not guilty than guilty.

⁴⁹⁶ Instruction 13 requested by defendant and refused by the court was in the following language: "Gentlemen of the jury, if you entertain a reasonable doubt as to whether or not 'Exhibit A' has been raised from a two dollar and a half check to an eight hundred and fifty dollar check, it will be your duty to acquit."

This instruction was correct and should have been given. There is no theory upon which the defendant could have been convicted under this information, and the evidence in the record, if the check was not raised as charged. The refusal of the instruction probably did no actual harm, for the evidence as to the raising of the check was all one way, but it was error to refuse it.

Instruction 14 (folio 510) was properly refused because it does not state a proposition of law, but deals with the effect of evidence.

The court erred in permitting the cross-examination of defendant for the purpose of showing that he got money from the loan and trust company on the forged check. This was a part of the people's case in chief. Counsel for the prosecution seem to have thought their case weak on that point, and sought to prove it more fully by the cross-examination of the defendant. This they had no right to do. He had not testified as to that matter in his direct examination, and they could not compel him to be a witness against himself.

The court did not err in admitting the check in evidence; there was no material variance between it and the paper set out in the information. Nor did the court err in overruling the objections to the questions asked the witnesses Brunjes and Daniels relating to the identification of the defendant.

A teller of the loan and trust company testified that he had examined the books of the bank to ascertain whether the defendant, when he passed the check and received an advance on it, had any account with the bank, and over the defendant's objection was allowed to state that he had no account at that time. The ruling of the court upon this point was correct. The fact called for was a general result that could have only been arrived at by the examination of numerous books and accounts which could not have been examined in court without great inconvenience ⁴⁹⁷ and loss of time, and was therefore properly provable

by parol under subdivision 5 of section 1855 of the Code of Civil Procedure.

The same witness was allowed to testify over the objection of the defendant that the State Loan and Trust Company was a corporation. This ruling was technically erroneous. It was competent and sufficient to prove that the bank was a *de facto* corporation, and to prove this by parol, but it was a fact to be proved, like character, by reputation, and not by direct statement of the witness.

As the result of the foregoing discussion it is apparent that the judgment and order appealed from must be reversed, and therefore it is unnecessary to decide whether the trial court exceeded the bounds of legal discretion in refusing a new trial on the ground of newly discovered evidence. This point cannot arise on a new trial, and all other points presented by the record have been decided.

The judgment and order denying a new trial are reversed, and cause remanded.

Van Fleet, J., concurred.

FORGERY—SUFFICIENCY OF INDICTMENT.—An indictment need not set forth that a bank was incorporated under the laws of this state or of the United States by a specific allegation, but if it is averred that a forgery was committed with intent to defraud a particular bank, describing it by its corporate name, and it appears that there is such a corporation incorporated by public statute, the court will take judicial notice of such act of incorporation, and the indictment is sufficient without any further designation of the bank than by its name: *State v. Jones*, 1 McMull. 236; 36 Am. Dec. 257. Compare *Goodson v. State*, 29 Fla. 511; 30 Am. St. Rep. 135.

FORGERY—SUFFICIENCY OF INDICTMENT—DUPLICITY. An indictment is not open to the objection of duplicity in alleging that the defendant forged, and caused to be forged, and aided in forging; these acts are not only the same offense, under the statute, but are, in legal contemplation, the same act: *State v. Morton*, 27 Vt. 810; 65 Am. Dec. 201, and note.

FORGERY—WHAT INSTRUMENTS ARE SUBJECTS OF.—All contracts, bonds, and instruments in writing which create a legal liability from one person to another that may be enforced at law are the subjects of forgery: See monographic note to *Hendricks v. State*, 8 Am. St. Rep. 466, as to what may be the subject of forgery.

WITNESSES — CROSS-EXAMINATION — SELF-INCRIMINATION.—A cross-examination must be confined to matters about which the direct testimony was given: *State v. Elfert*, 102 Iowa, 188; 63 Am. St. Rep. 433. A witness cannot be compelled to answer any question if the answer tends to incriminate him, but if he states a particular fact, he is bound, on his cross-examination, to state all the circumstances relating to that fact, although in doing so he may expose himself to a criminal charge: *Ex parte Park*, 37 Tex. Cr. Rep. 590; 66 Am. St. Rep. 835, and note.

EVIDENCE—CIRCUMSTANTIAL—INSTRUCTIONS.—In order

to warrant a conviction on circumstantial evidence, all the necessary facts must be consistent with one another and with the main fact sought to be established, and they must be of so conclusive a nature that, when considered in connection, they lead reasonably and with moral certainty to the conclusion that the defendant did commit the offense of which he is accused, and exclude any reasonable hypothesis except the guilt of the defendant: *Hocker v. State*, 34 Tex. Cr. Rep. 359; 53 Am. St. Rep. 716, and note.

INSTRUCTIONS.—There is no error in refusing to give instructions which have been submitted to the jury: *Galveston etc. Ry. Co. v. Gormley*, 91 Tex. 393; 66 Am. St. Rep. 894, and note.

INSTRUCTIONS—REASONABLE DOUBT.—A reasonable doubt is a conscious uncertainty in the mind of the jury, after a fair consideration of all the proofs in the case, respecting the guilt of the accused. So long as a moral certainty is not reached, a reasonable doubt may be said to remain on the mind: See monographic note to *Burt v. State*, 48 Am. St. Rep. 570, on reasonable doubt.

BENNETT & WILSON.

[122 CALIFORNIA, 509.]

EXECUTIONS—REDEMPTION—RIGHTS OF PRIOR REDEMPTIONER AS AGAINST VOID JUDGMENT.—A redemptioner who has made a valid redemption succeeds to all the rights of the purchaser at an execution sale, and retains in addition the rights of a redemptioner, and has such an equitable estate in the land as entitles him to protection against a subsequent redemption under a void judgment.

EXECUTION SALES—REDEMPTION FROM—EFFECT OF. A redemptioner from an execution sale succeeds to all of the rights of the purchaser, and acquires an equitable estate in the land sold, which, although conditional, may become absolute by mere lapse of time. The legal title remains in the judgment debtor with a right to defeat the sale within the statutory time, falling in which the rights of such redemptioner become indefeasible, and the legal title of the judgment debtor may be divested by applying for and obtaining a sheriff's deed.

EXECUTION SALES—ATTACHMENT OF PURCHASER'S INTEREST.—The estate or interest of a purchaser in land purchased by him at an execution sale may be attached and sold under execution both before and after the expiration of the time for redemption, and this rule applies to a redemptioner, other than the judgment debtor, who redeems from the purchaser.

EXECUTION SALES—REDEMPTION—ACTION TO DETERMINE INVALIDITY OF JUDGMENT.—A redemptioner from a valid execution sale may maintain an action to determine the invalidity of a judgment claimed to support a subsequent redemption, and also to determine that the holder thereof is not in fact a redemptioner, and that plaintiff is entitled to a sheriff's deed.

EXECUTION SALES—REDEMPTION—FRAUDULENT JUDGMENT.—A redemptioner from an execution sale, who brings an action to determine the invalidity of a judgment claimed to support a junior redemption, is entitled to show that such junior judgment was fraudulently obtained by default, upon a false and collusive return of service of process, and that it is void for want of jurisdiction of the person of the defendant.

EXECUTION SALES—REDEMPTION MONEY.—Although it is immaterial where the money comes from with which redemption from an execution sale is offered to be made, yet such tender, to be valid, must be made by a lawful redemptioner.

EXECUTION SALES—REDEMPTION—ESTOPPEL.—The sheriff is not so far the agent of a prior redemptioner from execution sale as to estop the latter from attacking the validity of a subsequent redemption under which the money is paid to the sheriff for such redemptioner.

EXECUTION SALES—REDEMPTION—PARTIES.—The purchaser from whom redemption from an execution sale is made by a prior redemptioner is not a necessary party to an action by him attacking the validity of a subsequent redemption.

Goodwin & Webb, for the appellants.

N. L. Peter, W. W. Kellogg, and R. V. Whiting, for the respondents.

510 CHIPMAN, C. Action to determine the invalidity of a certain judgment lien and that the holder thereof is not a redemptioner, **511** and that plaintiff, under his redemption, is entitled to sheriff's deed. A demurrer, interposed to the amended complaint upon several grounds, was sustained, and defendants had judgment dismissing the action, from which plaintiff appeals.

The facts alleged which are necessary to illustrate the main question discussed by counsel may be briefly stated. Defendant company is a foreign corporation and owned and operated mining property in Plumas county; defendant Bransford is sheriff of said county; defendant Wilson is a stockholder in and the managing agent and in actual control and management of the property of defendant corporation; in 1885, one Swearingen obtained a judgment lien against the property of defendant corporation which was sold on execution, and one Cole became the purchaser at sheriff's sale July 18, 1896; the defendant corporation did not redeem; plaintiff obtained a judgment lien before the time of redemption expired, and with it redeemed from the purchaser and sixty days thereafter demanded a deed from the sheriff, which was refused for the alleged reason that defendant Wilson was a lawful redemptioner, and had within the sixty days required by law made redemption; Wilson's judgment lien was junior to plaintiff's; it is alleged that Wilson's judgment was obtained by fraudulent collusion between him and said sheriff, whereby the sheriff made a false return of service of summons on defendant corporation; that no service was in fact made, and said corporation had no knowledge or notice of the action commenced by Wilson and did not appear or an-

swer, and judgment was obtained by default, and said judgment is fraudulent and void; plaintiff refused to accept the money tendered and demanded a deed from the sheriff, which was refused.

The demurrer admits that defendant Wilson is seeking to enforce the rights of a redemptioner while holding a judgment which is void. Plaintiff admits that defendant Wilson paid to the sheriff money sufficient to fully redeem from plaintiff's judgment and the original judgment and all attendant costs, interests, and charges. Plaintiff's injury, therefore, consists, not in losing any money he has paid out nor any of the money due on his judgment, but in losing whatever of advantage he might gain by acquiring the property of the judgment debtor.

⁵¹² The contention of the appellant is, that the corporation debtor, by failure to redeem in time, lost all equitable title, to which plaintiff succeeded by redemption, and the corporation now holds only the naked legal title to be conveyed by the sheriff; the title being in this condition, defendant Wilson presented himself to the sheriff as a redemptioner, with a judgment, regular in form, and must stand upon his strict legal rights arising from his judgment; he has no equities, nor can he urge any; that plaintiff acquired an inchoate right to the property by his redemption and became the equitable owner, and that equity will protect him in the enjoyment of such rights against a void judgment; and the judgment which gives the right to redeem must be a bona fide existing judgment. The position of respondents briefly stated is, that the Wilson judgment, being regular on its face, is valid as against the corporation until the latter proceeds to set it aside; and became a valid lien at its entry; if it was a fraud on the corporation, it was not such on plaintiff, as it was subordinate to his judgment; no collusion is charged between Wilson and the corporation, and no rights of plaintiff have been violated; he has received all he can rightfully ask and has shown no injury by Wilson's redemption, and no relief can be asked where no injury is shown; that Wilson's judgment was voidable, but not void; and no person not a party to the original action can be heard to call it in question in equity unless the rights of such person were injuriously affected by it at its rendition; that plaintiff does not seek to set aside Wilson's judgment, but to have it declared not to be a lien as entitling Wilson to the right of redemption, and the attack is collateral and not direct.

1. There is no dispute that Wilson on the face of his judgment was a redemptioner under section 701 of the Code of Civil

Procedure, and the only question is: Can plaintiff, as a prior redemptioner, prevent Wilson from redeeming by showing that his judgment is void?

Plaintiff, by his redemption from the purchaser, acquired something more than a lien by which was secured the right to be reimbursed what he had paid out and the amount of his judgment and attendant charges. He succeeded to the rights of the purchaser, to which are to be added the rights of a redemptioner. The interest of the purchaser has been defined to be "an inchoate ⁵¹² right, which may be perfected into a perfect title without any further act than the execution of a deed in pursuance of a sale already made. . . . The purchaser has already bought the land and paid for it. The sale is simply a conditional one, which may be defeated by the payment of a certain sum by certain designated parties, within a limited time": Page v. Rogers, 31 Cal. 294. It was there shown that the purchaser acquires an equitable estate in the lands, and, although conditional, it may become absolute by mere lapse of time; the legal title remains in the judgment debtor with a right to defeat the sale within the statutory time, failing in which the estate of the purchaser becomes indefeasible, and only the dry, naked, title remains in the judgment debtor which may be divested by the sheriff's deed; and during this redemption period the statute regards the purchaser as the owner in equity and gives him the rents and profits. As a further incident of this estate, it is shown that the purchaser's interest may be attached and sold on execution both before and after the expiration of the time for redemption: Page v. Rogers, 31 Cal. 294. This case has been frequently cited, and the general propositions above stated were reaffirmed as late as Robinson v. Thornton, 102 Cal. 675. Section 700 of the Code of Civil Procedure provides that where real estate is sold by a sheriff "the purchaser is substituted to and acquires all the right, title, and interest, and claim of the judgment debtor thereto," subject only to redemption as the statute prescribes.

In Forman v. Wallace, 75 Cal. 552, it was held that a sheriff's certificate of sale of real property is the evidence of the equitable interest which the purchaser has in the land, and is an instrument whereby an interest or title is created within the meaning of section 1107 of the Civil Code: See Freeman on Executions, sec. 323. See Walker v. McCusker, 71 Cal. 594, as to right of purchaser and redemptioner to rents, issues, and profits under section 707 of the Code of Civil Procedure.

It seems to us very clear that the law should give to the holder of such an estate in land some appropriate proceeding by which to protect it against the operation or lien of a void judgment. "A void judgment is, in legal effect, no judgment. By it no rights are divested. From it no rights can be obtained. Being ^{and} worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars any one": Freeman on Judgments, sec. 117. The general rule is, that none but the parties to a judgment can have it set aside. But this rule is not without its exceptions, and third parties—persons not nominal parties—who are necessarily affected by the judgment, may be protected from its operation: Freeman on Judgments, sec. 92.

Respondents urge with great earnestness that when plaintiff was tendered all he had paid out, and all penalties and the amount due on his judgment and interest, he had no right to ask more; and whether defendant Wilson's judgment was void or valid was of no concern to him; he was not injured, and only the judgment debtor could complain. It is true that only such strangers to the judgment as would be prejudiced thereby in some pre-existing right should be allowed to impeach the judgment. But we think the interest or estate vested in the purchaser or redemptioner, as already shown, was something more than the right to what respondents would limit him; and to permit plaintiff to be deprived of this estate by the lien of a void judgment would prejudice his pre-existing right. Respondent claims under a judgment procured through alleged fraud—a default judgment obtained against defendant corporation that was never served with summons, and did not appear at the trial and did not redeem from the sale. Plaintiff was not a party to that action, and had no opportunity to be heard in any way to impeach the validity of the judgment in that action. Unless he can do so by bill in equity, he can never have relief, but must surrender the rights acquired as a redemptioner under a valid judgment to a junior redemptioner who holds a judgment alleged to be void because the judgment debtor was not served with process, and void also because of alleged fraudulent collusion between the judgment creditor and the sheriff who made return of service. We think plaintiff's right of action comes clearly within the principles discussed by Mr. Freeman and supported by the cases cited in his work upon Judgments, in sections 334-337. Among the cases cited is that of *Downs v. Fuller*, 2 Met. 135; 35 Am. Dec. 393. In that case the junior redemptioner (plaintiff) held a judgment obtained—as the judg-

ment is alleged to have been obtained in this case—⁵¹⁵ i. e., without due service of summons, but no fraud was alleged. His offer to redeem was refused, and he brought a bill in equity to enforce redemption. Defendant pleaded that plaintiff's judgment was void, and his plea was sustained and the bill dismissed. The court said: "Although the judgment in favor of the plaintiff in the present case was not recovered by collusion with the debtor, or with any fraudulent intention, yet we think the defendant has a right to avoid it in the same manner, because he is neither party nor privy to the plaintiff's judgment, and is not entitled by the rules of law to reverse it by a writ of error. This was so decided in *Warter v. Perry*, Cro. Eliz. 196; and in *Randal's case*, 2 Mod. 308; and the same principle is laid down in *Comyn's Digest*, Error D, and in *Dane's Abridgment*, 255. This rule of law does not appear, in any case, to have been controverted, and it seems reasonable and just that where a judgment is recovered contrary to law and prejudicial to a third party, he should have a right to avoid it." The principle was applied in favor of a junior judgment creditor who was permitted to show that a prior sale of the premises under execution was invalid: *Clark v. Fowler*, 5 Allen, 46. See other instances cited in note to *Downs v. Fuller*, 2 Met. 135; 35 Am. Dec. 393. *Downs v. Fuller*, 2 Met. 135, 35 Am. Dec. 393, is cited approvingly in *Pierce v. Strickland*, 26 Me. 277, and the principle was also fully affirmed in *Caswell v. Caswell*, 28 Me. 232.

Respondent cites several cases and *Freeman on Executions* to show that the judgment debtor may confess judgment before the time of redemption has expired for the express purpose of making the judgment creditor a redemptioner. It was held in *McMillan v. Richards*, 9 Cal. 365, 70 Am. Dec. 655, that a creditor of a mortgagor, obtaining a judgment after sale under foreclosure, but before the execution of the conveyance thereunder, acquired a lien on the estate entitling him to redeem. And Mr. *Freeman* states that it is immaterial whether the judgment is the result of contested litigation or was confessed for the purpose of creating a right to redeem after the sale was made: *Freeman on Executions*, sec. 317. But the cases cited and the author quoted have reference to valid judgments—judgments confessed or entered in good faith. They can have no reference to a void judgment obtained by fraud and without the knowledge or consent of the debtor.

⁵¹⁶ *Seale v. Doane*, 17 Cal. 476, is cited to the proposition that

it is immaterial whence the money comes with which redemption is offered to be made. That may be true, but it must be tendered by a lawful redemptioner. The statute declares who alone are redemptioners. In the case cited the board of supervisors were empowered to redeem the property of the city and county of San Francisco, and having the power to protect the property, but having no money with which to redeem, it was held that the redemption was good and it was immaterial who furnished the money.

Respondents further claim that the complaint is not sufficient because it does not appear that there is any defense to Wilson's judgment on the merits: Citing Freeman on Judgments, sec. 486, and numerous California cases. The principles discussed in these cases relate to the rights of the parties to the action, and have no application to a case such as the present one. Respondents' contention would shut out relief where the judgment was collusive between the debtor and creditor and had no merit whatever. It is because the judgment is in fact void, not because it might have been made valid, that the relief is afforded.

Respondents further contend that plaintiff is estopped by section 704 of the Code of Civil Procedure. The part of the section relied upon reads: "The payment mentioned in the last two sections may be paid to the purchaser or redemptioner, or for him to the officer who made the sale." It is claimed that the sheriff is, by this section, made the agent for plaintiff, and payment to and acceptance by such sheriff (Bransford) of the money paid by Wilson on redemption was conclusive as against plaintiff. There is nothing in the point. The sheriff is authorized to receive the money of a redemptioner or a purchaser for a previous redemptioner, but the statute does not make the sheriff such an agent as that by receiving the money it would necessarily bind the purchaser or previous redemptioner to accept it.

2. It is claimed that there is a defect of parties defendant because Cole, the purchaser of the property sold, was not made a party. The complaint shows that plaintiff redeemed from him. He is not a necessary party.

⁵¹⁷ 3. It is claimed that there is a misjoinder of parties defendant because it does not appear from the complaint that the corporation is either a necessary or proper party. We do not at this moment see why the corporation should have been joined

as a defendant; but we do not see that respondents would be injured thereby.

Respondents state in their brief that the trial judge overruled the demurrer upon the special grounds alleged, and sustained it on the general ground of insufficiency of facts. We think the court erred in sustaining the demurrer on the grounds alleged; and advise that the judgment be reversed and the cause remanded with leave to the defendants to answer.

Searls, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment is reversed and the cause remanded with leave to defendants to answer.

Henshaw, J., Temple, J., McFarland, J.

EXECUTION—EFFECT OF REDEMPTION—RIGHTS OF REDEMPTIONER.—In a great majority of the states no valid conveyance can be made until the expiration of the time allowed to redeem. Hence, a redemption accomplished by the judgment debtor or his grantee has the effect of extinguishing the rights of the purchaser, and of releasing the judgment debtor's title from the consequences of the sale, leaving it subject to all other valid rights and liens: See monographic note to *Flanders v. Aumack*, 67 Am. St. Rep. 517, discussing the effect of redemption from execution sales.

EXECUTION—WHAT SUBJECT TO BE SEIZED UPON.—The purchaser of land on execution sale acquires no interest, before the expiration of the time for redemption, which is subject to sale on execution against him: *Bowman v. People*, 82 Ill. 246; 25 Am. Rep. 316.

SLOCUM v. BEAR VALLEY IRRIGATION COMPANY.

[122 CALIFORNIA, 555.]

CONSTITUTIONAL LAW—PAYMENT OF WAGES BY CORPORATION.—A statute providing that "every corporation doing business in this state shall pay the mechanics and laborers employed by it the wages earned by and due them, weekly or monthly, on such day in each week on month as shall be selected by such corporation," is unconstitutional as inhibited special legislation, attempting to provide for the creation of liens in favor of a special class of laborers, and a mere arbitrary classification not founded on natural differences, nor differences defined by the constitution.

Section 1 of the statute in question provides that: "Every corporation doing business in this state shall pay the mechanics and laborers employed by it the wages earned by and due them, weekly or monthly, on such day in each week or month as shall be selected by said corporation."

W. J. Hunsaker, for the appellants.

C. L. Allison, for the respondents.

THE COURT. This is an appeal by the receivers of the corporation defendant from a judgment declaring and enforcing certain asserted liens of plaintiffs upon the property of the corporation, and from an order denying a new trial. The liens are based upon the act of the legislature entitled, "An act to provide for the payment of the wages of mechanics and laborers employed by corporations," approved May 31, 1891: Stats. 1891, p. 195. The act is quoted in full in former decisions of this court hereinafter referred to and need not be republished here.

It is contended by appellants that the act in question is unconstitutional for various reasons, and, among others, for the reason ^{that} that it is special legislation inhibited by the constitution, because it attempts to provide for the creation of liens in favor of a special class of laborers, and thus attempts a mere arbitrary classification not founded upon natural differences, or differences defined by the constitution, within the meaning of the principle declared in *Darcy v. Mayor etc. of San Jose*, 104 Cal. 642, and other decisions of this court to the same point. This contention is correct if the said act provides a lien only for those laborers and mechanics who are employed by the week or month, and does not provide liens for those who are not thus employed. But this court has already declared such to be the construction of the act in two cases—one decided by one department of this court and the other by the other department. In *Keener v. Eagle Lake etc. Co.*, 110 Cal. 627, the court, referring to this act, and quoting it in full, says: "By the terms of the first section of this act it does not apply to all corporations, but only to those, who, while doing business in this state, employ laborers and mechanics by the week or month, whose wages, under the terms of their employment, are payable weekly or monthly. It does not purport to impose upon those corporations any duty or liability toward all the mechanics or laborers whom it may employ, or to create a right in favor of those of its employees whose wages are not earned or payable by the week or by the month." The petition for a hearing of the case in Bank was denied. In *Ackley v. Blackhawk etc. Co.*, 112 Cal. 42, the same construction was given to the act, and the language of the court in *Keener v. Eagle Lake etc. Co.*, 110 Cal. 627, was quoted and approved. The former of these two cases was decided in 1895, and the latter a few months afterward; they must be held to have definitely established the construction of the act as therein declared. Since the date of the decisions in those cases the legislature has been in session and has not seen fit to change the statute; and

whether the statute as thus construed is a proper and wise law, or whether it should be in any manner changed, are now questions for legislative discretion. Following the construction given to the act by the decisions above noticed, we hold it to be unconstitutional. In this case there are four separate complaints, each made by a different plaintiff; and, as there were no liens to be enforced, of course these different causes of action were not properly joined.

557 The judgment and order appealed from are reversed and the cause remanded.

MR. CHIEF JUSTICE BEATTY dissented and expressed the opinion that the statute in controversy was constitutional and valid. After quoting section 1 of such statute, he said: "No rule of statutory construction is more firmly established than this: that if an act of the legislature is open to two constructions, one of which harmonizes with the constitution and the other does not, the latter must be rejected. Now, whatever may be the more obvious meaning of the section above quoted, regarded by itself and without reference to the constitutional limitations upon the power of the legislature, it cannot be denied that, without doing violence to the language employed, it may be held to mean simply this: that every corporation employing laborers and mechanics is required to establish a regular pay day in each week or in each month, as it may elect, and on that day to pay all wages then earned and due, no matter what the term of employment."

STATUTES—CONSTITUTIONALITY—INTERFERENCE WITH RIGHT TO CONTRACT.—The right to contract necessarily includes the right to fix the price at which labor will be performed and the mode and time of payment; and a statute which restricts a person as to either of these essential elements of the right to contract to a mode different from that enjoyed by the community at large, deprives him of liberty and property without due process of law: *Low v. Rees Printing Co.*, 41 Neb. 127; 43 Am. St. Rep. 670. See monographic note to *State v. Goodwill*, 25 Am. St. Rep. 881, 882.

LANGLEY v. RODRIGUEZ.

[122 CALIFORNIA, 580.]

CONTRACTS—CONTEMPORANEOUS ORAL PROMISE.—

The breach of an oral promise honestly made to pay part of the agreed price in advance of curing a crop, if in conflict with the written contract that payment would be made on delivery of the crop, is no excuse for a breach of the latter by the seller, and is within the rule forbidding proof of a contemporaneous or prior oral agreement to detract from the terms of a contract in writing, but if such oral promise was made without any intention of performing it and for the purpose of securing the execution of the written contract, it is a fraud, and is ground for the avoidance of the written contract.

FRAUD—ORAL PROMISE—PLEADING.—In pleading fraud in the making of an oral promise, it is not necessary to allege in so many words that there was no intention to fulfill the promise at the time it was made. It is sufficient that such is the effect of the averments on the subject.

CONTRACTS—BREACH—PROOF OF DAMAGE IMMATERIAL.—The payment of a promised advance to enable a vendor to gather and cure a crop, if fraudulently promised, is a condition precedent to the duty of the vendor to deliver the crop, and precludes the necessity of proof that he was damaged by the failure to receive the promised advance.

H. L. Smith, for the appellant.

L. L. Cory, for the respondent.

580 **BRITT, C.** Rodriguez, the defendant here, and the Cutting Fruit Packing Company, a corporation, the latter acting by one Bates, its agent, made and signed a contract in writing, of date July 6, 1896, by the terms whereof Rodriguez agreed to sell to said packing company his crop of raisin grapes, then growing, and said company agreed to pay him at the rate of two cents 591 per pound for the same when delivered "in sweat boxes" at its packinghouse. This is an action by the assignee of the packing company to recover damages for defendant's refusal to deliver the goods pursuant to said written agreement.

In his answer defendant pleaded, in substance, that his signature to said instrument was procured by fraud of said Bates, consisting in this: To induce defendant to sign the paper, Bates orally promised and agreed, on behalf of the packing company, that when the grapes should be ready to gather, said company would advance to defendant on the said agreed price thereof, the sum of three hundred and fifty dollars, to enable him to pick and cure the same; that without the prior promise of such advance defendant would not have signed said writing; that Bates, when he made the said oral promise, did not know and was without reasonable ground to believe that the packing company would advance anything on the contract price, as promised by him; that said company refused such advance when, at the proper time, defendant requested the same; and that because of such refusal defendant on his part refused to deliver the raisins as stipulated in said instrument of writing. At the trial defendant submitted evidence tending, though with varying degrees of cogency, to prove the said allegations of his answer; the court seems to have held the affirmative defense pleaded to by itself insufficient, and rejected the evidence offered in support thereof and rendered judgment for plaintiff.

The oral promise to pay part of the agreed price in advance of the curing of the crop was in conflict with the provision of the written contract that payment would be made on delivery of the raisins at the packinghouse, and if the promise was honestly made it was undoubtedly within the rule forbidding proof of a contemporaneous or prior oral agreement to detract from the terms of a contract in writing. The rule cannot be avoided by showing that the promise outside the writing has been broken; such breach in itself does not constitute fraud: *Feeney v. Howard*, 79 Cal. 525; 12 Am. St. Rep. 162; *Fisher v. New York Common Pleas*, 18 Wend. 608. But a promise made without any intention of performing it is one of the forms of actual fraud: Civ. Code, sec. 1572; and cases are not infrequent where relief against a contract reduced to writing has been granted on the ⁵⁸² ground that its execution was procured by means of oral promises fraudulent in the particular mentioned, however variant from the terms of the written engagement into which they were the means of inveigling the party: *Newman v. Smith*, 77 Cal. 22, 26, and authorities cited; *Hays v. Gloster*, 88 Cal. 560.

Now if, as defendant alleged, and as the evidence he offered had some tendency to show, when Bates agreed that the company would make an advance payment, he had no reasonable ground to believe that it would do so, it is impossible to see how his promise could have been made in good faith—that is to say, with intent that it should be kept; therefore, it was equivalent to a promise made without such intention and was fraudulent. It was not essential that the answer should charge in so many words that there was no intention to fulfill the promise at the time it was made; it is sufficient that such was the effect of the averments on the subject: *Hays v. Gloster*, 88 Cal. 560. The case is close; but in our opinion the evidence produced by defendant should have been considered; plaintiff being allowed to rebut by any relevant matter, including facts tending to establish the good faith of Bates' oral promises.

Respondent makes the point that defendant was not shown to have been damaged by failure to receive the expected advances. That is not the question; if, as defendant claims, the advances were to be made in order to enable him to pick and cure his crop—processes necessarily preceding delivery under the contract—then the payment of the promised advance was a condition precedent to the duty of defendant to deliver the goods. The judgment should be reversed.

Chipman, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment is reversed.

Harrison, J., Garoutte, J., Van Fleet, J.

Hearing in Bank denied.

SALES—CONTRACTS—RESCISSION FOR FRAUD.—A vendor cannot rescind a contract of sale and reclaim the goods on the ground of fraud, unless it appears that he was induced to part with such goods by the deceptive assertions and false representations of the vendee: *Cross v. Peters*, 1 Greenl. 376; 10 Am. Dec. 78. A contract consummated by writing is presumed to contain the whole agreement: *Reed v. Van Ostrand*, 1 Wend. 424; 19 Am. Dec. 529. Parol evidence to show that a written agreement does not contain the whole or the true contract, on account of fraud, accident, or mistake, must be entirely clear and most satisfactory: *Gelpcke v. Blake*, 15 Iowa. 387; 83 Am. Dec. 418, and note. Compare *Cake v. Pottsville Bank*, 116 Pa. St. 264; 2 Am. St. Rep. 600; *Knowlton v. Keenan*, 146 Mass. 86; 4 Am. St. Rep. 282.

CONTRACTS—PAROL AGREEMENT AS TO MANNER OF PAYMENT—FRAUD.—It is a fraud to secure the execution of a contract by representations as to the manner in which payment shall be made, differing in important particulars from those contained in the written contract, and, after the contract has been signed, attempt to compel literal performance with its terms, regardless of the contemporaneous agreement without which it would not have been signed: *Clinch Valley etc. Co. v. Willing*, 180 Pa. St. 165; 57 Am. St. Rep. 626, and note.

FRAUD—PLEADING OF—SUFFICIENCY.—The declaration in an action for fraud should charge the fraudulent intent in positive terms, and not leave it to inference: *Bartholomew v. Bentley*, 15 Ohio. 659; 45 Am. Dec. 506; *Feeney v. Howard*, 79 Cal. 525; 12 Am. St. Rep. 162. The facts constituting the fraud must be pleaded and proved: *Thomas v. Thomas*, 33 Neb. 373; 29 Am. St. Rep. 483.

FOULSON v. STANLEY.

[122 CALIFORNIA. 655.]

WITNESSES—COMPETENCY OF WIFE.—In an action by a widow against the administrator of her husband's estate, in which she claims title to land by virtue of a conveyance alleged to have been made to her by her husband, she is a competent witness to testify that the deed under which she claims was delivered to her by her husband in his lifetime. Such action is not "upon a claim or demand against the deceased" within the meaning of a statute making parties in interest, or the assignors of parties to such action, incompetent as witnesses to testify to any matter of fact occurring before the death of such deceased.

HUSBAND AND WIFE—PRIVILEGED COMMUNICATIONS.—The delivery of a deed from a husband to his wife is not a privileged communication.

APPELLATE PRACTICE—DELIVERY OF DEED.—Whether the conduct and acts of a person after the time when he claims to have received a deed were such as to authorize the inference that such deed had not been delivered to him, is a question to be determined by the trial court upon the evidence before it, and cannot be reviewed on appeal.

APPELLATE PRACTICE—HUSBAND AND WIFE—INTENT TO DEFRAUD CREDITORS.—The intent of a husband to defraud his creditors by a conveyance to his wife is a question of fact under the statute, to be determined in the trial court, and the findings on such question, if supported by any evidence, cannot be reviewed on appeal.

HUSBAND AND WIFE—FRAUDULENT CONVEYANCES—CONSIDERATION.—A conveyance from a husband to his wife cannot, under the California statute, be adjudged fraudulent solely on the ground that it was not made for a valuable consideration.

T. W. Sawyer and A. Morgenthal, for the appellant.

E. M. Gibson and W. Whitmore, for the appellee.

656 HARRISON, J. Appeal from a judgment in favor of the plaintiff quieting her title to certain real estate.

The plaintiff was the wife of Peter Wilhelm Poulson, who died April 23, 1894, and the defendant Stanley is the administrator of his estate. The plaintiff claims title to the land in question by virtue of a conveyance alleged to have been made to her by her husband. The instrument was never recorded, and she was unable to produce it at the trial, claiming that it had been abstracted from her desk and destroyed. Testimony was given that a conveyance to the plaintiff of the property in question had been signed and acknowledged by her husband, and that such a conveyance had been in her possession subsequent to the time it purported to have been made. For the purpose of proving its delivery to her, the plaintiff was asked whether she had ever received a deed of the property from her husband. The defendants objected to this question upon the ground that under section 1880 of the Code of Civil Procedure, the plaintiff is incompetent to testify as to any fact occurring before **657** the death of her husband—this being an action by her against his administrator upon a claim against his estate. The court overruled the objection, and the defendants excepted thereto.

The provision of section 1880 relied on by the appellant is as follows: "The following persons cannot be witnesses: 3. Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator upon a claim or demand against the estate of a deceased person as to any matter of fact occurring before the death of such deceased person."

Whether a person shall be competent as a witness upon the trial of a question of fact, either by virtue of the relation he bears to the opposite party, or his interest in the cause of action,

and the degree of interest in the cause which will disqualify him as a witness, are questions of legislative policy, and the function of courts in reference thereto is to apply the rules prescribed by the legislature. Formerly a party to an action was not permitted to be a witness as to any fact in issue therein, and such was the law in this state under the procedure act first enacted. The strictness of this rule was gradually modified until the adoption of the codes in 1872. The history of these changes prior to 1864 is given in *Davis v. Davis*, 26 Cal. 23, 36; 85 Am. Dec. 157. In 1870 (Stats. 1869-70, p. 662) the legislature repealed section 393 of the practice act, under which this decision was made, and thereafter a witness was not incompetent by reason of the relation which he bore to the cause of action, or to the adverse party, except in the case of certain confidential relations. In the codes, as originally enacted, section 1880 of the Code of Civil Procedure, preserved the same rule, but in 1874 this section was amended by adding thereto subdivision 3, including as persons who were incompetent as witnesses, the following: "Parties to an action or proceeding, or in whose behalf an action or proceeding is prosecuted, against an executor or an administrator, upon a claim or demand against the estate of the deceased"; and in 1880 this subdivision was still further amended by including the assignors of such parties, and limiting the incompetency to matters of fact occurring before the death of the deceased person.

⁶³⁸ Under section 1879 of the Code of Civil Procedure, all persons are competent as witnesses except those enumerated in sections 1880 and 1881, and, before a person can be held incompetent or his testimony excluded, it must appear that he, or the matter upon which he is to be examined, is within the provisions of the exceptions. The exception in subdivision 3 of section 1880 requires not only that the witness be a party to the action, and that the action be against the administrator of a decedent, but it must also appear that the action is upon a claim or demand against the estate of the decedent, and that the testimony sought from the witness is as to a matter of fact occurring before the death of the decedent. Unless all of the conditions exist the witness cannot be held incompetent. In *Booth v. Pendola*, 88 Cal. 36, it was held that the exception did not apply in an action for the foreclosure of a mechanic's lien; that as no personal judgment could be recovered in the action against the estate payable in due course of administration, it was not a "claim" within the meaning of subdivision 3 of the section. There is no difference

in principle between an action to establish a lien upon property belonging to the estate and an action to declare that the estate has no interest in the property. In *Myers v. Reinstein*, 67 Cal. 89, it was held that this provision of the statute did not render the plaintiff incompetent in an action to establish a resulting trust in certain property held by the estate. The court, therefore, did not err in permitting the witness to give the testimony.

The provision of subdivision 1 of section 1881 is not applicable. The delivery of a deed is not a "communication" within the meaning of that section.

Whether the conduct and acts of plaintiff after the time when she claimed to have received the deed were such as to authorize the inference that it had not been delivered to her, was a question to be determined by the trial court upon the evidence before it, and is not open here for review. Neither can we review the finding of the court that the deed was not made with intent to hinder, delay or defraud any creditor of the grantor. Such fraudulent intent is by the statute made a question of fact, and under section 3442 of the Civil Code, as the section stood at the time of the transaction, the transfer could not be adjudged fraudulent solely on the ground that it was not made for a valuable consideration: See, also, *Emmons v. Barton*, 109 Cal. 662.

The judgment and order are affirmed.

Garoutte, J., and Van Fleet, J., concurred.

Hearing in Bank denied.

WITNESSES—PRIVILEGED COMMUNICATIONS—HUSBAND AND WIFE.—It is well settled that all such conversations or communications between husband and wife as are confidential or privileged during their lifetime, remain sacred after their death, and cannot be disclosed. But a husband or wife, either before or after divorce or the death of one of the parties, is a competent witness, for or against the other, to prove facts which came to the knowledge of either during the existence of the marriage relation, but not confidentially, nor by means of the situation of husband and wife: See monographic note to *Commonwealth v. Sapp*, 29 Am. St. Rep. 418, 419, on privileged communications between husband and wife.

FRAUDULENT CONVEYANCES BETWEEN HUSBAND AND WIFE.—A voluntary conveyance to a wife or child is not fraudulent per se, but it is a question of fact in each case whether a fraud was intended: Monographic note to *Jenkins v. Clement*, 14 Am. Dec. 706. See *Filley v. Register*, 4 Minn. 391; 77 Am. Dec. 522; *Hamilton v. Greenwood*, 1 Bay, 173; 1 Am. Dec. 607; note to *Henderson v. Henderson*, 19 Am. St. Rep. 657.

CASES
IN THE
SUPREME COURT
OF
GEORGIA.

BENNETT v. STATE

[108 GEORGIA, 66.]

FORNICATION.—TO COMMIT THE OFFENSE of fornication, in the state of Georgia, both parties to the illicit sexual intercourse must be unmarried.

EVIDENCE.—THERE IS NO PRESUMPTION, either of law or of fact, that a man or a woman is single or unmarried.

FORNICATION—INDICTMENT—PROOF.—An indictment for fornication must allege that both parties to the illicit intercourse were, at the time, single or unmarried, and this fact must be proved by the state before a conviction can be had.

Indictment for fornication.

W. R. Rankin, for the plaintiff in error.

Sam. P. Maddox, solicitor general, and Albert S. Johnson, for the defendant in error.

FISH, J. Pete Bennett was indicted, at the August term, 1897, of the superior court of Gordon county, for fornication with Martha Reynolds. The indictment charged that he was a single man and she a single woman at the time the offense is alleged to have been committed. Martha Reynolds, the only witness sworn, testified, in behalf of the state, that she ⁶⁷ was delivered of a bastard child a few months prior to the trial, and that Pete Bennett was its father; that he had sexual intercourse with her, in Gordon county, in May, 1896. There was no evidence that either of them was unmarried. The accused was convicted, and, upon his motion for new trial being overruled, he excepted. The assignment of error insisted on here is, that

the court, after charging the jury, as requested by counsel for the accused, that "it is incumbent on the state to prove every material allegation in the bill of indictment. That the parties were not married is material. If the state failed to show that the woman was an unmarried female and that the man was single, then you ought to acquit," erred in adding to such charge the following: "But I charge you, gentlemen, that the single or unmarried state is the natural state, the normal condition of man and woman; and in the absence of any proof to the contrary, the law would presume that the defendant and the witness Martha Reynolds are and have always been single or unmarried."

.1 To commit the offense of fornication in this state, both the parties to the illicit sexual intercourse must be unmarried: *Kendrick v. State*, 100 Ga. 360, and cases there cited. The indictment in the case under consideration alleged this necessary ingredient of the crime. The trial judge correctly charged the jury that it was incumbent upon the state to prove every material allegation in the indictment, and that if the state failed to show that the accused was a single man and that the woman with whom he was charged to have had sexual intercourse was a single woman, then the accused should be acquitted. The court committed error, however, in charging that "the law would presume that the defendant and the witness Martha Reynolds are and have always been single or unmarried." There is no presumption of law or of fact that a man or a woman is single, nor any presumption to the contrary. There is no presumption that a man is not a member of the church, or of the masonic or any other order, simply because he was not a member in early life. Nor can it be inferred that a man is uneducated from the fact that such was his original condition. Yet there is as much reason for a presumption in such cases as there is ^{as} for presuming that a man is unmarried because that must necessarily have been his first state. It may be that at a fixed age a majority of persons are single, and that at a more advanced age a majority are married, but it would be very uncertain and unreliable to presume that a particular individual of either age was single or that he was married. Moreover, why should a man in a civilized community, who is competent to marry, be presumed not to have entered into a contract of marriage, when no presumption arises that he has not entered into any other kind of a contract? As above stated, the indictment in this case alleged that the accused and the other party to the offense were

single at the time it was committed, and the burden was upon the state to prove the averment.

2. The case of *Hopper v. State*, 54 Ga. 389, was relied upon in the argument here, by counsel for the state in this case. The distinction between the *Hopper* case and the case at bar is this: in that case the charge was seduction, and the accused was found guilty of the offense of fornication, and this court held that a conviction for the latter offense could be supported on such an indictment, though it did not affirmatively allege that the accused was a single man; and it was also held that evidence showing that he was an unmarried man was admissible, though the indictment was silent as to this matter. So, even if that decision is sound in both respects, it does not touch the question now involved. In a word, in *Hopper's* case it was held that an indictment and conviction for fornication could stand on proof that the man and woman were both single, though the indictment did not allege whether the man was married or single. In the case at bar, there is no question as to the sufficiency of the indictment, or as to the admissibility of evidence; the indictment is perfect, and alleges, as we have seen, that both parties to the illicit intercourse were single; and the sole question is, Must this fact be proved? This court did not, in the *Hopper* case, hold that a person could be convicted of fornication without proving that he and the woman of whom he had carnal knowledge were both single. Indeed, the trial judge in that case charged the jury that if the proof satisfied them that the accused and the woman with whom he ⁶⁹ was alleged to have had sexual intercourse were both single, they could convict; and this charge was approved by this court. The *Hopper* case, therefore, is not authority upon the question here involved, and its intimations and inferences will not be carried beyond what is there ruled.

Judgment reversed.

All the justices concurring.

AN INDICTMENT FOR FORNICATION, which fails to allege that both parties to the offense were unmarried, is fatally defective: *Cosgrove v. State*, 67 Am. St. Rep. 802.

LEESBURG v. PUTNAM.

[108 GEORGIA, 110.]

INTOXICATING LIQUORS—DISPENSARY SYSTEM.—The controlling features of the dispensary system of selling liquors are: 1. That no liquors shall be sold by the drink, and none shall be drunk on the premises where sold; 2. That the management and control of the sale of liquors under such a system must be in the hands of a person not peculiarly interested in the quantity of liquors to be sold.

MUNICIPAL CORPORATIONS MAY EXERCISE SUCH POWERS as may be reasonably implied from the terms of their charters; but the implied powers of a municipal corporation must be such as are necessary and proper to carry into effect the objects and purposes for which the corporation was created.

MUNICIPAL CORPORATIONS—POWER TO LICENSE. The power of a municipal corporation to license saloons clearly imports that the business must be in the hands of some person other than the licensing authority. One person cannot be the licensing power and the licensee.

MUNICIPAL CORPORATIONS—IMPLIED POWERS—DISPENSARY SYSTEM.—It is not ordinarily within the power of a municipal corporation to engage directly in any commercial enterprise, and it cannot, therefore, establish and operate a dispensary system for selling liquors without express legislative authority. Its power to license and regulate the management of barrooms, saloons, et cetera, does not include the right to run a dispensary. Such a right cannot be implied from the "general welfare" clause of its charter, for its exercise is inconsistent with the usual purposes of municipal government.

INJUNCTION.—A MUNICIPAL CORPORATION may be enjoined from running a dispensary system of selling liquors where such a power is not expressly conferred by statute.

Injunction.

Long & Son and Allen Fort, for the plaintiff in error.

Thomson & Whipple and J. W. Walters, for the defendant in error.

¹¹¹ COBB, J. In 1874 the town of Leesburg was incorporated by an act of the general assembly: Acts 1874, p. 201. It was there declared that an act entitled an act to prescribe the manner of incorporating towns and villages in this state, approved August 26, 1872, excepting the first five sections thereof, should be the charter of the town of Leesburg, with the proviso that no recorder should be elected for the town. That part of the general law for the incorporation of towns and villages, which was thus declared to constitute the charter of the town, is now embraced in sections 689 et seq. of the Political Code. In a town or village thus incorporated the council has "power to make and pass all needful orders, by-laws, ordinances, resolu-

tions, rules and regulations, not contrary to the constitution and laws of this state": Pol. Code, sec. 696. Such council also has "power to license and regulate the management of bar-rooms, saloons, hotels, and private boardinghouses, liverystables, and private and public transportation through the town or village": Pol. Code, sec. 702. There being no law prohibiting the sale of liquor in the county in which Leesburg is situated, the council of the town fixed the license for the sale of liquors during the year 1897 at one thousand dollars. There was no application for a license, and the council thereupon passed the following ordinance:

"Section 1. Be it ordained by the town council of Leesburg, Georgia, and it is hereby ordained by authority of the same, that the council of said town, as soon as practicable after the passage of this ordinance, establish what is known as a dispensary in said town for the sale of spirituous and malt liquors, under such regulations as they may by their authority enact."

"Sec. 2. Be it further enacted, that a committee of three be appointed by the mayor, from the council of said town, to manage and prescribe regulations for said dispensary, to purchase stock and put in operation said dispensary, subject to the approval of the town council."

¹¹² Section 3 repeals conflicting laws. (Passed and approved June 10, 1897.)

The council were proceeding to establish a dispensary in accordance with this ordinance, when certain residents and taxpayers of the town filed an equitable petition, alleging that there was no authority in the charter of the town authorizing the passage of such an ordinance; that debts in the name of the town had been or were about to be contracted under the authority of the ordinance; and praying that the town council be enjoined "from further carrying out their illegal scheme for the establishment of the said dispensary, from selling or offering to sell any liquors in the town of Leesburg, from contracting any debts or paying out any money in connection with said dispensary, and doing any other act in connection with the same." Upon the hearing the judge granted the injunction prayed for, and to this ruling the defendant excepted.

A public corporation is one having for its object the administration of a portion of the powers of government, delegated to it for that purpose: Civ. Code, sec. 1833. Its powers are fixed by its charter: Civ. Code, sec. 1831. It may exercise such powers as are expressly delegated to it, as well as those which would

be reasonably implied from the terms of the charter. The implied powers of a municipal corporation must be such as are necessary and proper to carry into effect the objects and purposes for which the corporation was created. Did the town council of Leesburg have authority to establish "what is known as a dispensary" for the sale of spirituous and malt liquors? The purpose of the ordinance being to establish in the town of Leesburg that system of selling liquors which is known as the dispensary system, it becomes necessary to inquire what is such system. It must be presumed that the town council of Leesburg, when it passed the ordinance quoted above, had in contemplation those dispensaries which are established and operated by authority of the laws of this state. An examination of such laws will disclose that the controlling features of the system are: 1. That no liquors shall be sold by the drink, and none sold shall be drunk on the premises where sold; and 2. That the management and control of the sale of liquors under such a system must be in the hands of a person not ¹¹³ pecuniarily interested in the quantity of liquors to be sold: See Acts 1890-91, vol 2, p. 436 (Athens Dispensary); Acts 1895, p. 157 (Camilla Dispensary); Acts 1896, p. 183 (Ft. Gaines Dispensary.) The licensed tippling-house was the evil; the dispensary, under the dispensary system, was the remedy. Two of the things which, combined with others, made the bar-room an intolerable nuisance in any community were entirely obviated. Authority to sell liquors over the counter in such quantities as to be consumed on the premises, when vested in a person who is pecuniarily interested in such sales, is calculated to increase the quantity consumed, and thus bring about intemperance with all its attendant evils. The saloonkeeper not only supplies those who are already addicted to the use of liquors, but he wastes neither pains nor expense to allure to his place of business both young and old, who, but for its attractions, would have cared nothing for the article which he sells. While the dispensary plan does not remedy the evil entirely, it is claimed that it does away, to a great extent, with the blighting influence which inevitably results from the presence of the licensed tippling-house in a community. Such being the case, a dispensary cannot be correctly termed either a bar-room or a saloon. While it is a place wherein the sale of liquor is lawful, it had its origin in an effort to provide a plan for the authorized sale of liquor, in which the evils resulting from the bar-room and saloon would be, to some extent, done away with. It is a protest against the tippling-house, saloon,

bar-room and grogshop. A bar-room is defined to be "a room containing a bar or counter at which liquors are sold," and also "a room with a bar where liquors and refreshments are served." A bar is defined to be "a barrier or counter from which liquors and food are passed to customers; hence the portion of the room behind the counter where liquors for sale are kept," and also a "room or counter where liquors or refreshments are dispensed, as in a public house." A saloon is defined to be "a public room for specific uses; especially a bar-room or grogshop; as a drinking saloon, et cetera," and also "a place devoted to the retailing and drinking of intoxicating liquors; a grogshop": See Webster's and Standard Dictionaries. It is apparent from ¹¹⁴ these definitions that the terms "bar-room" and "saloon" are inseparably connected with that class of the liquor traffic formerly represented by what was called the tippling-house or grogshop. The use of either term conveys at once the idea of a place where liquors are sold in such quantities as to be drunk upon the premises where sold. It therefore does not follow that where a municipal corporation has the "power to license and regulate the management of bar-rooms, saloons, et cetera," this power includes the right to operate a dispensary. The power to license saloons clearly imports that the business must be in the hands of some person other than the licensing authority. One person cannot be the licensing power and the licensee.

Neither can the power to operate a dispensary be drawn from what is known as the "general welfare clause," because it is not ordinarily within the power of a municipal corporation to engage directly in any commercial enterprise. Such powers only as are usually incident to municipal corporations are those which can be exercised under the authority of the general welfare clause. It is only when the general assembly sees proper to delegate to a municipal corporation the right to engage in that which would ordinarily be the business of an individual and not the business of the public, that the corporation can exercise such power. It is only under the exercise of the police power that this can be done in any case, and the sovereign power of the state must determine in each instance whether it is for the peace, good order and welfare of the state that a particular business shall be operated directly by the state or one of its municipal corporations. The fact that the dispensaries established and in operation within the limits of this state have been established in pursuance of express authority delegated in the charter of the particular town evidences that it is the judgment of the general assembly that

express power is necessary for such purpose. There is nothing in the case of *Chambers v. Barnesville*, 89 Ga. 739, that conflicts with the view we have presented above. The selling of liquor, except for medicinal, mechanical, and sacramental purposes, was prohibited by law in the county in which Barnesville was situated. The general assembly conferred upon the mayor and council ¹¹⁵ of Barnesville the power and authority "to regulate and control the sale in Barnesville of spirituous and malt liquors, wines and ciders, for medicinal, mechanical, and sacramental purposes only." After the passage of this act the city authorities of Barnesville adopted by ordinance a dispensary system, and prohibited, under a penalty, the sale by a person other than the keeper of the dispensary. Chambers was prosecuted in the police court of the city for a violation of this ordinance, in selling spirituous liquor, not being a keeper of a dispensary. The ordinance does not appear in the record, and the court affirmed the judgment of conviction, upon the ground that the mayor and council had the right to pass such an ordinance, and in its absence from the record it will be presumed here that a lawful ordinance did exist. The right of the city authorities to operate a dispensary directly was not involved in that case, and it does not appear from the record that the dispensary was operated directly by the city. The sole question involved was whether, if the city of Barnesville had established a lawful dispensary, they could prohibit by ordinance, under a penalty, the sale of liquors by persons other than those whom they placed in charge of the dispensary.

2. The town of Leesburg having no express authority delegated to it by the general assembly to establish a dispensary, and there being nothing in its charter from which it can be necessarily implied that it was intended to confer such power, there was no error in granting the injunction.

Judgment affirmed.

All the justices concurring.

MUNICIPAL CORPORATIONS HAVE ONLY THOSE POWERS expressly granted, or those essential to the execution of powers so granted: *South Covington etc. Ry. Co. v. Berry*, 93 Ky. 43; 40 Am. St. Rep. 161; note to *Winchester v. Redmond*, 57 Am. St. Rep. 826. A general power granted to a municipal corporation to pass all ordinances necessary for the welfare of the corporation is qualified and restricted by those other clauses and provisions of the charter which specify particular purposes for which ordinances may be passed: Note to *Crawfordsville v. Braden*, 30 Am. St. Rep. 225; and a municipal corporation cannot, by ordinance, enlarge the powers expressly granted by its charter any further than is absolutely neces-

ary to carry such powers into effect: *State v. Robertson*, 45 La. Ann. 964; 40 Am. St. Rep. 272.

INJUNCTION AGAINST MUNICIPAL CORPORATION.—Equity has undoubted jurisdiction to restrain a municipality from acting in excess of its authority and from the commission of acts ultra vires: *Note to Stevens v. St. Mary's Training School*, 36 Am. St. Rep. 451.

SAVANNAH, FLORIDA AND WESTERN RAILWAY COMPANY v. QUO.

[108 GEORGIA, 125.]

IT IS A CARRIER'S DUTY TO PROTECT PASSENGERS from injury, violence, insult, and ill-treatment at the hands of its employes, during the course of transportation.

RAILROADS—FEMALE PASSENGERS—ASSAULT BY EMPLOYE WITH INTENT TO COMMIT RAPE—LIABILITY OF COMPANY.—If a person employed by a railroad company as a baggage-master upon one of its trains assaults a female passenger thereon, with intent to commit a rape upon her, the company is answerable in damages to her for the act.

WITNESSES.—A JUROR IS NOT INCOMPETENT to testify as a witness solely on account of having been impaneled and sworn in the case, if he is otherwise competent.

Erwin, du Bignon, Chisholm & Clay, for the plaintiff in error.

Toomer & Reynolds, for the defendant in error.

125 COBB, J. Lulu Quo sued the Savannah, Florida & Western Railway Company, alleging that on June 13, 1896, while she was a passenger upon the train of the defendant, one Monroe, an employe of the defendant, unlawfully assaulted her and attempted to commit a rape upon her person, and that the defendant was negligent in not protecting her, and in having such employe in its service, it being known to the company that he was notoriously a dissolute and abandoned character. Upon the trial, the evidence was conflicting, but there was evidence in behalf of the plaintiff, which, if credible, established the allegations in her petition. It appeared from this evidence that the person committing the assault was a baggage-master on the train, and that he came into the part of the coach in which plaintiff was sitting alone, and, having fastened both of the doors of the car, committed the assault upon her which is the subject matter of her complaint, and did not desist until some one came to one ¹²⁶ of the doors and witnessed what was transpiring in the car. The jury returned a verdict in favor of the plaintiff for two thousand dollars; and the defendant's motion for a new trial being overruled, it excepted.

1. When a contract of carriage is entered into between a passenger and a carrier, there arises out of the relation thus created, not only a duty to safely transport the passenger to the destination fixed in the contract, but also to protect him from injury, violence, insult, and ill-treatment at the hands of the servants of the carrier, who are in charge of or connected in any way with the carriage in which the passenger is being transported: 5 Am. & Eng. Ency. of Law, 2d ed., 541. This seems to be the settled doctrine of this state: *Western etc. R. R. Co. v. Turner*, 72 Ga. 292; 53 Am. Rep. 842; *Atlanta etc. R. R. Co. v. Condor*, 75 Ga. 51; *East Tennessee etc. Ry. Co. v. Fleetwood*, 90 Ga. 23; *Cole v. Atlanta etc. R. R. Co.*, 102 Ga. 474. While a carrier of passengers owes a duty to all of its passengers to protect them from violence and insult on the part of its servants, it owes an especial duty to female passengers to protect them from insult and abuse. In the case of *Chamberlain v. Chandler*, 3 Mason, 242, Judge Story, in discussing the question now under consideration, uses the following language: "In respect to passengers, the case of the master is one of peculiar responsibility and delicacy. Their contract with him is not for mere ship room, and personal existence on board; but for reasonable food, comforts, necessities, and kindness. It is a stipulation, not for toleration merely, but for respectful treatment, for that decency of demeanor which constitutes the charm of social life, for that attention which mitigates evils without reluctance, and that promptitude which administers aid to distress. In respect to females, it proceeds yet farther; it includes an implied stipulation against obscenity, that immodesty of approach which borders on lasciviousness, and against that wanton disregard of the feelings which aggravates every evil and endeavors by the excitement of terror, and cool malignity of conduct, to inflict torture upon susceptible minds. What can be more disreputable, and at the same time more distressing, than habitual obscenity, harsh threats, and immodest conduct, to delicate and inoffensive females? What can be more oppressive than to confine them to their cabins by threats of personal insult or injury? What more aggravating than a malicious tyranny, which denies them every reasonable request, and seeks revenge by withholding suitable food and the common means of relief in cases of seasickness and ill-health?" In the case of *Nieto v. Clark*, 1 Cliff. 145, this decision of Judge Story was cited with approval by Judge Clifford. While it is true that in the two cases cited the carrier whose liability was under consideration was a carrier by water, still the doctrine laid down in

these cases has been followed in cases where suits were brought for wrongs of a similar nature inflicted upon passengers in a railway carriage: See *Craker v. Chicago etc. Ry. Co.*, 36 Wis. 657; 17 Am. Rep. 504; *Louisville etc. R. R. Co. v. Ballard*, 85 Ky. 307; 7 Am. St. Rep. 600.

2. One of the jurors impaneled to try this case was called from the jury-box and placed upon the stand as a witness. To this proceeding the defendant objected, on the ground that a person who had been selected as a juror in a case was, by reason of such relation to the case, disqualified to testify as a witness. It is too well settled to admit of discussion that a juror is not incompetent to testify as a witness solely on account of having been impaneled and sworn in the case, if he is otherwise competent: Civ. Code, sec. 5337; *Chattanooga etc. R. R. Co. v. Owen*, 90 Ga. 266 (9), and cases cited.

3. There was sufficient evidence to authorize the verdict, and none of the alleged errors were such as to require the granting of a new trial.

Judgment affirmed.

All the justices concurring.

ASSAULT—CARRIER'S DUTY TO PROTECT PASSENGERS.

A carrier must protect its passengers and treat them respectfully. If this duty is intrusted to a servant, the carrier is answerable for the manner in which the servant executes the trust: See monographic note to *Goodloe v. Memphis etc. R. R. Co.*, 54 Am. St. Rep. 89, on the acts of a servant for which a master is not answerable. If, therefore, a person is assaulted while a passenger, by a servant of the carrier and is subjected to violence and insult by him, the carrier is answerable for the injury, although the servant was not acting strictly within the line of his employment, and his act was not expressly or impliedly authorized by the master: See monographic note to *Richmond etc. R. R. Co. v. Jefferson*, 32 Am. St. Rep. 96, on a carrier's duty to protect passengers from assault.

WITNESSES—JURORS—COMPETENCY.—It is well settled that a juror may be a witness on a trial before himself and his fellows: Note to *Roy v. Horsley*, 25 Am. Rep. 540.

FARKAS v. TOWNS.

[103 GEORGIA, 150.]

WATERS, SURFACE—DIVERSION OF—LIABILITY FOR INJURY—CIVIL-LAW RULE.—If a lower and adjacent landowner elevates his land, and thus turns surface water, which naturally flows over it, back upon the upper proprietor, or so obstructs the natural flow of such water as to prevent its escaping from the dominant estate, he is answerable to such neighboring proprietor for any damages resulting to the latter in consequence of his act, including compensation for the diminution, if any, in the market value of the property thus injured.

DAMAGES—DIMINUTION IN VALUE OF PROPERTY.—An owner of property is entitled to use it in its present condition; and, if a defendant has, by his wrongful act, caused a diminution, either in the market value of the plaintiff's property, or in its value for use, the plaintiff is entitled to compensation from him for the loss thus sustained.

SETOFF—INCREASE OF MARKET VALUE—DAMAGES. An increase in the market value of a plaintiff's property cannot be set off against any compensation to which he is entitled for actual physical injuries to it, nor against damages arising from a diminution of its value for use.

EVIDENCE—INCREASE OR DECREASE IN MARKET VALUE.—If a plaintiff claims that the wrongful act of the defendant has caused a diminution in the market value of the former's property, the defendant has a right to show that the market value has, in consequence of the act complained of, been increased, but such proof of increase would simply show that there had been no decrease, and that the plaintiff could not recover on that account. It would not give the defendant any right to recoup against the plaintiff for the amount of such increase.

Action for damages, brought by Lucy A. Towns, W. D. Towns, and others against Farkas. There was a verdict for the plaintiffs, and the defendant's motion for a new trial being overruled, he excepted.

Jesse W. Walters, for the plaintiff in error.

W. T. Jones and E. R. Jones, for the defendant in error.

¹⁵² **FISH, J.** 1. In the case of Goldsmith v. Elsas, 53 Ga. 186, it was decided that, "Where two city lots adjoin, the lower lot owes a servitude to the higher so far as to receive the water which naturally runs from it, provided the owner of the latter has done no act to increase such flow by artificial ¹⁵³ means." This is in accordance with the rule of the civil law. By the civil law, the right of drainage of surface water, as between owners of adjacent lands of different elevations, is governed by the law of nature. The owner of land which, relatively to that of an adjoining proprietor, is the lower estate, is bound to receive the surface waters which naturally flow from the upper estate, pro-

vided the industry of man has not created or increased the servitude. And if, by raising an embankment upon his premises, or by other means, he expels surface water from his own land and causes it to flow back upon that of the upper proprietor, or so obstructs the natural flow of such water as to prevent its escaping from the dominant estate, he is liable to such neighboring proprietor for any damages resulting to the latter in consequence of his act. There are some slight modifications of this rule, in the interest of agriculture, which it is not necessary to consider here. The rule of the common law is different, and is stated by the court in *Hoyt v. Hudson*, 27 Wis. 659, 9 Am. Rep. 473, in the following language: "The doctrine of the common law is, that there exists no such natural easement or servitude in favor of the owner of the superior or higher ground or fields as to mere surface water, or such as falls or accumulates by rain or the melting snow; and that the proprietor of the inferior or lower tenement or estate may, if he choose, lawfully obstruct or hinder the natural flow of such water thereon, and in so doing may turn the same back upon or off on to or over the lands of other proprietors, without liability for injuries ensuing from such obstruction or diversion." The decisions of the courts of this country upon the question are conflicting, owing to the fact that some of them follow the rule of the common law and others accept that of the civil law. In the case of *Mayor etc. v. Sikes*, 24 Ga. 30, 47 Am. St. Rep. 132, this court, after a careful consideration of these two conflicting rules, decided to follow, "as the true law of this state, the rule of the civil law; it being, of the two, the sounder, the more consistent with natural justice and right, and the more in harmony with our system of law and the general conditions of the commonwealth of this state." Such, then, being the law of this state, when Farkas, who, relatively to the plaintiffs, ¹⁵⁴ owned the lower and servient estate, filled up the natural depression or basin which existed upon his premises and raised the level of his land above that of the plaintiffs' lot, and by this reversal of the order of nature caused the surface water to accumulate and stand on the land of the plaintiffs, he became, as to them, a wrongdoer, and rendered himself liable for any damages which they should sustain in consequence of his wrongful act. After he had raised the level of his lot above that of the plaintiffs, and after the water had been ponded for several days upon the premises of the latter, upon which there was a dwelling-house, the ground beneath a double-stack brick chimney, which furnished fireplaces to two adjoining rooms

of the house, and which had rested securely upon its foundation for more than twenty years, suddenly gave way, precipitating the entire chimney several feet below the surface of the ground, and leaving a large and deep cavity immediately under the house. The fall of the chimney injured the plastering and left a hole in the floor where it had stood. There was testimony which showed the formation of another sink near the kitchen. In addition to these physical injuries to the land and the building thereon, the evidence showed that the premises were otherwise rendered less suitable and desirable as a residence lot, to which purpose they had been devoted, by reason of the ponding of the water upon them. The plaintiffs alleged, and the testimony strongly tended to show, that all these damages resulted from the acts of the defendant complained of.

The material question to be considered is, whether the defendant could set off against these actual, physical damages to the plaintiffs' property, or against damages which they sustained by reason of a diminution of the value of their premises for the use to which the same were devoted, an increase in the market value of the property occasioned by the act which caused the damages. If, by his wrongful act, the defendant caused a diminution in the market value of the plaintiffs' lot, they would be entitled to compensation from him for the loss which they thus sustained. In reply to evidence supporting a claim of this character, the defendant would have the right to show that the ¹⁵⁵ market value, in consequence of the act complained of, had in fact been increased. Proof of an increase in market value would give the defendant no right to recoup against the plaintiffs for the amount of such increase, but would simply show that there had been no decrease in market value, and therefore the plaintiffs were not entitled to recover on that account. But an increase in market value could not be set off against any compensation to which the plaintiffs were entitled for actual, physical injuries to their lot and the building thereon, nor could it be set off against damages which they sustained by reason of a diminution of the value of their property for use. A wrongdoer cannot escape liability for the destruction of his neighbor's house by showing that, in consequence of the act which caused its destruction, the lot upon which the house stood is worth more than it was before the house was destroyed. His neighbor was entitled to possess, use, and enjoy both his house and his lot, in their existing conditions, and cannot, after the destruction of the former, be compelled to sell the lot, or to devote it to a different use, in

order to obtain compensation for the loss which he has sustained: *Davis v. East Tennessee etc. Ry. Co.*, 87 Ga. 605, 612; *Gerrish v. New Market etc. Co.*, 30 N. H. 485; *Marcy v. Fries*, 18 Kan. 353; *Francis v. Schoellkopf*, 53 N. Y. 153. Nor could such wrongdoer escape liability for any diminution in the value of the premises for use by showing that the market value of the property had been increased. "The owner of property is entitled to use it in its present condition, and one who unlawfully hinders, obstructs, or interferes with such use cannot appeal to the increased market value which might be realized if the property were devoted to other purposes, and take credit for such increase by way of indirect setoff against the direct loss or injury which he has occasioned": *Davis v. East Tennessee etc. Ry. Co.*, 87 Ga. 605.

There is no conflict between the views here expressed and the decision in the case of *Hurt v. Atlanta*, 100 Ga. 274. It is true that it was decided in that case that as against a demand for compensation for consequential damages arising to the plaintiff's property by reason of the building by the city of a bridge on one of its streets, the city could set off enhancement ¹⁵⁶ in the market value of such property occasioned by the erection of the bridge. But there are wide differences between that case and this. There the city had a perfect right, under its charter, to build the bridge, and in doing so, it was exercising a governmental power in the interest of the public. It was therefore not a wrongdoer; and the law of assessment for property taken or damaged for public purposes was applicable to the case, and not the law of nuisance. Here the defendant was a wrongdoer, and the law of nuisance is applicable between the parties. In that case the city did nothing changing in the slightest degree the physical status or condition of Mrs. Hurt's property as it stood before the bridge was built. Her property was not invaded. Here, as we have seen, the plaintiffs' property was invaded and serious physical injuries inflicted upon it. In the *Davis* case, the railway company was a wrongdoer, and, although it did not touch the property of Mrs. Davis or change its physical status, it was held liable for diminution in the annual value of the same for use.

2. The charge of the court complained of, though in some respects subject to criticism, was substantially in accord with the law as above laid down. The evidence in reference to the damages sustained by the plaintiffs in consequence of the actual

physical injuries to their property, alone, fully authorized the verdict rendered.

Judgment affirmed.

All the justices concurring.

SURFACE WATERS—OBSTRUCTING FLOW OF—LIABILITY FOR INJURY.—If one person owns a tract of land situated above and adjacent to that of another person, the latter tract owes a servitude to the former to receive all waters which naturally flow from it; and the proprietor below is not allowed to erect anything to obstruct the natural flow of the water to the injury of the owner of the dominant tenement: *Martin v. Jett*, 12 La. 501; 32 Am. Dec. 120, and monographic note thereto on servitude to receive flow of water: notes to *Earl v. De Hart*, 72 Am. Dec. 402; *Kansas City etc. R. R. Co. v. Smith*, 48 Am. St. Rep. 588; *Wharton v. Stevens*, 84 Iowa. 107 35 Am. St. Rep. 296. This is the rule of the civil law: Note to *Cairo etc. R. R. Co. v. Stevens*, 38 Am. Rep. 144; and it imposes the same obligation on corporations as on private owners: *Ohio etc. Ry. Co. v. Thillman*, 143 Ill. 127; 36 Am. St. Rep. 359, and note. But at common law any landowner has the right to expel surface water from his own land without regard to the injury thereby occasioned to another proprietor: Note to *Kansas City etc. R. R. Co. v. Smith*, 48 Am. St. Rep. 588; notes to *Gilfillan v. Schmidt*, 58 Am. St. Rep. 521; *Jacobson v. Van Boening*, 58 Am. St. Rep. 691. Some of the states which have accepted the civil law on this subject, and some of those which have accepted the common law, are named in *Mayor v. Sikes*, 94 Ga. 80; 47 Am. St. Rep. 132; note to *Cairo etc. R. R. Co. v. Stevens*, 38 Am. Rep. 144. Under the common-law rule, a landowner may, in the reasonable use of his own land, lawfully prevent the flow of surface water onto his premises from the adjacent higher land of another, although such adjacent land may be injured thereby: Note to *Rowe v. St. Paul etc. Ry. Co.*, 16 Am. St. Rep. 710.

BRUNSWICK v. TUCKER.

[103 GEORGIA, 238.]

MUNICIPAL CORPORATIONS—LIABILITY FOR INJURIES CAUSED BY DEFECTIVE DRAINS.—If municipal authorities allow the drains and sewers of the city to fall out of repair, and become clogged, so as to cause surface water to settle and become ponded on a lot, thereby rendering it less valuable for use and occupation, the city is answerable to the owner of the property affected for any damages growing out of the nuisance thus created.

SET-OFF OF INCREASED VALUE AGAINST CLAIM FOR DAMAGES.—The right to set off increased value against a claim for damages is not conferred by law upon a wrongdoer. Hence, if surface water ponds on a lot, and injures it, which injury is caused by the negligence of municipal authorities to keep the drains and sewers of the city in repair, it is no defense for the city to show, against the plaintiff's claim for damages, that the city, in constructing its streets and drains, made improvements which increased the market value of the property affected.

NEW TRIAL—REDUCING VERDICT.—There is no error in overruling a motion for a new trial where the amount of the verdict, as voluntarily reduced by the plaintiff, is authorized by the evidence.

Action for damages.

W. E. Kay, Owens Johnson, and John M. Graham, for the plaintiff in error.

²³³ COBB, J. Mrs. Tucker brought suit against the mayor and council of the city of Brunswick, to recover damages for the alleged negligence of the municipal authorities in allowing certain street drains to become clogged by wood and sand, thus gradually raising the level of the drains, so that the surface water, which was formerly carried away from a lot owned by her by means of such drains, was caused to settle and become ponded thereon with no means of outlet. It appears that in 1868 the city of Brunswick leased the premises to one Coleman, his heirs and assigns, and that he afterward assigned the lease to the plaintiff, who entered in possession in 1877, and has so remained to the present time. The premises consisted of three city lots, containing about one-half of an acre of ground, bounded on all sides by streets. Upon the premises was a dwelling, which was occupied at least five years before plaintiff's entry. This dwelling was on that portion of the premises which was unaffected by the overflow, while the garden was ²³⁴ below the level of the street. In June, 1889, a heavy rainstorm came, which partly filled up the larger drain and caused the water to back and settle upon the premises of the plaintiff. Upon the question of negligence the evidence was conflicting. The jury returned a verdict for the plaintiff for nineteen hundred and fifty dollars, nine hundred and fifty dollars of which was voluntarily written off. The defendant made a motion for a new trial, in which it was alleged that the verdict was contrary to law and evidence, and, furthermore, that the evidence showed that the plaintiff sustained no loss; and that the defendant acted simply in its governmental capacity, and was not liable for injuries happening to plaintiff by surface water. This motion was overruled, and the defendant excepted.

1. If a municipal corporation adopt a general plan for the improvement of its streets and drains, and in carrying such plan into execution is guilty of negligence, whereby a property owner is damaged, it is liable in damages to the latter: 2 Dillon on Municipal Corporations, 4th ed., sec. 1051. It follows that if a municipal corporation construct its streets and drains in such a negligent manner that surface water from the streets and adjacent property is cast upon the lot of an adjoining owner and caused to pond thereon, or if such result is brought about by a

system of drains originally properly constructed, but negligently allowed to fall out of repair, such corporation will be liable to the owner of the property affected, for any damages growing out of the nuisance thus created: *Reid v. Atlanta*, 73 Ga. 523; *Maguire v. Mayor etc.*, 76 Ga. 84. And if loss be shown directly traceable to the nuisance so created, it will not be sufficient as an answer to the plaintiff's claim for damages for the defendant to show that the improvement made was of a character which increased the market value of the property affected. The right to set off increased value against a claim for damages is not conferred by the law upon a wrongdoer: See *Davis v. East Tennessee etc. Ry. Co.*, 87 Ga. 611, and cases cited. In that case Chief Justice Bleckley says: "The scope of the plaintiff's action embraces two classes of damage—damage to the corpus or freehold, and damage by diminishing the annual value of the premises for use. The evidence shows very conclusively that the market value of the property was increased, ²³⁵ rather than diminished, by the location and use of the railroad in the street. The plaintiff can recover nothing on that score, for the reason, if for no other, that she proved no damage of that class. But the evidence did tend to show that she had sustained damage by the diminished annual value of the premises for use in their present condition. The court in its charge to the jury seems not to have recognized this element as a basis for recovery. We think this was error. A wrongdoer cannot set off increase of market value caused by his unlawful act against loss of rents and profits occasioned thereby. . . . Injury to rental value is, or may be, separate and distinct from injury to market value. The measure of damages in an action for a nuisance affecting real estate is not simply the depreciation of the property. . . . The owner of the property is entitled to use it in its present condition, and one who unlawfully hinders, obstructs, or interferes with such use cannot appeal to the increased market value which might be realized if the property were devoted to other purposes, and take credit for such increase by way of indirect setoff against the direct loss or injury which he has occasioned": See, also, *Farkas v. Towns*, 103 Ga. 150; ante, p. 88.

2. The verdict as originally returned by the jury was for an amount which was unauthorized by the evidence, but as the plaintiff voluntarily reduced the same to an amount which was authorized by the evidence, there was no error in overruling the motion for a new trial: *Augusta Ry. Co. v. Glover*, 92 Ga. 134, 148; *Central R. R. Co. v. Crosby*, 74 Ga. 737; 58 Am. Rep. 463.

Judgment affirmed.

All the justices concurring, except Atkinson, J., who was disqualified.

MUNICIPAL CORPORATIONS—OBSTRUCTION OF SEWERS—LIABILITY.—A city must keep its sewers or drains in good repair, and if it allows them to become clogged up, to the injury of a property owner, it is answerable for its negligence. It is liable if it suffers a sewer, after its construction, to occasion a nuisance: See monographic note to *Chalkley v. Richmond*, 29 Am. St. Rep. 740, 741, on the liability of municipal corporations for defects in and want of repair of sewers. The liability of a city for a nuisance, in such cases, created by its act or negligence, is well established: Note to *Godard v. Harpawell*, 30 Am. St. Rep. 395, 396.

HERRINGTON v. STATE.

[108 GEORGIA, 318.]

OFFICE—CREATION OF—WANT OF AUTHORITY—DE FACTO OFFICER.—An office cannot exist unless it is lawfully created by law. Hence, one who fills an alleged office that has no constitutional or statutory authority for its existence cannot be recognized even as a de facto officer.

EXTORTION—PUBLIC OFFICER—INDICTMENT SHOULD BE QUASHED, WHEN.—An indictment charging one with the offense of extortion, in that he did, by color of his office as policeman of a certain county, wrongfully take money from a person, should be quashed on demurrer, where no such office has ever been created by the laws of the state, and there is no such public officer known.

OFFICE—COUNTY POLICEMAN—WANT OF AUTHORITY TO CREATE.—The commissioners of roads and revenues of a county cannot, without any legislative authority whatever, create the office of county policeman.

Indictment for extortion.

Lewis W. Thomas, for the plaintiff in error.

James F. O'Neill, solicitor, for the defendant in error.

³¹⁸ **LEWIS, J.** The indictment in this case charged the accused with the offense of extortion, alleging that, "in the county aforesaid, on the first day of January, in the year of our Lord eighteen hundred and ninety-seven, with force and arms, being then and there a public officer, to wit, being a county policeman in and for the county of Fulton, did, by color of his office, ³¹⁹ wrongfully take from one Sarah Moore seven dollars and fifty cents which was not due him, the said W. M. Herrington, said money of the value of seven dollars and fifty cents and the property of the said Sarah Moore; the case in which said money

was wrongfully taken from the said Sarah Moore being in the case of *The State v. L. W. Evans and Lucinda Moore*, charged with the offense of adultery; a warrant for said offense of adultery having been sworn out against the said L. W. Evans and Lucinda Moore by one W. A. Bradley before D. A. Cook, a justice of the peace in and for the 469th district G. M., Fulton county, Georgia, on the first day of July, 1895; the said seven dollars and fifty cents taken by the said W. M. Herrington as costs in said case, which the said Herrington represented to the said Sarah Moore was due the justice court of the said D. A. Cook, and which he, the said Herrington, was then and there authorized to collect; contrary to the laws of said state, the good order, peace, and dignity thereof." To this indictment the accused demurred, on the ground, among others, "that the same does not show that the defendant was such a public officer as, under the laws of Georgia, could commit the offense of extortion."

There is an irreconcilable conflict of authority upon the proposition as to whether or not it is possible that the doctrine of an officer *de facto* can be applied to any case without presupposing the existence of an office *de jure*. Much respectable authority can be produced to the effect that where an office is provided for by an unconstitutional act of the legislature, the incumbent of such an office, for the sake of public policy and the protection of private rights, will be recognized as an officer *de facto* until the unconstitutionality of the act has been judicially determined. On the other hand, there is considerable, and perhaps a greater weight of authority, directly the reverse. It is not necessary, in the consideration of this case, to enter upon an examination of the text-writers and the decisions of the courts upon the subject, with a view of determining in which direction the scale of reasoning leans. We will content ourselves with citing the case of *Norton v. Shelby County*, 118 U. S. 425. An exhaustive opinion written by Mr. Justice Field ²³⁰ in that case goes into a review of many of the leading cases on the subject. The final conclusion reached by the court is embodied in the headnotes on page 426, as follows: "While acts of a *de facto* incumbent of an office lawfully created by law and existing are often held to be binding from reasons of public policy, the acts of a person assuming to fill and perform the duties of an office which does not exist *de jure* can have no validity whatever in law." "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal

contemplation, as inoperative as though it had never been passed." In the case of *Collier v. Elliott*, 100 Ga. 363, it appears that this office of county policeman was created by the commissioners of roads and revenues of Fulton county, without any legislative authority whatever. The office itself, therefore, has never been in existence even under color of legislative enactment; and we have been unable to find any authority that one who holds such a position is for any purpose whatever an officer *de facto*. Under the facts alleged in the indictment, the crime committed by the accused was not one of extortion by a public officer. The accused was indicted under the provisions of a statute directed against public officers; and the indictment, showing upon its face that he occupied no such relation, should have been quashed on demurrer.

Judgment reversed.

All the justices concurring.

AN OFFICE must be created by the constitution, statute, or adequate authority: See monographic note to *State v. Hocker*, 63 Am. St. Rep. 184.

EXTORTION.—IT IS ESSENTIAL to the offense of extortion that the offending person be an officer, and that the taking be under color of office; but an offense analogous to extortion may be perpetrated by an unofficial person, who falsely pretends to be an officer: See monographic note to *Commonwealth v. Mitchell*, 96 Am. Dec. 104, on extortion.

BROXTON v. NELSON.

[108 GEORGIA, 327.]

BUILDING CONTRACTS, WHEN ENTIRE AND NOT DIVISIBLE.—If two persons enter into a building contract, and one of them obligates himself to build four houses for the other, and the latter, in turn, obligates himself to pay a gross sum therefor, the agreement is an entire contract, and not divisible, although different amounts are to be paid for each house.

CONTRACTS—WHAT BREACHES MUST BE INCLUDED IN ONE ACTION.—One suit only can be maintained for several precedent breaches of an entire contract.

BUILDING CONTRACTS—ENTIRE CAUSE OF ACTION CANNOT BE DIVIDED SO AS TO MAINTAIN TWO SUITS UPON IT.—If one institutes an action in a justice's court for a specified sum claimed to be due upon a building contract, a copy of which is set forth, and for other demands connected with it, all of the alleged items of indebtedness sued for being stated in one account, the same being credited with various sums as partial payments, and the plaintiff's net demand in the case being for a "balance due on contract," he cannot afterward maintain a suit for alleged breaches of the same contract which occurred before the first suit was instituted.

JUDGMENT—ACTION ON CONTRACT—FORMER RECOVERY—PAROL PROOF TO CONTRADICT RECORD—DAMAGES BEYOND JURISDICTION.—If a plaintiff sues upon an entire contract in a justice's court, and recovers judgment, he cannot afterward sue in a city court for alleged breaches of the same contract, which occurred before the first suit, as against a plea of former recovery, setting out the pleadings in the justice's court, and showing that the two causes of action were identical. This question of identity must be determined by the record, and the plaintiff cannot introduce parol testimony to show that a different subject matter was, in fact, litigated. Neither is the rule requiring all breaches of a contract up to the time of bringing an action thereon to be included in the one action affected by the fact that the damages sought to be recovered in the city court were for an amount beyond the jurisdiction of a justice's court.

Action on contract, brought in a city court of Atlanta by Broxton against Nelson. The building contract was not performed on time, owing to the defendant's failure and refusal to furnish the material as fast as needed. This rendered it necessary for the plaintiff to pay out additional wages to workmen and to incur other extra expenses, thus occasioning him a loss of four hundred and forty-two dollars, the items of which were set out. The defendant pleaded a former recovery in a justice's court, on the same demand. The defendant introduced in evidence a certified copy of the proceedings in the justice's court, showing a judgment for the plaintiff and which had been paid in full. The plaintiff then offered parol testimony to prove what was the contest and issue in the justice's court, but the court rejected it and directed a verdict for the defendant.

Simmons & Corrigan, for the plaintiff in error.

King & Spalding, for the defendant in error.

330 LITTLE, J. The plaintiff entered into a contract with the defendant, whereby the former undertook to construct for the latter "all the work included in the carpenter work labor only on houses No. 1, No. 2, No. 3, and No. 4, on Highland and East avenues and Garfield place, Atlanta, Georgia, according to plans and specifications for said houses," made by a named architect; the defendant to "proceed with said work and every part and detail thereof in a prompt and diligent manner, and shall wholly finish the said work according to the drawings and specifications. . . . The sum to be paid by the owner [defendant] to the contractor [plaintiff] for the said work only shall be three hundred and eighty dollars for No. 1 house, four hundred and seven dollars for No. 2 house, four hundred and seventy-six dollars for No. 3 house, and three hundred and

eighty dollars for No. 4 house; a total of sixteen hundred and forty-three dollars for the four houses. . . . Such sums shall be paid by the owner to the contractor during the progress of the work on estimates made by the architect, which at no time shall exceed seventy-five per cent of amount of work accepted by the architect. . . . Said owner hereby promises and agrees with the said contractor to employ and hereby employs him to provide the labor and do the said work according to the terms and conditions herein contained and referred to, for the price aforesaid," et cetera.

1. This was an entire contract, and not divisible. Under its terms the plaintiff obligated himself to build four houses, and the defendant in turn obligated himself to pay a gross sum therefor. Story in his work on Contracts, fifth edition, volume 1, section 26, says: "An entire contract is a contract the consideration of which is entire on both sides. The entire fulfillment of the promise by either, in the absence of any agreement to the contrary, or waiver, is a condition precedent to the fulfillment of any part of the promise by the other. Whenever, therefore, there is a contract to pay a gross sum for a certain and definite consideration, the contract is entire, and is not apportionable either at law or in equity." In determining whether a contract is entire or severable, the criterion is to be found in the question whether the whole quantity, service or thing—all as ³³¹ a whole—is of the essence of the contract. If it appear that the contract was to take the whole or none, then the contract would be entire: Clark on Contracts, 657. In the present case, the work which the plaintiff undertook to do was definite and fixed—to build four houses; and the defendant undertook to pay a gross sum in consideration of such work. The amounts named for each house were not separate undertakings on the part of the defendant, but were component parts entering into and comprising the gross sum agreed to be paid. The consideration to be paid was single and entire, and therefore the contract must be held to be entire, although the subject of the contract consisted of several distinct and wholly independent items: Branch v. Palmer, 65 Ga. 210; Miner v. Bradley, 22 Pick. 457. This being an entire contract, an action brought thereon by either of the parties, and sued to judgment on the merits, would bar any subsequent suit for any and all breaches which occurred prior to the commencement of the original action. "If a contract be entire, but one suit can be maintained for a breach thereof; but if it be severable, or if the breaches occur at suc-

cessive periods in an entire contract (as where money is to be paid by installments), an action will lie for each breach; but all the breaches occurring up to the commencement of the action must be included therein": Civ. Code, sec. 3793. Accordingly, in the case of *Evans v. Collier*, 79 Ga. 319, which was a suit upon an entire contract, the court ruled that all breaches of the contract up to the commencement of the former action, and the amount due to the plaintiff therefor, are conclusively presumed to have been included in such suit: See, also, *Deavergers v. Willis*, 58 Ga. 388.

2. Wherefore, it follows that the plaintiff having instituted in a justice's court an action for a specified sum claimed to be due upon the contract sued upon in the present case (a copy of such contract being set forth), and for other demands connected with said contract, all the alleged items of indebtedness sued for being stated and summed up in an account, the same being credited with various sums as partial payments thereof, and the plaintiff's net demand in the case being for a "balance due on contract," he could not thereafter maintain the present suit ~~and~~ in the city court for alleged breaches of the same contract which occurred before the first suit was instituted, as against a plea of former recovery, setting out the pleadings in the justice's court, from which it was apparent that the two causes of action were identical, or rather founded upon the same contract. Nor in the trial of the subsequent action in the city court, in which by plea the defendant set out the pleadings in the former action, was it competent for the plaintiff to introduce parol testimony the effect of which would be to contradict the allegations unequivocally appearing on the face of the pleadings in the former action. The rule is well established, if not elementary, that a party insisting upon a former recovery must show that the record of the former suit includes the matters alleged to have been determined: *Campbell v. Butte*, 3 N. Y. 174. And the question of the identity of the two causes of action must be determined by the record; and if that state a particular cause of action as the foundation of the first suit, parol proof is not admissible to show that a different subject matter was in fact litigated; for this would be to contradict the record, which shows the issue and the verdict and judgment upon that issue, to the exclusion of all other matters whatsoever: 2 Story on Contracts, 5th ed., sec. 1683; *Campbell v. Butte*, 3 N. Y. 174.

3. The fact that the damages sought to be recovered in the present action were for an amount beyond the jurisdiction of a

justice's court, does not affect the principle above laid down, the rule being that all breaches of the contract up to the time of bringing the action on the same must be included in the one action: Civ. Code, sec. 3793; *Thompson v. McDonald*, 84 Ga. 6, and authorities there cited. If the plaintiff, in order to bring the case within the jurisdiction of the justice's court, abandoned part of his claim, the judgment recovered in that suit will be a bar to any action which he may bring to recover the part so abandoned. The same rule applies to other cases where the creditor has chosen to compel payment of a part of his claim by process of law. This will, in general, where the claim consists of an entire demand, operate as an extinguishment of the whole, upon the principle that a creditor shall not split up and divide an entire cause of action so as to maintain two suits upon it: 2 Chitty on Contracts, 11th ed., 1172.

³³³ Hence we conclude that the court committed no error in directing a verdict for the defendant on the plea of former recovery; and accordingly the judgment is affirmed.

All the justices concurring.

ACTIONS—RIGHT TO SPLIT.—A single cause of action cannot be split in order that separate suits may be brought for the various parts of what constitutes but one demand: *Wheeler Sav. Bank v. Tracey*, 141 Mo. 252; 64 Am. St. Rep. 505.

CONTRACTS—ENTIRETY OF.—If the consideration of a contract is single and entire, the contract must be held to be entire, although the subject thereof may consist of several distinct and wholly independent items: *Fullmer v. Poust*, 155 Pa. St. 275; 35 Am. St. Rep. 881. The entirety of a contract depends somewhat upon the intention of the parties: *Note to Stewart v. Thayer*, 60 Am. St. Rep. 411. Compare monographic note to *Huyett etc. Co. v. Chicago Edison Co.*, 59 Am. St. Rep. 277, showing that an entire contract is indivisible; and that if the consideration of a contract is single, the contract is entire, whatever may be the number or variety of the items embraced in its subject. The entirety of building contracts is also discussed in the same note at 285-289.

ACTION FOR DEMANDS ALREADY DUE—PLEA OF FORMER RECOVERY.—One action only may be maintained for demands already due on the same contract, as for damages arising from a single wrong, although such demands may have fallen due or such damages have developed at different times; and recovery for part of an entire demand merges the whole and bars any further recovery thereof: *Bendernagle v. Cocks*, 19 Wend. 207; 32 Am. Dec. 448. A plea of former recovery is good in bar, if it contains sufficient matter to show that the causes of action in the two suits were the same, and that the merits were determined in the first case: *Outler v. Cox*, 2 Blackf. 178; 18 Am. Dec. 152. An answer setting up a former adjudication must be accompanied by a complete record of all the pleadings and proceedings in the case upon which it is founded: *Williamson v. Foreman*, 23 Ind. 540; 85 Am. Dec. 475. If such a plea avers the causes of action to be the same, and the record does not show them to be different, the averment, on demurrer to the plea, must be taken as true: *Outler v. Cox*, 2 Blackf. 178; 18 Am. Dec. 152.

BELL v. STATE.

[103 GEORGIA, 397.]

COURTS—POWER TO COMMIT—WAIVER.—There is nothing in the law establishing the criminal court of Atlanta, and regulating trials therein, which authorizes the judge of that court to discontinue a trial and bind over the accused to the next superior court, if, after hearing the evidence, he should be of opinion that the defendant is guilty of an offense which is beyond the jurisdiction of such court. Hence, a defendant, by waiving indictment and demanding a jury trial in such court, does not consent for the judge of that court to exercise such power, a power not conferred upon it by law.

FORMER JEOPARDY—ATTACHES WHEN, AND WHEN A BAR—ASSAULT—INTENT TO RAPE.—When a person is put upon trial, for an assault and battery, in a court which has no power to stop the trial and bind him over for a greater offense, if the evidence justifies it, and a jury is impaneled and sworn to try the case, he is in legal jeopardy and may avail himself of this defense in a subsequent trial for assault with intent to commit a rape founded upon the same act.

FORMER JEOPARDY AS A BAR TO A SUBSEQUENT PROSECUTION.—When a person has been put in legal jeopardy of a conviction of an offense which is a necessary element in, and constitutes an essential part of, another offense, such jeopardy is a bar to a subsequent prosecution for the latter offense, if founded upon the same act.

FORMER JEOPARDY—WHEN A BAR—ASSAULT—INTENT TO RAPE.—Assault is an absolutely necessary element in, and essential to, the crime of assault with intent to commit a rape, and, if one is tried for an assault and battery, he is in jeopardy of a conviction of assault. Hence, when a man has been tried for the offense of assault, he may interpose the plea of former jeopardy as a complete defense to a subsequent indictment for the crime of assault with intent to commit a rape, where such indictment is founded on the same act.

Indictment for assault with intent to commit a rape.

James K. Hines and S. C. Crane, for the plaintiff in error.

C. D. Hill, solicitor general, for the defendant in error.

³⁹⁷ **FISH, J.** 1. Was the plea of former jeopardy, under the facts alleged therein and admitted by the state, good in bar of the prosecution under the indictment for assault with intent to ³⁹⁸ commit a rape? The facts set forth in the plea show that the prosecution in the criminal court of Atlanta put the accused in jeopardy of a conviction of assault and battery and in jeopardy of a conviction of assault. This is not disputed by the state. The state contends that, while this is true, the accused was not in jeopardy so far as the crime of assault with intent to commit a rape is concerned, and that the jeopardy in which he was placed by the proceedings had in the city criminal court

was no bar to his subsequent prosecution for the greater offense for which he was tried in the superior court. In support of this contention, the state cites the decision in *Cunningham v. State*, 80 Ga. 4. That decision is not applicable in this case. An accusation was preferred against Cunningham, in the county court of Decatur, for the offense of assault. He waived indictment by the grand jury, and demanded a trial by a jury in the county court. During the progress of the trial, the judge of that court, after hearing the evidence, concluded that the evidence made a case of assault with intent to murder, or of shooting at another, and stopped the trial, over the protest of counsel for the defendant, and bound the defendant over to the next term of the superior court. Cunningham was subsequently indicted and tried in the superior court for assault with intent to murder. When arraigned in the superior court, he pleaded former jeopardy, arising out of the trial in the county court. The judge presiding at the trial in the superior court held this plea to be invalid, and this court sustained his ruling, holding that when Cunningham waived indictment and demanded a jury trial in the county court, it amounted to an agreement on his part to be tried under the provisions of the act regulating trials in that court, "including the right of the judge of that court, if at any time during the progress of the trial he should be of opinion that the evidence produced before him made the offense of a felony instead of a misdemeanor, to stop the trial at once and commit the defendant to jail, or require him to give bond for his appearance at the next term of the superior court."

This right of the judge of the county court to discontinue the trial and exercise the powers of a committing court is ~~300~~ found in the provisions of the statute embraced in section 761 of the Penal Code. The provisions of this section are not applicable to the criminal court of Atlanta. When an accusation is preferred against a party in the criminal court of Atlanta, and he waives indictment by the grand jury and demands a trial by a jury in that court, he impliedly agrees to be tried, for the offense named in the accusation, under the provisions of the law regulating trials in that court. He does not agree to be tried under the provisions of the law regulating trials in the county courts. The law regulating trials in that court is found in the act establishing the criminal court of Atlanta: Acts 1890-1891, p. 935. There is nothing in that act which authorizes the judge of that court to discontinue a trial and bind over the ac-

cused to the next superior court, if, after hearing the evidence, he should be of opinion that the defendant is guilty of an offense which is beyond the jurisdiction of such criminal court. Therefore, when a person against whom an accusation is preferred in that court waives indictment and demands a jury trial therein, he does not consent for the judge to stop the trial, dismiss the jury, and bind him over to the superior court, if, in the opinion of the judge, the evidence makes out a case of felony. By his waiver and demand, he does not consent for the judge of that court to exercise, in his case, a power which the law has not conferred upon him.

It was said by the court, in *Cunningham v. State*, 80 Ga. 4, that the "defendant made the waiver above alluded to with the knowledge and understanding that the law was, that if the county judge should determine from the evidence that it was a felony and not a misdemeanor, he would have the right to stop the trial and bind the defendant over for a felony." In this case, it may be said that the defendant made the waiver with the knowledge and understanding that if the judge of the criminal court of Atlanta should determine that the offense was a felony and not a misdemeanor, he would have no right to stop the trial and bind him over for the greater offense. Without this knowledge and understanding, he might not have made the waiver. When, therefore, the accused was put upon trial in the criminal court of Atlanta, upon an accusation ⁴⁰⁰ charging him with assault and battery, and a jury was impaneled and sworn to try the case, he was in legal jeopardy and could avail himself of this defense in a subsequent trial for assault with intent to commit a rape founded upon the same act.

2, 3. In the case of *Roberts v. State*, 14 Ga. 8, 58 Am. Dec. 528, this court laid down the broad rule that "the plea of autrefois acquit or convict is sufficient whenever the proof shows the second case to be the same transaction with the first." Again, in *Holt v. State*, 38 Ga. 187, it was held that where a party has been acquitted of an offense for which he was indicted and "is afterward indicted a second time for the same criminal acts as alleged in the first indictment, though under a differently named offense, he may plead his discharge and acquittal under the first indictment in bar to the second." And in *Jones v. State*, 55 Ga. 625, it was held that "a plea that the defendant was put on trial for the same transaction under a valid indictment for simple larceny and the case nolle prossed, and withdrawn from the jury without his consent, is good in bar of a subse-

quent indictment for burglary. Having been in jeopardy of liberty once, he cannot be put in jeopardy again for the same transaction, save on his own motion for a new trial, or in case of mistrial." The rule laid down in these decisions, if followed, would be decisive of this case, for it is admitted that the prosecution in the city criminal court and the one in the superior court were founded upon the same transaction—that they were for the same act. The principle ruled in these cases was followed in *Buhler v. State*, 64 Ga. 504; *Goode v. State*, 76 Ga. 752; and *Knight v. State*, 73 Ga. 804. It was not followed in *Blair v. State*, 81 Ga. 629, for there the court, without alluding to any of the first three cases which we have mentioned, held that "a former conviction of selling liquor to a minor without the written consent of his parent or guardian, even if properly pleaded, would not be good in bar of a prosecution for selling liquor without license, though the act of selling were the same in both cases." The court said: "The offenses are separate and distinct." Chief Justice Bleckley reluctantly concurred in this decision, yielding to what he believed to be the weight of authority, but gravely doubting the principle upon which it was based. 401 While it might be sufficient to rest the decision in the present case upon the broad principle announced in the first three cases which we have cited, which have not been overruled, we shall put it upon the principle which underlies the decision in a case more recent than any of those above mentioned (*Franklin v. State*, 85 Ga. 570), a principle the soundness of which we do not think can be successfully assailed, although there are some courts which do not recognize it. That principle, which we shall presently discuss, stated in general terms, is: Where a person has been put in legal jeopardy of a conviction of an offense which is a necessary element in and constitutes an essential part of another offense, such jeopardy is a bar to a subsequent prosecution for the latter offense, if founded upon the same act.

If a man perpetrates the offense of assault and battery, and by the same act commits the offense of assault with intent to commit a rape, the less offense is a part of the greater. The act involved in each case being the same, what would otherwise be but assault and battery, by reason of the felonious intent, becomes also assault with intent to commit a rape. The technical rule of the old common-law pleaders, that a misdemeanor is always merged into a felony when the two meet, and that therefore, upon an indictment for a misdemeanor, the accused should be acquitted if the evidence shows the offense was

a felony, and upon an indictment for a felony there should be an acquittal if the evidence shows the offense to have been only a misdemeanor, has long since been abolished in this state. Upon an indictment for assault with intent to commit a rape, the accused can be convicted of assault and battery, or assault; and upon an indictment for assault and battery he may be convicted of a bare assault. Assault is an absolutely necessary element in and an essential part of each of the greater offenses. Without the commission of an assault, neither of the other offenses can be perpetrated. While the offense of assault and battery is not an absolutely essential part of the crime of assault with intent to commit a rape, yet it becomes a part of such greater offense if by the same act both offenses are committed. As a matter of fact, it is probably true that in a ⁴⁰² great majority of the cases of assault with intent to commit a rape the offense of assault and battery is a part of the greater crime. So that both as a matter of fact and of law assault and battery may be a part of the crime of assault with intent to commit a rape. As a matter of law and of fact assault is always a part of such crime. Viewing the case in this light, the question presented for our consideration is, Can the state divide one crime into its constituent parts, or several grades, and prosecute the perpetrator, separately, for each part, as a distinct and substantive offense? Can it, for the same act, first prosecute, convict, and punish a man for assault, then prosecute, convict, and punish him for assault and battery, and then again prosecute, convict, and punish him for assault with intent to murder? Would not this be trying, convicting, and punishing him three times for the same offense of assault and twice for the same offense of assault and battery? In the present case, suppose that the trial of the accused, in the criminal court of Atlanta, for the offense of assault and battery, had resulted in a verdict of not guilty, could he afterward be held to be guilty of assault with intent to commit rape? If he could, the proposition necessary to be maintained might be stated this way: whatever his intention was in committing the act, he did not commit an assault, but he did commit an assault with intent to commit rape. Clearly one branch of this proposition contradicts the other.

The question now under consideration was not involved in the case of *Blair v. State*, 81 Ga. 629. For while the offense of selling liquor without a license and the offense of selling liquor to a minor without the written consent of his parent or guardian may be committed by the same act, neither of them is a neces-

nary element in and an essential part of the other. A person can commit either without perpetrating the other. When he is prosecuted for either, he is in no jeopardy of being convicted of the other, or of being convicted of an offense which is an essential part of the other. But it is legally impossible to commit the offense of assault with intent to commit a rape without committing the offense of assault. The greater offense always includes the less. And, as we have seen, where in the ⁴⁰³ prosecution of an intent to rape, battery is perpetrated as a part of the same act, both assault and battery and assault become component parts of the felony, and, under an indictment for the highest offense, there may be a conviction of either of the lower ones. We think that when a man has been tried for the offense of assault, and subsequently, for the same act, tried for the crime of assault with intent to commit a rape, he has been twice put in jeopardy of a conviction for the same offense of assault, and the constitutional provision that "no person shall be put in jeopardy of life or liberty more than once for the same offense, save on his or her own motion for a new trial, after conviction, or in case of mistrial," has been violated: *Franklin v. State*, 85 Ga. 570, and authorities there cited; *Moore v. State*, 71 Ala. 307; *Commonwealth v. Arner*, 149 Pa. St. 35; *State v. Hatcher*, 146 Mo. 641. Of course, the principle upon which we base this decision does not hold good in a case where the state shows that the first prosecution was procured by the fraud, connivance, or collusion of the defendant: 1 Bishop's New Criminal Law, sec. 1009; 2 Bishop's New Criminal Law, sec. 1010, and cases cited.

4. The court erred in holding that the plea of former jeopardy did not allege a complete defense against the indictment.

Judgment reversed.

All the justices concurring.

FORMER JEOPARDY—WHEN A BAR.—If the offense on trial is a necessary element in, and constitutes an essential part of, another offense, and both are in fact but one transaction, a conviction or acquittal of one is a bar to a prosecution for the other: Note to *People v. Ny Sam Chung*, 28 Am. St. Rep. 132. An acquittal or conviction of a less offense, of the same nature as a greater, subsequently charged, is a bar to the prosecution on the second indictment. Hence, a conviction or acquittal upon an indictment for an attempt to commit rape is a bar to an indictment for rape: and a conviction of assault and battery is a bar to a subsequent indictment for assault and battery with intent to commit murder: See monographic note to *Roberts v. State*, 58 Am. Dec. 544, 545, on what facts sustain a plea of former acquittal or conviction. Compare the instructive discussion embodied in the note to *State v. Littlefield*, 35 Am. Rep. 339.

COLEMAN v. GLENN.

[103 GEORGIA, 458.]

OFFICERS—REMOVAL OF—NOTICE—HEARING.—A public officer who has, under the law, a fixed term of office, and is removable only for definite and specified causes, can not be removed without notice and a hearing on the charge or charges preferred against him.

OFFICERS—BOARD OF EDUCATION—REMOVAL OF, WHEN A NULLITY.—Members of a county board of education are public officers, having fixed terms. Hence a statute providing for the removal from office of such an officer for inefficiency, incapacity, neglect of duty, or other cause, and which makes no provision for giving him notice, or for allowing him to be heard in his defense, is contrary to the constitutional provision that no person shall be deprived of life, liberty, or property without due process of law, and an order of removal, based upon such a statute, is a mere nullity, especially where no notice was in fact given.

INJUNCTION—QUESTIONS AS TO OFFICERS.—Courts of equity will not interfere, by injunction, to determine questions concerning the appointment or election of public officers, or their title to office, such questions being of a purely legal nature, and cognizable only by courts of law.

INJUNCTION—REMOVAL OF OFFICERS—BOARD OF EDUCATION.—An injunction will not lie, either against a removing officer or body to prevent the removal of a public officer, or against the person appointed in the place of an officer removed, to prevent him from exercising the duties of the office. Therefore, if a court, under an unconstitutional statute, orders the removal of members of a county board of education from office, the state school commissioner will not be enjoined from issuing commissions to the persons named as their successors in office, for there is a legal remedy.

INJUNCTION—EXECUTIVE OFFICER OF STATE.—As to questions concerning offices and officers, an injunction does not lie against an executive officer of the state.

Petition for an injunction, presented by Coleman and others against Glenn, a state school commissioner. The petitioners claimed to be the legal board of education of Tattnall county. The grand jury had recommended their removal from office for general neglect of duty in not looking after the school interests of the county as closely and attentively as they should have done, and had further recommended that the judge of the superior court should appoint certain persons as their successors. The judge did so, without notice, or giving them an opportunity to be heard, and a certified copy of the order of removal and appointment was forwarded to the state school commissioner by the clerk of the superior court. The petitioners, at the time, had no intimation of these proceedings. The state school commissioner agreed to withhold the issuing of the commission for the newly appointed board of education for a short time, until the petitioners could take proper legal steps to vindicate their

official acts as members of the board of education. The petitioners prayed that the state school commissioner be enjoined, until further order, from issuing a commission to the persons appointed as their successors; that the latter be made parties defendant, and show cause why the recommendation of the grand jury should not be declared inoperative and ineffective, and the order of the judge vacated; that petitioners be allowed to show cause why they should not be deprived of their office; that the recommendation of the grand jury be annulled and said order abrogated; and for general relief. The court refused the prayer, and the petitioners excepted.

W. T. Burkhalter and James K. Hines, for the appellant in error.

458 LUMPKIN, P. J. 1. Members of a county board of education are public officers: *Smith v. Bohler*, 72 Ga. 546. They are elected for fixed terms (Pol. Code, sec. 1354), and are paid for their services out of the school fund: Pol. Code, sec. 1355. In 1887 the general assembly passed an act which, among other things, provided that: "Any member or members of a county board of education shall be removable by the judge of the superior court of the county, on the address of two-thirds of 460 the grand jury, for inefficiency, incapacity, general neglect of duty, or malfeasance or corruption in office": Acts 1887, p. 72; Pol. Code, sec. 1356. Neither the act referred to nor the code makes any provision whatever for any notice to these officers, or for any hearing of charges against them as a condition precedent to their removal from office. We are therefore of the opinion that so much of the act of 1887, now embraced in section 1356 of the Political Code, as provides for the removal from office of members of a county board of education, is unconstitutional and void. While it is true that one who holds an office during the pleasure of the appointing power is removable without notice and without a hearing, this rule is not applicable when the office is held during good behavior or for a fixed term. "Where an officer holds his office for a certain number of years, 'if he shall so long behave himself well,' he cannot be removed, even for a misbehavior, without notice and a hearing. So where he is appointed for a fixed term, and removable only for cause, he can be removed only upon charges, notice, and an opportunity to be heard": Throop on Public Officers, sec. 364. "Where an officer is appointed during pleasure, or where the power of removal is discretionary, the power to re-

move may be exercised without notice or hearing. But where the appointment is during good behavior, or where the removal can only be for certain specified causes, the power of removal cannot . . . be exercised unless there be a formulated charge against the officer, notice to him of the accusation, and a hearing of the evidence in support of the charge, and an opportunity given to the party of making defense": 1 Dillon on Municipal Corporations, sec. 250. "Where the appointment or election is made for a definite term or during good behavior, and the removal is to be for cause, it is now clearly established by the great weight of authority that the power of removal cannot, except by clear statutory authority, be exercised without notice and hearing, but that the existence of the cause for which the power is to be exercised must first be determined, after notice has been given to the officer of the charges made against him, and he has been given an opportunity to be heard in his defense": Mechem on Public Officers, sec. 454. And, in this connection, see, also, 19 American and ⁴⁶¹ English Encyclopedia of Law, 562r*. Among the cases almost without number which support the doctrine laid down as above by the textwriters, may be mentioned: Board of Alderman v. Darrow, 13 Colo. 460; 16 Am. St. Rep. 215; State v. St. Louis, 90 Mo. 19; Field v. Commonwealth, 32 Pa. St. 478.

It may, therefore, be considered as settled beyond all doubt or peradventure that a public officer who has under the law a fixed term of office, and who is removable only for definite and specified causes, cannot be removed without notice and a hearing on the charge or charges preferred against him, with an opportunity to make defense. It follows necessarily that a statute providing for the removal from office of such an officer for inefficiency, incapacity, neglect of duty, or other cause, and which makes no provision for giving him notice, or for allowing him to be heard in his defense, is contrary to the constitutional guaranty which declares that no person shall be deprived of life, liberty, or property without due process of law: See Kennard v. Louisiana, 92 U. S. 480; Foster v. Kansas, 112 U. S. 201. The doctrine just announced was distinctly recognized and applied by this court in Savannah etc. Ry. Co. v. Mayor etc., 96 Ga. 680, in which it was held that a section of the city charter of Savannah providing for condemning land for street purposes was unconstitutional because it made no provision for any notice to landowners whose property was to be taken. The principle of that case is directly applicable to the case in hand, and in ac-

cord with the rule which, so far as we are informed, prevails everywhere in this country. The order entered by the judge of the superior court of Tattnall county, upon the recommendation of the grand jury, undertaking to remove from office the members of the county board of education of that county, was a mere nullity. It was based upon an unconstitutional statute which made no provision for notice to these officers, and none was in fact given.

2. We are quite confident, however, that the officers thus sought to be removed could not enjoin the state school commissioner from issuing commissions to the persons named as their successors in the judge's order, nor enjoin such persons from assuming to exercise the duties of the office to which they ⁴⁰² were appointed. In the first place it is not to be presumed that the state school commissioner would undertake to issue commissions to persons not entitled to receive the same; and even if he did, such commissions would not be conclusive, but only prima facie evidence of their right to hold the office. The officers sought to be removed, but who were really rightly in office, would be under no obligation of surrendering to those presenting the new commissions; and, by simply declining to do so, could compel the latter to institute proper proceedings to test their legal right to the office. Moreover, the writ of injunction does not, in such cases, lie against an executive officer of the state. "It is not the province of a court of equity to interfere in cases involving merely the question of title to an office; and accordingly an injunction will not lie, either against the removing officer or body, to prevent the removal, or against the person appointed in place of the officer removed, to prevent him from exercising the duties of the office": Throop on Public Officers, sec. 392. "No principle of the law of injunctions, and perhaps no doctrine of equity jurisprudence, is more definitely fixed or more clearly established than that courts of equity will not interfere by injunction to determine questions concerning the appointment or election of public officers or their title to office, such questions being of a purely legal nature, and cognizable only by courts of law. A court of equity will not permit itself to be made the forum for determining disputed questions of title to public offices, or for the trial of contested elections, but will in all cases leave the claimant of the office to pursue the statutory remedy, if there be such, or the common law remedy by proceeding in the nature of a quo warranto. Thus, equity will not interfere by injunction to restrain persons from exercising the

functions of public offices, on the ground of the illegality of the law under which their appointments were made, but will leave that question to be determined by a legal forum": 2 High on Injunctions, 3d ed., sec. 1312.

3. Our conclusion therefore is, that the trial judge rightly held that the equitable petition filed by the plaintiffs in error, by which they sought to enjoin the state school commissioner from issuing commissions to the persons named as their successors in ⁴⁰³ office, and to require the latter to show cause why the order of the judge based upon the recommendation of the grand jury should not be declared void, was without merit. This is so for the obvious reason that the superior court of Tattnall county had no authority to grant the relief thus prayed for. We have already intimated the course which, in our judgment, the plaintiffs in error may properly pursue in this matter.

Judgment affirmed.

All concurring, Little, J., specially.

OFFICERS—REMOVAL OF.—A constitution or statute authorizing the removal of a public officer for cause entitles him to notice of his contemplated removal, and a right to be heard in opposition thereto. A sentence and order of removal without such notice and opportunity to be heard with respect thereto is void: *State v. Hewitt*, 3 S. Dak. 187; 44 Am. St. Rep. 788. Removal from office for cause cannot take place without notice to the accused officer: *State v. Walbridge*, 119 Mo. 383; 41 Am. St. Rep. 663; *State v. Sullivan*, 58 Ohio St. 505; 65 Am. St. Rep. 781. Though the law conferring authority to make such removal does not expressly provide for such notice, still it must be presumed to have been intended as a prerequisite to the exercise of the power: *State v. Walbridge*, 119 Mo. 383; 41 Am. St. Rep. 663. If an officer is appointed for a fixed term, and the power of removal is not expressly declared by law to be discretionary, he cannot be removed except for cause; and when cause must be assigned for his removal, he is entitled to notice and a chance to defend: *Hallgren v. Campbell*, 82 Mich. 255; 21 Am. St. Rep. 557. What is a sufficient cause for the removal of an officer is a question for the courts: *State v. Duluth*, 53 Minn. 238; 39 Am. St. Rep. 595; *State v. Walbridge*, 119 Mo. 383; 41 Am. St. Rep. 663. An officer is entitled to a hearing before he can be ousted by authority, other than that of the appointing power, because the question whether he shall be ousted is a judicial one, and a decision given without affording him an opportunity to be heard is ineffectual: *Board of Commrs. v. Johnson*, 124 Ind. 145; 19 Am. St. Rep. 88.

UNLAWFUL REMOVAL OF OFFICERS—REMEDY.—If an officer is not properly removed, a successor cannot, therefore, be legally appointed; and the remedy to settle the question is not an injunction, but a quo warranto against the person claiming to be his successor; and where the title to the office is not in dispute, mandamus will lie to restore the person entitled to it: *Delahanty v. Warner*, 75 Ill. 185; 20 Am. Rep. 237. See, also, *Hagner v. Heyberger*, 7 Watts & S. 104; 42 Am. Dec. 220; *Hamlin v. Kassafer*, 15 Or. 456; 3 Am. St. Rep. 176; *Sherman v. Clark*, 4 Nev. 138; 97 Am. Dec. 516.

BARRANGER v. BAUM.

[108 GEORGIA, 455.]

HABEAS CORPUS—RIGHT OF APPEAL.—A WRIT OF ERROR lies directly to the supreme court of Georgia from a decision of the judge of the city court of Richmond county, of that state, in a habeas corpus case.

HABEAS CORPUS—EXTRAORDINARY REMEDY—APPEAL—BILL OF EXCEPTIONS.—A proceeding by habeas corpus is not an extraordinary remedy. Hence, a statute prescribing a time in which a bill of exceptions shall be presented in cases involving such a remedy does not apply.

HABEAS CORPUS—RENDITION WARRANT—WHAT EVIDENCE IS INADMISSIBLE.—After a governor has issued a warrant for the rendition of a fugitive from justice, a court will not, on habeas corpus, inquire into the motive and purpose of the extradition proceedings, to ascertain whether the object thereof is to punish a crime or to collect a debt. Such evidence simply throws light upon the guilt or innocence of the prisoner, and is inadmissible, because the court has no jurisdiction, in such a case, to inquire into the guilt or innocence of the accused.

HABEAS CORPUS—EXECUTIVE POWER AND DISCRETION AS TO RENDITION WARRANT.—The executive of the asylum state can, with impunity, refuse to issue a warrant for the rendition of a fugitive from justice who is under arrest, and, after issuing the same, he can revoke it and order the release of the prisoner; but when it has been issued and executed, and release is sought on habeas corpus, the only question of which the judiciary has jurisdiction is whether or not the executive has acted contrary to law.

HABEAS CORPUS—FUGITIVE FROM JUSTICE—BOND IN BAIL TROVER—EVIDENCE.—The fact that an alleged fugitive from justice, under arrest, has given a bond in bail trover, in a suit against him for the recovery of goods involved in the crime charged, is no reason for his discharge on habeas corpus, and is not admissible in evidence on a hearing of the writ.

HABEAS CORPUS—INTERSTATE EXTRADITION—CHARGE OF CRIME—SUFFICIENCY OF.—Whenever one state has made a demand upon another for the return of a fugitive from its justice, the question whether or not such offender is charged with the commission of a crime against the laws of the demanding state, is one of law, and is always open, on the face of the papers, in a habeas corpus proceeding, to judicial inquiry; but it is no cause for his discharge that an indictment which forms the basis of the extradition proceeding is defective either at common law or under the laws of the state in which the person is apprehended, so long as it substantially charges a crime in conformity with the laws of the demanding state.

HABEAS CORPUS—INTERSTATE EXTRADITION—SUFFICIENCY OF INDICTMENT—HOW DETERMINED.—Upon habeas corpus proceedings for the release of an alleged fugitive from the justice of another state, the sufficiency of an indictment, which is the foundation of the extradition proceeding, must be tested by the laws of the demanding state, for every state has a right to determine what shall be deemed a sufficient indictment in its own courts; and its sufficiency, as a matter of technical pleading, will not be inquired into, on habeas corpus, for, if the indictment sufficiently charges a crime under the laws of the demanding state, it

will sustain a requisition, even though insufficient under the laws of the asylum state.

HABEAS CORPUS—INTERSTATE EXTRADITION—INDICTMENT IS EVIDENCE THAT ACT CHARGED IS A CRIME. A properly authenticated indictment, accompanied by requisition papers, in due and legal form, is sufficient, on habeas corpus proceedings for the release of an alleged fugitive from justice, to raise a presumption that the act charged is a crime against the laws of the demanding state, and that the indictment conforms to the laws of that state in charging the crime. The burden is, therefore, upon the petitioner to show the contrary.

HABEAS CORPUS—INTERSTATE EXTRADITION—LAWS OF DEMANDING STATE—CONSIDERATION OF.—A court, on habeas corpus proceedings for the release of an alleged fugitive from the justice of another state, is necessarily called upon to decide whether a crime has been charged against the laws of the demanding state, and its laws alone are, therefore, in issue. Hence, in such a case, involving, as it does, not only the liberty of a citizen, but the rights of another state, it is not only the right, but the duty of the court to seek the highest sources of information at its command, such as the statutes and published decisions of the highest judicial tribunals of the demanding state, to ascertain its laws on the subject.

HABEAS CORPUS—INTERSTATE EXTRADITION—ILLEGAL DISCHARGE.—If the chief executive of a state honors a requisition for the surrender, to another state, of an alleged fugitive from the justice of that state, it is reversible error for a court, on habeas corpus, to discharge the offender from the custody of the agent of the demanding state, where the surrendering governor acted on an indictment which sufficiently charged such fugitive with obtaining property by false pretenses in the demanding state.

Habeas corpus.

J. S. & W. T. Davidson, for the plaintiff in error.

J. R. Lamar and C. H. Cohen, for the defendant in error.

406 LEWIS, J. Under an extradition warrant issued by the governor of this state upon a requisition of the governor of Maryland, Marcus Baum was arrested and turned over to Barranger as agent for the state of Maryland. This requisition was based on an indictment, a copy of which is as follows:

"State of Maryland, City of Baltimore, to wit:

"The jurors of the state of Maryland, for the body of the city of Baltimore, do on their oath present that Marcus Baum, late of the city of Baltimore aforesaid, on the seventh day of August in the year of our Lord one thousand eight hundred and ninety-six, at the city of Baltimore aforesaid, by a certain false pretense by him then and there made to a certain Nathan Hamburger, who with Joseph Schenthal and Henry Schenthal was then and there trading under the firm name of Joseph Schenthal & Company (which said false pretense was not then and there a mere promise for future payment, and was not then and

there a mere promise for future payment not intended to be performed), unlawfully, knowingly, and designedly did obtain from said Nathan Hamburger, Joseph Schenthal, and Henry Schenthal, so trading as Joseph Schenthal & Company as aforesaid, one thousand four hundred and sixteen shirts each of the value of thirty-three cents current money, sixty pairs of drawers each pair of the value of thirty-three ⁴⁰⁷ cents current money, sixty pairs of drawers each of the value of twenty-one cents current money, ninety-six pairs of overalls each pair of the value of twenty cents current money, twenty-four pairs of cuffs each pair of the value of ten cents current money, one hundred and forty-four collars each of the value of five cents current money, four hundred and forty-four pairs of suspenders each pair of the value of thirteen cents current money, twenty-four belts each of the value of twenty cents current money, and three hundred and twenty-four handkerchiefs each of the value of five cents current money, of the goods and chattels of the said Nathan Hamburger, Joseph Schenthal, and Henry Schenthal, then and there trading as Joseph Schenthal & Company as aforesaid, then and there to defraud, he, the said Marcus Baum, then and there well knowing the said false pretense to be false, then and there contrary to the form of the act of assembly in such case made and provided, and against peace, government, and dignity of the state.

HENRY DUFFY,

The State's Attorney for the City of Baltimore."

Backed: "No. 2000. State of Maryland. Indictment. (True Bill.) Wm. Read, Foreman. Filed, Dec. 4th, 1896. Nathan Hamburger, A. L. Rosenauer, Samuel Grant, and John Mulbrenon, witnesses."

Whereupon Julius Baum, as the brother and next friend of Marcus Baum, sued out in his behalf, before the Hon. William F. Eve, judge of the city court of Richmond county, a writ of habeas corpus, upon the following grounds: (a) He has never been a fugitive from the justice of Maryland; (b) No crime for which requisition can issue is charged against him in Maryland; (c) The alleged offense is not one for which, under the laws of the United States, extradition can issue; (d) The extradition and requisition papers are void; (e) He is under bond to appear at the April term, 1897, of the superior court of Richmond county, to answer for a charge and claim rising out of the same transaction on which the requisition was based, and bail has been given by him and is now pending in the superior court; (f) The restraining of Barranger is illegal. Upon an

inspection of the record, it appears that the extradition warrant ⁴⁰⁸ issued by the governor of Georgia and the requisition papers of the governor of Maryland were regular in all respects. At the hearing the petitioner introduced in evidence a certified copy of the record of the extradition proceedings. He also introduced evidence which was offered for the purpose of showing that the prosecution was not in good faith, but was instituted for the purpose of collecting a debt, this evidence consisting of affidavits to the effect that Rosenauer, who had come to Augusta as the agent of Schenthal & Company, and of other Baltimore creditors of Baum, and sued out bail trover proceedings against him for Schenthal & Company, had made threats that unless Baum settled, he (Rosenauer) or Schenthal & Company, if they took his advice, would have Baum brought to Baltimore upon a requisition, and would in that way force him to settle or go to jail. Barranger objected to this evidence; 1. As being irrelevant; 2. Because Schenthal & Company were not parties to the proceeding, but it was a proceeding upon the part of the state of Maryland against Baum as a fugitive from justice, in order that he might be taken to Maryland for trial upon an indictment; and 3. Because the evidence was illegal, in that it went to the question of the guilt or innocence of the defendant, and the court was not authorized on the hearing of a writ of habeas corpus, in extradition proceedings, to try that question. Petitioner also offered in evidence bail trover proceedings instituted by Schenthal & Company against Marcus Baum and returnable to the superior court of Richmond county at a time subsequent to the hearing then in progress, with a bond of Marcus Baum conditioned for the payment of the eventual condemnation money, for the purpose of showing that Rosenauer was the agent of Schenthal & Company, and that the goods sued for in trover proceedings were the same as those for which the indictment was found, and to show that Baum was under bond, as required in proceedings to bail trover. This evidence was objected to by Barranger, on the grounds: 1. That it was irrelevant; 2. That the proceedings were between entirely different parties in law according to the record; and 3. Because bond in bail trover was not a bond within the meaning of the law requiring the personal appearance of the ⁴⁰⁹ defendant, or under which the security could surrender the principal in satisfaction of the bond. Barranger then introduced in evidence affidavits of Rosenauer, denying that he had made the statements referred to in the above-mentioned affi-

avits introduced by the petitioner. He also introduced an affidavit of one of the firm of Schenthal & Company, denying that Rosenauer was their agent in any way touching the indictment found.

The hearing was had on March 4, 1887. The judge presiding reserved his decision thereon until July 21, 1897, which was filed in the clerk's office July 24, 1897, discharging Marcus Baum, to which ruling Barranger excepts; and it will be our purpose now to inquire whether or not the court erred in so doing.

1. It is insisted in behalf of the defendant in error in this case that when the judge was sitting upon the return of the writ of habeas corpus he was not sitting as judge of the city court, but as the judge of the habeas corpus court; and that therefore a writ of error did not lie direct from his decision, but that the only channel through which it could pass for review by this court was first by certiorari to the superior court. The constitution of the state (Civ. Code, sec. 5836) provides that: "The supreme court shall have no original jurisdiction, but shall be a court alone for the trial and correction of errors from the superior courts, and from the city courts of Atlanta and Savannah, and such other like courts as may be hereafter established in other cities." It is conceded that the city court of Richmond county is "such other like court" within the contemplation of the foregoing provision of the constitution. It therefore follows that there is the same constitutional right of reviewing by direct bill of exceptions errors from the city court of Richmond county as exists for the correction of errors from the superior courts. It will hardly be contended that this court has not jurisdiction for the trial and correction of errors from a decision of the judge of the superior court in a habeas corpus case. It would certainly be an anomaly in law if the judge of the superior court had first to review by certiorari his own decision in a habeas corpus case before the same could reach this court. But it is contended that under the ⁴⁷⁰ Civil Code, section 5527, authority is given either party to except to any decree of the superior court, "or of the judge thereof, in any matter heard at chambers." It will be seen, however, by an examination of that section, that the same refers to "either party in any civil cause, and the defendant in any criminal proceeding, in the superior courts of this state." Therefore, if a habeas corpus case before a judge of the superior court is not a case in the superior court, the above provision of the statute does not re-

lieve us from the difficulty. If it is a case in the superior court, then it necessarily follows that when such a proceeding is before a judge of the city court, it is, in contemplation of law, a case pending in that court.

Under section 17 of the act creating the city court of Richmond county (Acts of 1880-81, p. 578), it is provided that "the judge of said city court shall have all the powers and authority, throughout his jurisdiction, of judges of the superior courts, except when by law exclusive power and authority are vested in the judges of the superior courts; and all laws relating to and governing judges of the superior courts shall apply to the judge of said city court, so far as the same may be applicable, except as herein provided." The judge of the superior court having jurisdiction to hear habeas corpus cases, and this jurisdiction not being exclusive, it necessarily follows from the above-quoted provision of the statute that the judge of this city court has concurrent jurisdiction over such cases. Construing this statute in connection with the constitutional provision above cited, it also follows that if a writ of error lies direct to this court from a decision of a judge of the superior court in such cases, the same authority exists for a review in like manner of a decision rendered by the judge of this city court in the same class of causes. The true intent of the constitutional provision upon the subject was to confer the right of carrying to this court by a direct bill of exceptions any ruling made by judges of the superior court, and of the city courts mentioned, in any cause passed upon by them in their judicial capacity. Jurisdiction is conferred upon these branches of the superior and city courts (namely, upon the judges thereof) to hear and determine writs of habeas corpus; and the fact that all the machinery ⁴⁷¹ of those courts at a regular term is not called into requisition for the purpose of such trial is not inconsistent with the idea that such cases are nevertheless suits in said courts. The law recognizes no such courts *eo nomine* as habeas corpus courts. It is true, in the case of *Moore v. Roberson*, 63 Ga. 506-508, Justice Bleckley alluded to the ordinary on trying such cases as holding a special habeas corpus court. The reason assigned for this was, that jurisdiction in such matters was not conferred by statute upon the court of ordinary, but upon the ordinary; and hence the constitution of 1877, by restricting the jurisdiction of courts of ordinary in some respects to county matters, did not affect the statutory power of the ordinary previously granted to preside on the return of writs of habeas cor-

pus. In the case of *Southern Exp. Co. v. Lynch*, 65 Ga. 240, 245, Justice Jackson states that when the judge of the superior court is trying a case upon a writ of habeas corpus, he sits as a habeas corpus court and not as the superior court. This was merely obiter, and not necessary to the decision rendered in that case, which was simply that the proper remedy for one who was illegally imprisoned with or without form of law is by habeas corpus. But we do not consider this dictum of the court necessarily in conflict with the view herein contained. We think, however, a more accurate legal view to take of the matter is, that when a judge of a superior or city court is sitting on the trial of a habeas corpus, he is presiding in a cause pending in the court of which he is judge, and his judgment is a decision of that court, the court recognized by the constitution and established by the laws of the state. The fact that the trial does not occur in regular term does not affect the question. In the case of *Moore v. Ferrell*, 1 Ga. 6, a motion was made to dismiss the writ of error, on the ground that the order of the judge below was made at chambers, and that the supreme court possessed no jurisdiction over the decisions of the judges of the superior courts made in vacation. Judge Lumpkin, who delivered the opinion in that case, said "that the session of the court below, although intermediate the regular terms, was nevertheless a term quoad the judgment or decree complained of."

473 2. It was further contended by the defendant in error that the bill of exceptions, being presented to the judge and signed by him more than twenty days after his decision, was too late under section 5540 of the Civil Code. We do not think this case falls within the class mentioned in that section. The fact that the case was heard at chambers, and was speedily returnable, is no reason why it should be treated as an extraordinary remedy. To sustain this contention, a possessory warrant or and other summary proceeding would have to be considered as an extraordinary remedy. It required an act of the legislature (Acts 1897, p. 53) to make the section of the code just cited applicable to habeas corpus cases. The bill of exceptions in this case was sued out before the passage of said act.

3. The right of one nation to demand the delivery of an offender against its laws who has taken refuge in another state depends usually upon treaties between the respective countries. These treaties the courts should regard as a paramount law of the land, and, whenever called upon to expound or enforce them, they should protect with vigilance the plighted faith of their

government. As far back as two and a half centuries ago, when but few of the American colonies had been organized and when those in existence were in their infancy, history teaches us that compacts were entered into among them recognizing the right of extradition and agreeing to deliver up to each other fugitives from justice. After the colonies had organized as independent and separate states for their common protection and defense under the old articles of confederation, a similar treaty under article 4 of that instrument was entered into. Again, when the present constitution was adopted, a like compact was sealed by the states, securing to them the same rights; not asserting any new power they never previously had, but simply delegating to the federal government the power to regulate interstate extradition in order to produce uniformity in procedure looking to the apprehension and delivery of offenders against the penal laws of one state who had sought an asylum in another state of the union. For the law governing this case we must, therefore, look to the constitution of the ⁴⁷³ United States and the acts of Congress passed in pursuance thereof. The constitution provides as follows: "A person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime." In pursuance of this constitutional provision, Congress has enacted the following statute: "Whenever the executive authority of any state or territory demands any person as a fugitive from justice, of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be delivered and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear," et cetera: U. S. Rev. Stats. sec. 5278.

From these provisions of the constitution and act of Congress, it will be observed that the alleged fugitive whose extradition is sought must simply be charged with the commission

of a crime against the laws of the demanding state. The courts of the asylum state cannot, upon a writ of habeas corpus, inquire into the guilt or innocence of the accused. No such jurisdiction is given them by law; and it would be a manifestly unwise provision if authority to investigate such a question were conferred on a tribunal that had no power to compel the attendance of witnesses who resided in another state, and whose testimony would be necessary to throw light on the issue. Upon the hearing of the present case, petitioner introduced evidence for the purpose of showing that the prosecution was not in good faith, but was instituted for the purpose of collecting a ⁴⁷⁴ debt. This evidence could only be insisted on as a circumstance throwing light upon the guilt or innocence of the prisoner. We think, therefore, it was clearly inadmissible, and that the judge erred in undertaking to inquire into the motive and purpose of this prosecution. It was held by the supreme court of North Carolina in *In re Sultan*, 115 N. C. 57, 44 Am. St. Rep. 433, that: "Where a warrant of extradition is granted by the governor, the courts will not inquire into the motive and purpose of the extradition proceedings, to ascertain whether the object thereof is to punish a crime or collect a debt." And Burwell, J., who delivered the opinion of the court in that case, said: "The executive and judicial are co-ordinate departments of the government. The judiciary will control and correct the acts of the executive officers only when they are acting contrary to law, or without its sanction." The executive of the asylum state has probably the right to investigate such issues of fact either before or after the issuing of his warrant of extradition. He has at least the power; for while the constitution and act of Congress seem to impose upon him an imperative duty, yet it is simply a moral obligation, for if he refuses to honor the requisition of the executive of the demanding state, there is no power in any branch of the government, state or federal, that can coerce him. He can with impunity refuse to issue the warrant, and after issuing the same he can revoke it and order the release of the prisoner: *Commonwealth v. Dennison*, 24 How. 66; *Taylor v. Taintor*, 16 Wall. 366-374; *Roberts v. Reilly*, 116 U. S. 81. But when the governor's warrant has been issued and executed, and release is sought for the prisoner by appeal to the courts on a habeas corpus, the only question of which the judiciary has jurisdiction is whether or not the executive has acted contrary to law.

4. The fact that the accused had given a bond in bail trover,

in a suit for the recovery of the identical goods alleged to have been obtained under false pretenses, furnished no legal reason for his release on the writ of habeas corpus. Such a bond was simply for the eventual condemnation money, and in nowise for the personal appearance of the accused to answer to any charge in any court of this state.

⁴⁷⁵ 5. A fundamental and jurisdictional question which arises whenever one state has made a demand upon another for the return of a fugitive from its justice is, whether or not such offender is charged with the commission of a crime against the laws of the demanding state. This is a question of law, and is always open on the face of the papers to judicial inquiry: See *Roberts v. Reilly*, 116 U. S. 80, *Ex parte Reggle*, 114 U. S. 642. It was ably and thoroughly argued by counsel for the defendant in error that the indictment which forms the basis of the extradition proceedings in this case charged no crime against the prisoner; that it was fatally defective, in that it did not allege what the false pretenses were by which the accused obtained the goods; it did not allege that the owners believed such pretenses and acted upon them, or, in other words, that they were defrauded; and that this objection was not merely one to technical defects or irregularities in the indictment, was not one that went to its form, but substance. The words "treason, felony, or other crime," in the constitution of the United States, include every offense forbidden and made punishable by the laws of the state where the offense is committed, whether it be a felony or misdemeanor, or an act made criminal at common law or by statute: *Commonwealth v. Dennison*, 24 How. 66. Obviously, therefore, to determine whether or not a crime is charged in this case, we must have regard alone to the laws of the state of Maryland on the subject. That the indictment is defective either at common law, or under the laws of the state in which the person is apprehended, or under other well-known rules of criminal procedure, is not cause for the release of the prisoner upon the trial of the writ of habeas corpus. Upon the universally recognized doctrine that "every state has the right to regulate the forms of pleadings and process in civil and criminal cases, and to determine what shall be deemed a sufficient indictment, information, affidavit, or declaration in its own courts," the sufficiency of the indictment must, in the present case, necessarily be tested by the laws of Maryland: See *Webb v. York*, 79 Fed. Rep. 616, and cases cited. In the case of *Ex parte Reggel*, 114 U. S. 643, above cited, that court said: "Each state has ⁴⁷⁵

the right to prescribe the forms of pleading and process to be observed in its courts, in both civil and criminal cases, subject only to those provisions of the national constitution designed for the protection of life, liberty, and property in all the states of the Union; consequently, in a case involving the surrender, under the act of Congress, of a fugitive from justice, it may not be objected that the indictment is not framed according to the technical rules of criminal pleading, if it conforms substantially to the laws of the demanding state." In this instance, no one will question the legislative power in the state of Maryland to enact a law making it penal for one to obtain goods by false pretenses with intent to defraud, whether such pretenses actually result in defrauding anyone or not; nor can it be questioned that its legislature would have like power to provide that the pleadings of the state in such a case need not specifically set forth the false pretenses that were used. Such provisions in its laws, however unwise they might be, or to whatever extent they might be in derogation of the common law, could in nowise affect any constitutional guaranty that a citizen has for the protection of life, liberty, and property.

The case of *Pearce v. Texas*, 155 U. S. 311, we regard as conclusive authority on this subject. Pearce was arrested in Texas on an executive warrant issued by the governor of that state upon a requisition of the governor of Alabama, to be delivered up to the latter state to answer to two indictments found against him in the city court of Mobile. While in the custody of the agent of Alabama, Pearce sued out a writ of habeas corpus, contending that he should be discharged for the reason that the indictments were insufficient to authorize his extradition, because it was not alleged therein that the offenses were committed in Alabama in violation of her laws; that the indictments were wholly void, in that no time or place was laid therein, and it did not appear where the offenses were committed, nor that they were not long since barred. The record in that case, as in the case we are now considering, showed the requisition made by the governor of Alabama, copies of the indictments duly certified, the warrant of the governor of Texas; and in effect the relator relied for his discharge entirely ⁴⁷⁷ upon the invalidity of the indictments. The case was first tried before the judge of the forty-second district of the state of Texas. On the hearing of the petition the district judge refused to discharge the prisoner; he thereupon appealed to the court of criminal appeals for the state of Texas, where the judgment below

was affirmed: *Ex parte Pearce*, 32 Tex. Crim. Rep. 301. Thereupon the case was appealed to the supreme court of the United States, and by that court again affirmed. An opinion was filed by the court of appeals by Simkins, J., in which it was held that an indictment which, under the laws of the demanding state, sufficiently charges the crime, will sustain a requisition, even though insufficient under the laws of the asylum state. The majority of the judges of the court of appeals did not concur in all the propositions stated in that opinion, but went one step further, and expressed their views as follows: "We desire to modify certain propositions stated in the opinion of Judge Simkins. It is intimated, if not stated directly, that the relator would have the right to show by proper evidence that the indictment in substance was not sufficient under the laws of the demanding state. Our position upon this question is, that if it reasonably appears upon the trial of the habeas corpus that the relator is charged by indictment in the demanding state, whether the indictment be sufficient or not under the law of that state, the court trying the habeas corpus will not discharge the relator because of substantial defects in the indictment under the laws of the demanding state." And, in reviewing this case, the supreme court of the United States affirmed the judgment upon the ground that the indictments substantially conformed to the laws of Alabama, ruling that their sufficiency as a matter of technical pleading would not be inquired into on habeas corpus: Citing *Ex parte Reggel*, 114 U. S. 642.

6. But it is insisted in this case that the judge below, upon the trial of the writ of habeas corpus, did not have before him any law of the state of Maryland, and that therefore there was no evidence that the indictment charged any crime against the laws of that state. Petitioner alleges in this case an illegal detention. He asserts that the indictment preferred against ⁴⁷⁸ him charges him with no crime against the laws of the state demanding his delivery. The burden of proof is upon him to show the illegality of the act of the executive of this state. The fact that an indictment had been found charging him with certain acts against the penal laws of another state raises a presumption that the acts charged constitute an offense against said laws, and that the indictment substantially conforms to the rules of criminal procedure thereunder. If it was incumbent, then, upon either party to formally introduce on the trial the statute of the demanding state, would it not seem reasonable, under these circumstances, that the burden of overcoming this

presumption would rest upon him who alleged that no crime was charged? An indictment, being an official proceeding instituted by a branch of the government, founded upon the oath of a tribunal presumed to act without fear or favor and with impartiality, carries with it more weight and validity than the affidavit of an individual which has not upon it the stamp of official authority. These views we think are sustained by an unbroken current of authority upon the subject. The supreme court of Nebraska, in a well-considered case on this subject, sustains this conclusion; and as the authorities cited and quoted are so apt and in point, we give the following extract from the opinion delivered in that case. Harrison, J., speaking for that court, in *In re Van Sceiver*, 42 Neb. 772, 47 Am. St. Rep. 730, makes the following citation from Hawley on Interstate Extradition, page 30: "The fact that an indictment has been found is regarded as affording at least *prima facie* evidence that the act charged is a crime." And the same author further says, on pages 32, 33, of his work: "The distinction between an affidavit and an indictment in one case is stated as follows: 'If the charge is by way of affidavit against the alleged fugitive, and it appears clearly from the whole facts stated in the affidavit, taken together, that no crime has been committed, it might, with some show of reason, be claimed that the subject matter was not within the provisions of the constitution and act of Congress, and therefore, as to the jurisdiction of the executive to issue the warrant, the whole matter would be *non coram iudice*.'" The case of *In re Heilbonn*, 1 Park. C. C. 429, is of this character. But that is far ⁴⁷⁹ from being this case. Here the charge against the alleged fugitive is by a bill of indictment found by a grand jury, and whether the bill charges an indictable offense under the statute of Illinois should be left to the determination of the courts of that state: *Ex parte Greenough*, 31 Vt. 279. While the rule seems to be that the making of an affidavit, and the issuing of a warrant by a magistrate, is not evidence that the act charged is a crime, all of the authorities agree that the finding of an indictment is at least *prima facie* evidence that the act charged amounts to a crime: *In re Briscoe*, 51 How. Pr. 422.' The supreme court of Maine, in an opinion given to the governor, said: 'In our opinion, it is the duty of the executive of this state to cause to be delivered over to the agent of another state, at the request of the executive thereof, a citizen of their state charged by indictment with the fraud before set forth, which, being indicted in such state, may be presumed to be there

regarded as a crime': 24 American Jurist, 226; Hurd on Habeas Corpus, 608, 609, and cases cited and commented upon; *Ex parte Pearce*, 32 Tex. Cr. Rep. 301; *Brown's case*, 112 Mass. 409; 17 Am. Rep. 114. In Moore on Extradition, volume 2, section 638, page 1030, it is stated as follows: 'It is believed that there is no case in which a court has, on habeas corpus, discharged a fugitive from custody on a rendition warrant, on the ground that an indictment accompanying the requisition did not constitute or contain a sufficient charge of crime.'"

The trend of authorities above cited seems to point to the rule, that the courts will not go behind an indictment for the purpose of inquiring whether or not it substantially complies with the laws of the state where it was found. We are not prepared to hold, however, that the courts cannot enter into such an investigation; or that the petitioner, on a writ of habeas corpus, would not have the right to show that the indictment charges no crime under laws of the demanding state. What we do rule is, that the indictment in this case, being duly authenticated by the proper authorities in the state of Maryland, accompanied as it is with requisition papers in due and legal form, is sufficient to raise the presumption that it conforms to the laws of that state in charging ⁴⁸⁰ a crime, and that the burden is on the petitioner to show the contrary.

7. Neither do we think that in a judicial investigation of this kind the courts should be held down to the rigid rule of considering only such proof of the laws of another state as has been formally tendered in evidence by one of the litigants. It is true ordinarily that whenever it becomes necessary for a court of one state, in order to give effect to a public act of another, to ascertain what effect it has in that state, the law of that state must be proved as a fact: *Craven v. Bates*, 96 Ga. 78. But in the case of *Herschfeld v. Dixel*, 12 Ga. 582, this court held: "The court on the trial of a cause may proceed on their knowledge of the laws of another state, and it is not necessary in that case to prove them; and their judgment will not be reversed, when they proceed in such knowledge, unless it should appear that they decided wrong as to those laws." Again, in the case of *Chattanooga etc. R. R. Co. v. Jackson*, 86 Ga. 676, this court, upon a point which involved the law of Tennessee on the subject of appeals and their dismissal, and the practice in the circuit courts in regard to such matters, held, that while the trial judge might have resorted to the statutes and decisions of the supreme court of Tennessee, they would not say that it was

error to receive the testimony of skilled attorneys who practiced in the courts of that state, to aid the trial judge in arriving at a proper conclusion as to what was the law of that state. And our present chief justice, who rendered the opinion of the court in that case, said: "Knowing as we do the great difficulty under which courts labor in arriving at the true law of a case, and especially the difficulty encountered here as well as by the court below in this case, we cannot condemn a trial judge for resorting to any sources of information which will aid him in coming to a correct conclusion as to the law. The record shows that the judge in this case did not confine himself to the opinions of the attorneys, but that the statutes of Tennessee and the decision of its supreme court were read to him." The above-cited cases involved simply the rights of individuals, who were insisting in the courts of this state, where its laws ordinarily ⁴⁶¹ govern the rights of parties, that the laws of another state were different and should prevail. Upon the question we are now considering, neither the statutes of this state nor the common law can have any bearing. The court is necessarily called upon to decide whether a crime has been charged against the laws of another state; and hence its laws are alone in issue. In such a case, involving, as it does, not only the liberty of a citizen but the rights of another state, we think it would be the right, if not the duty, of the courts to seek the highest sources of information at their command to ascertain the laws of such state on the subject and to give them force and effect according to their true intent and spirit, whether or not such laws have been formally tendered in evidence. To this end they may resort to the published statutes of that state, or to the published decisions of its highest judicial tribunals.

8. While the indictment in the present case, under the laws of Georgia, on account of its want of certainty and precision in the allegations essential to constitute a crime, might before our courts be held bad on demurrer, yet upon an examination into the statutes of Maryland and decisions of its supreme court on the subject, we think it substantially complies with the laws of that state. By the code, article 27, section 288, of that state, it is provided that "in any indictment for false pretenses, it shall not be necessary to state the particular false pretenses intended to be relied on in proof of the same, but the defendant, on application to the state's attorney before the trial, shall be entitled to the names of the witnesses and a statement of the false pretenses intended to be given in evidence." And by an act of

the legislature of that state (Code, art. 27, sec. 291), in order to obviate certain technical difficulties and refined distinctions which frequently arose in the trial of classes of cases now under consideration, it was provided that in indictments for obtaining property by false pretenses, and also in some other cases, it shall be sufficient to allege that the defendant did the act with intent to defraud, without alleging the intent of the defendant to be to defraud any particular person, and that on the trial it shall be sufficient to prove that the defendant did the ^{act} act with an intent to defraud: *State v. Blizzard*, 70 Md. 385; 14 Am. St. Rep. 366.

Upon a careful review of the entire case we are unavoidably led to the conclusion that the chief executive of this state did not act contrary to law when he honored the requisition from the state of Maryland, and that the prisoner has not been illegally deprived of his liberty. The right of any citizen to have the legality of his restraint inquired into by the courts on a writ of habeas corpus is as old as English liberty itself, and will no doubt endure as long as any institution of our government exists. But no less important to the rights of the people is the execution of such laws enacted for their protection against offenders who would invade the rights of life, liberty or property. "The object," said Attorney General Cushing, "to be accomplished in all these [extradition] cases is alike interesting to each government—namely, the punishment of malefactors, the common enemy of every society." "The improved facilities of communication which modern invention has afforded, and the consequent ease with which malefactors can escape from the jurisdiction of the countries whose laws they have violated, have rendered it essential to the order of society that flight should not secure immunity from punishment": 1 Moore on Extradition, ecs. 3. Upon this principle is founded the doctrine of interstate extradition in this country. By the observance of this constitutional compact entered into between the states, not only is the honor of the state preserved, but the rights of its own citizens protected. For a state to establish an asylum for the protection of persons who have violated the criminal laws of another state, would be simply to invite within her borders an element of citizenship which would be a menace to society.

Judgment reversed.

All the justices concurring.

HABEAS CORPUS—APPEAL.—A writ of error will not lie in behalf of the state to review a judgment of a court of competent juris-

diction in habeas corpus proceedings, discharging from custody a person convicted and imprisoned for crime: Note to *In re Sneden*, 55 Am. St. Rep. 437. But, in Nebraska, a habeas corpus is held to be in the nature of a civil proceeding and the judgment thereon to be reviewable by petition in error, as in other cases: *In re Van Schever*, 42 Neb. 772; 47 Am. St. Rep. 730.

HABEAS CORPUS—EXTRADITION BETWEEN STATES.—In habeas corpus proceedings in extradition cases, the merits cannot be considered. The only subjects of inquiry are the sufficiency of the papers and the identity of the prisoner: *Kurtz v. State*, 22 Fla. 36; 1 Am. St. Rep. 173. While there must be a proper charge of crime, the courts will not, on habeas corpus, investigate the guilt or innocence of the prisoner: See monographic note to *Matter of Fetter*, 57 Am. Dec. 395, 397, on proceedings for the arrest and surrender in one state of fugitives from justice in another; or inquire whether there was probable cause for the prosecution in the demanding state: *In re Van Schever*, 42 Neb. 772; 47 Am. St. Rep. 730; but, while courts have no power to control executive discretion and compel the surrender of a fugitive from justice, yet, where the executive has once acted, and has issued his warrant, the question may be investigated on habeas corpus, whether or not the prisoner is properly detained under the constitution and law of Congress: Note to *Matter of Fetter*, 57 Am. Dec. 393. A copy of an indictment accompanying a requisition for the extradition of a fugitive from justice is *prima facie* evidence that the act charged therein is a crime against the laws of the demanding state: *In re Van Schever*, 42 Neb. 772; 47 Am. St. Rep. 730. If the copy of the indictment accompanying a requisition contains a charge of crime, the tribunals of the state in which the criminal is found will not consider or pass upon the sufficiency of the indictment as a matter of technical pleading. Whether the charge has been made in proper legal form, or whether it can be sustained by legal evidence, are questions which must be left to the courts of the demanding state: Note to *Matter of Fetter*, 57 Am. Dec. 395.

Grounds on Which One State may Refuse to Surrender a Person Demanded by the Authorities of Another.

The obligation of a state, upon which a demand is made, to surrender a fugitive from justice, rests exclusively upon the federal constitution and the act of Congress of 1793: *People v. Cross*, 135 N. Y. 536; 31 Am. St. Rep. 850; *People v. Brady*, 56 N. Y. 182. The second paragraph of section 2, article 4, of the constitution declares that "a person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in any other state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime." It is plain from the language of this clause of the constitution, that the obligation of a state to deliver a fugitive from justice, on demand of the state from which he fled, arises when the fugitive is charged with crime within the state demanding the surrender; but there must be a charge of crime existing against the fugitive in the latter state before the demand can legally be made, and it must be a charge made in the regular course of judicial proceedings. It is equally necessary that the executive authority of the state upon which the demand is made, when called on to render his aid, should be satisfied by competent proof that the party is so charged. This proceeding, when duly authenticated, is his authority

for arresting the offender: *Commonwealth v. Dennison*, 24 How. 66, 104. The clause referred to contains no grant of power, but is a regulation of a previously existing right, for when the articles of confederation were adopted, a provision was made for the surrender of fugitives from justice almost identical with that afterward incorporated into the constitution of the United States: *Matter of Fetter*, 23 N. J. L. 311; 57 Am. Dec. 382; and monographic note there-to on proceedings for the arrest and surrender in one state of fugitives from justice in another: *Matter of Leary*, 10 Ben. 197, 6 Abb. N. C. 43, 53.

The act of Congress of February 12, 1793 (1 Stats. at Large, 302), passed for the purpose of giving effect to the above constitutional provision, and establishing a uniform mode of procedure in cases within it, provides in what manner the charge of crime shall be made known to the executive of the state upon which the demand is made; for it is evident that it is a condition precedent to the obligation to surrender that the authorities shall be apprised of the existence of the facts upon which the duty depends. This provision, slightly changed in phraseology, is now section 5278 of the United States Revised Statutes, which provides that, on demand made of the executive authority of any state or territory to which a fugitive from justice has fled, and the compliance with certain requirements, "it shall be the duty" of such executive authority to cause the arrest and delivery of the fugitive. The act of Congress does not, however, provide any means to compel the execution of this duty, nor inflict any punishment for the neglect or refusal on the part of the executive of the state; "nor is there any clause or provision in the federal constitution which arms the government of the United States with this power": *Commonwealth v. Dennison*, 24 How. 66, 107.

Nature of Duty or Obligation to Surrender.—As the duty of the governor upon whom a demand is made for a fugitive from justice is, under the constitution and law of Congress, one of "imperfect obligation," much has been said, in the few cases where the subject has been considered, about the nature of the executive duty or obligation to surrender. Where the proper demand has been made, and is accompanied by the requisite evidence, it has been said that the duty imposed by the act of Congress upon the executive on whom demand is made is a moral one, and not mandatory; and that the act of Congress is simply declaratory of the grave duty which every moral reason requires him to perform: *Kentucky v. Dennison*, 24 How. 66, 107; *Ex parte Swearingen*, 13 S. C. 74, 81; *Matter of Briscoe*, 51 How. Pr. 422, 428; *Hibler v. State*, 43 Tex. 197, 203. Other courts say that it is the "constitutional duty" of a sister state, in every case, to extradite a fugitive from justice, upon a legal requisition from another sister state; and that it cannot ask any questions upon the subject, nor impose any terms: *State v. Hall*, 40 Kan. 338; 10 Am. St. Rep. 200. The executive duty to surrender is often said to be "imperative," and one not resting, in any degree, in discretion: *Matter of Voorhees*, 32 N. J. L. 141; *Lascelles v. State*, 90 Ga. 347; 35 Am. St. Rep. 216; affirmed in *Lascelles v. Georgia*, 148 U. S. 537;

but the duty has been said to be "discretionary": In re Sultan, 115 N. C. 57; 44 Am. St. Rep. 433. This diversity of statement has led to some apparent confusion in the authorities, yet we conceive that they all practically point to the same result; namely, that when a case comes within the terms of the constitution, that is, when a person is charged with crime, has fled from justice, and whose surrender is demanded by the proper authority, the duty of the governor upon whom demand is made is merely ministerial, and he has no right to exercise any discretionary power as to the nature or character of the crime charged, for it is then his plain, constitutional, imperative duty to surrender the fugitive: Commonwealth v. Dennison, 24 How. 66, 106; Matter of Voorhees, 32 N. J. L. 141; Work v. Corrington, 34 Ohio St. 64; 32 Am. Rep. 345; Ex parte Swearingen, 13 S. C. 74, 81; Lascelles v. State, 90 Ga. 347; 35 Am. St. Rep. 216; Johnston v. Riley, 13 Ga. 97; State v. Hall, 40 Kan. 338; 10 Am. St. Rep. 200; State v. Toole, 69 Minn. 104; 65 Am. St. Rep. 553; Ex parte Rosenblat, 51 Cal. 283, 287; Matter of Manchester, 5 Cal. 237, 238; Matter of Leary, 10 Ben. 197, 208; 6 Abb. N. C. 43, 53; but that the governor upon whom the demand is made does have, and may properly exercise, a discretion in determining whether a case contemplated by the constitution and law of Congress has been presented for his action: In re Sultan, 115 N. C. 57; 44 Am. St. Rep. 433; Lascelles v. State, 90 Ga. 347; 35 Am. St. Rep. 216; Work v. Corrington, 34 Ohio St. 64; 32 Am. Rep. 345. If he fails or refuses, however, to perform his duty, when a case is presented which is clearly one contemplated by the federal constitution, we know of no power, state or federal, to compel him to do so: Kentucky v. Dennison, 24 How. 66, 107; State v. Toole, 69 Minn. 104; 65 Am. St. Rep. 553; Matter of Voorhees, 32 N. J. L. 141, 145. The duty of the executive of the surrendering state is well stated in Ex parte Swearingen, 13 S. C. 74, 81, as follows: "It seems to us that the true rule is, that when a requisition comes to the governor of this state for any person found in this state, which shows upon its face that all the requirements of the act of Congress have been complied with, it is the duty of the proper authorities of this state to recognize the statements of fact made therein as true, and to surrender to the agent of the state making the demand the person demanded, in the fullest confidence that he will receive ample justice at the hands of the authorities of such state. The very fact that there is no mode of enforcing the performance of the duty imposed upon the governor of the state upon which the demand is made, by mandamus or otherwise (Kentucky v. Dennison, 24 How. 66, 107), makes it all the more obligatory that he should be scrupulously exact and prompt in the performance of such duty."

Refusal to Surrender, When Proper.—It is clear from what is said above that, before a governor upon whom demand is made for the return of a fugitive from justice can lawfully comply with it, it must appear to him that the person demanded is substantially charged with a crime against the laws of the state from whose justice he is alleged to have fled, and the plain inference is that the governor may refuse to surrender the fugitive unless he is so charged: Roberts v. Reilly, 116 U. S. 80, 86; 24 Fed. Rep. 132. It must also appear that

the person demanded is a fugitive from the justice of the state, the executive authority of which makes the demand, for the governor upon whom demand is made may refuse to surrender a person who is not a fugitive from justice: See *Roberts v. Reilly*, 116 U. S. 80, 95; 24 Fed. Rep. 132. This is a question of fact, which the governor of the state upon whom the demand is made must decide, upon such evidence as he may deem satisfactory: *Roberts v. Reilly*, 116 U. S. 80, 95; and he does not fall in duty if he makes it a condition precedent to the surrender of the accused that it be shown to him, by competent proof, that the accused is, in fact, a fugitive from the justice of the demanding state: *Ex parte Reggel*, 114 U. S. 642, 652.

It must also be observed that the constitution and the law of Congress refer to fugitives at large, in relation to whom there is no conflict of jurisdiction: *Matter of Troutman*, 24 N. J. L. 634, 638; for the executive of a state upon whom a demand is made may properly refuse to surrender a fugitive criminal until the justice of that state is satisfied. Hence, if, at the time of the demand, the accused stands charged with a violation of its laws, its right to administer justice in the case is paramount to that of the demanding state. In other words, if a party is detained in one state, because the laws of that state have claims upon him, he cannot be extradited and taken to another state before the justice of the state which holds him has first been satisfied; that is, the right of the state demanding the alleged fugitive, in order that it may be compelled to answer to its laws, is not superior to that of the state which holds him for a similar purpose: *Matter of Briscoe*, 51 How. Pr. 422, 431; *Matter of Troutman*, 24 N. J. L. 634, 638; *Lascelles v. State*, 90 Ga. 347; 35 Am. St. Rep. 216.

This has always been understood to apply to detentions on criminal charges; otherwise, to use an extreme illustration, a person detained for murder committed in the state upon which demand is made, would have to be surrendered, though demanded, to answer elsewhere for simple petit larceny: See *Matter of Troutman*, 24 N. J. L. 634, 639. The governor of the state to which a fugitive has fled may also properly refuse to surrender him where he is imprisoned, in such state, under civil process: *Matter of Briscoe*, 51 How. Pr. 422; *Matter of Troutman*, 24 N. J. L. 634, 639.

In determining whether a case contemplated by the constitution is presented, the governor of the state upon whom the demand is made may exercise a discretion in determining whether the demand is made for some ulterior and improper purpose, as, for example, the collection of a private debt, and, if he finds such to be the case, he may properly refuse to issue a warrant, even where the papers are apparently sufficient and in due form: *State v. Toole*, 69 Minn. 104; 65 Am. St. Rep. 553. "No satisfactory reason," says the court, in *Work v. Corrington*, 34 Ohio St. 64; 32 Am. Rep. 345, "is perceived why a governor should issue or obey a requisition where he is satisfied that the sole object of the party complaining is to enforce the payment of a private claim for money. Such an abuse of process is equivalent to a fraudulent use of it." A demanding governor may be imposed upon by a false affidavit, and the governors of the two states be im-

posed upon, unless there is some scrutiny used. The whole extradition proceeding should not be allowed to become a fraud upon the law. "The fact that the demanding governor has been imposed upon is no reason why the governor of the surrendering state should be; and he certainly cannot be said to fall in his duty, where, upon information before him, showing that the demand is not made in good faith, though regular in form, he refuses to surrender an alleged fugitive from justice. It surely was never intended that the respective executives of the demanding and surrendering states should be so hampered in the exercise of their judgments as to allow such a fraud and imposition to be practiced upon the law as was perpetrated in the case of *State v. Jackson*, 36 Fed. Rep. 258; *Church on Habeas Corpus*, 2d ed., 829, note.

It being within the governor's discretion to issue or to refuse to issue a warrant of arrest in extradition, where it is sought for ulterior purposes (*In re Sultan*, 115 N. C. 57; 44 Am. St. Rep. 433), it follows that he may revoke it, whether issued by himself or his predecessor, where it has been obtained in a case in which it should not have been issued: *Work v. Corrington*, 34 Ohio St. 64; 32 Am. Rep. 345; *In re Sultan*, 115 N. C. 57; 44 Am. St. Rep. 433. "If a governor," says the court in *State v. Toole*, 69 Minn. 104, 107; 65 Am. St. Rep. 553, 558, "may exercise such a discretion in regard to issuing the warrant, we do not see why he may not exercise the same discretion in regard to revoking it. The existence of the power to revoke would seem necessary, in order to prevent great abuses and wrongs. A warrant is, of necessity, almost always issued ex parte, and the governor is liable to be imposed upon by those demanding it, or, for some other cause, to issue it improvidently. It would seem that, in such cases, the same officer who had the exclusive power to issue the warrant should have the power to remedy the wrong by revoking it. Of course, to be effective for any purpose, the warrant must be revoked before the alleged fugitive is taken out of the state." It is said, further, that a governor from whom an extradition warrant has been obtained for the advancement of private ends fails to discharge his duty if he neglects to revoke the process on discovering the fraud: *Work v. Corrington*, 34 Ohio St. 64, 75; 32 Am. Rep. 345.

Statutes have been passed, in some of the states, regulating the executive duty as to surrendering fugitive criminals. Massachusetts has such a law, leaving the executive a large discretion, yet fixing the limits within which he must act, and beyond which he must not pass. This law has been held constitutional in that state: *Commonwealth v. Tracy*, 5 Met. 536, 549. Ohio and Georgia, also, have such laws: *Work v. Corrington*, 34 Ohio St. 64, 75; 32 Am. Rep. 345; *Lancelles v. State*, 90 Ga. 347; 35 Am. St. Rep. 216. And this is, perhaps, true of other states, though such laws must further the object of the federal constitution and aid the law of Congress in accomplishing extradition; otherwise there would be a conflict of authority, resulting in the supremacy of the laws of the United States. A state statute prohibiting the surrender of a citizen or resident of that state as an alleged fugitive from justice, upon the requisition of the governor of another state, when it shall be made to appear that such

alleged fugitive was in the former state at the time of the alleged commission of the crime and providing for such an inquiry, is constitutional: *Hartman v. Aveline*, 63 Ind. 344; 30 Am. Rep. 217. And a state may, in the exercise of its reserved sovereign powers, and as an act of comity to a sister state, provide by statute for the surrender, upon requisition, of persons who are indictable for a crime committed through their constructive presence in such sister state, though they have never been corporeally within such state and have never fled therefrom to escape arrest and punishment. But, in the absence of such statute, such persons are not subject to extradition by the latter state: *State v. Hall*, 115 N. C. 811; 44 Am. St. Rep. 501.

GRIGGS v. MACON.

[103 GEORGIA, 602.]

MUNICIPAL CORPORATIONS—REGULATIONS AS TO THE KEEPING OF DOGS—VALID ORDINANCE.—A city whose charter authorizes it to "pass such ordinances as may be deemed necessary for the regulation of stock and other animals within the city," and which contains a "general welfare" clause, has power to pass and enforce a penal ordinance requiring all persons keeping dogs on their premises, within the city limits, to register and procure badges for the same, and to pay a fee of one dollar for each registration and badge.

POLICE POWER—REGULATIONS AS TO KEEPING OF DOGS.—The power to regulate the keeping of dogs, and to enforce such regulations by forfeitures, fines, and penalties, is recognized as within the police power.

POLICE POWER—REGULATIONS AS TO KEEPING OF DOGS—TAX.—A fee of one dollar required by a city ordinance for registering a dog and obtaining a badge, the purpose of which is to evidence the fact of registration, is not, in a strict sense, a "tax," but should be regarded as a police regulation.

Petition for certiorari.

Hope Polhill, for the plaintiff in error.

Minter Wimberly, for the defendant in error.

603 **LUMPKIN, P. J.** The charter of the city of Macon authorizes the mayor and council to "pass such ordinances as may be deemed necessary for the regulation of stock and other animals within the city," and also contains a "general welfare clause" conferring upon the mayor and council the powers usually embraced in like portions of municipal charters. The question presented by the present case is, whether or not the mayor and council of Macon have the power to pass and enforce a penal ordinance requiring all persons keeping dogs on their premises within the city limits to register and procure badges for the

same, and pay a fee of one dollar for each registration and badge. It seems difficult to fix with precision the legal status of the dog, but we have reached the conclusion that an ordinance of the kind above indicated was within the domain of the powers enjoyed by the municipal authorities of Macon. In 1 Dillon on Municipal Corporations, fourth edition, 212, note 2, it is said that: "The power to regulate the keeping of dogs and to enforce such regulations by forfeitures, fines, and penalties, is recognized as within the police power"; and as authority for this proposition, the case of *Faribault v. Wilson*, 34 Minn. 254, is cited. In that case, Wilson was prosecuted and convicted before a city justice for violating the provisions of an ordinance requiring the owner of every dog to register the same with the city recorder, and at the same time pay a specified fee. Each person complying with the requirements of this ordinance was entitled to a certificate showing his right to keep upon his premises the dog therein described, and every person keeping a dog upon his premises without complying with the terms of the ordinance was made subject to fine and imprisonment. This ordinance was passed under a statute authorizing the council to "regulate or prevent the running at large of dogs, to require license for keeping the same," et cetera. The supreme court of Minnesota held that the ordinance was not unreasonable, and affirmed the conviction.

It is true that the power conferred by the charter of Macon is not stated in such explicit terms as that given to the city of Faribault, but we think, nevertheless, it was sufficient to warrant the adoption by the mayor and council of Macon of the ordinance now under review. In delivering the opinion of the court in the case just cited, Chief Justice Gilfillan remarked that the power to regulate the keeping of dogs was one very generally exercised, and that it is recognized as within the police power; and observed that regulations of this kind were proper, because dogs, from their nature, were liable to become nuisances. So regarding them, the requirement of fees for registering them has a tendency to reduce their number. In *Van Horn v. People*, 46 Mich. 183, 41 Am. Rep. 159, it was held that an act taxing dogs, and appropriating the resulting fund to the payment of damages done by dogs to sheep, was not strictly a "tax" law, but an exercise of the police power of the state; and in the same case it was said that "dogs are properly subjected to special and peculiar regulations for the purpose of repressing the mischief likely to be done by them to more valuable property and to persons." So, in *Ex parte Cooper*, 3 Tex. App. 489, 30 Am. Rep.

152, it was said that an act exempting to each family one dog, and imposing on all other dogs a "tax," was not technically a tax law, but more properly a police regulation and a legitimate exercise of the police power. And to the same effect, see *Blair v. Forehand*, 100 Mass. 136; 97 Am. Dec. 82; 1 Am. Rep. 94.

These authorities tend to establish the proposition that the fee of one dollar required in Macon for registering a dog and obtaining a badge, the purpose of which is to evidence the fact of registration, is not, in a strict sense, a "tax," but should be regarded as a police regulation. Thus viewing it, we are of the opinion that it is not unreasonable, and should be upheld.

Judgment affirmed.

All concurring, except Cobb, J., absent.

POLICE POWER—KEEPING OF DOGS—REGULATIONS—MUNICIPAL CORPORATIONS—ORDINANCES.—The police power may be exercised with respect to the keeping of dogs, and the imposition of license taxes upon the owners of dogs may be sustained under this power: See monographic note to *Hamby v. Samson*, 67 Am. St. Rep. 298, on property in dogs and the remedies for its enforcement. The legislature may, under its police power, regulate the keeping of dogs, and authorize their summary destruction by a municipal corporation when the regulations are not complied with: *Blair v. Forehead*, 100 Mass. 136; 97 Am. Dec. 82; 1 Am. Rep. 94; *State v. Topeka*, 86 Kan. 76; 59 Am. Rep. 529; but it has been held that the law recognizes property in dogs, and that a city ordinance requiring the owner of such property to obtain a license for keeping the same, and subjecting him to arrest, fine, and imprisonment for not procuring such license is invalid, the idea being that, if dogs are property, they may be taxed, and the tax assessed to the owner, but that for the nonpayment of the tax the owner cannot be arrested, fined, and imprisoned, especially where he keeps his dogs at home: *Mayor v. Meigs*, 1 McAr. 53; 29 Am. Rep. 578.

DRAPER v. MACON DRY GOODS COMPANY.

[103 GEORGIA, 571.]

PLEADING—CONTRACT REQUIRED BY STATUTE OF FRAUDS TO BE IN WRITING.—The law of pleading does not require a plaintiff, who brings an action for damages on a contract which is required by the statute of frauds to be in writing, to allege in his petition that the contract was in writing, and his failure to do so does not make the petition demurrable.

PLEADING—STATUTE OF FRAUDS AS A DEFENSE—NATURE OF.—The defense of the statute of frauds, like that of a plea of usury, is in the nature of a personal privilege, of which the defendant can avail himself or not, as he sees fit. Such defenses are not usually a subject-matter of demurrer, but of pleading and proof.

EVIDENCE—PRESUMPTION AS TO CONTRACT BEING IN WRITING.—In cases where the statute, in derogation of the com-

mon law, requires certain contracts to be executed in a prescribed manner in order to be binding upon the parties, the law will not presume, in the absence of proof, that either party has violated the statute.

Action for breach of contract, brought by Draper, Moore & Co. against the Macon Dry Goods Company. The defendant sold a bill of goods to the plaintiff, and, by the terms of the contract, the goods were to be shipped by the defendant to the plaintiff at Atlanta, Georgia, and were to be paid for on delivery. To make the contract, members of the plaintiff firm went to Macon, Georgia, at some expense, which the defendant, in consideration of the contract, agreed to pay. The defendant failed to ship the goods to the plaintiff, or to comply with the contract in any particular. On the contrary, the defendant, having a chance to dispose of its entire stock, including the goods which it had agreed to deliver to the plaintiff, did so, and expressed its regrets, by letter, from its authorized agent and officer to the plaintiff, for not complying with its contract. This letter recognized the existence of the contract. The time of the members of the plaintiffs' firm was very valuable, and they claimed to have been damaged by its loss in going to Macon. It also claimed other damages for the breach of the contract. The court sustained a demurrer to the petition and dismissed the case.

Hill, Harris & Birch and Candler & Thomson, for the plaintiff in error.

Hardeman, Davis & Turner, for the defendant in error.

§ 33 LEWIS, J. The contract, which is the basis of the plaintiff's action in this case, is such a one as the statute of frauds requires to be in writing: Civ. Code, sec. 2693, subd. 7. Inasmuch as the declaration did not disclose the fact that the contract was in writing, counsel for defendant in error contended that the court did not err in dismissing the same upon demurrer. Neither the petition nor the amendment thereto sets forth whether or not the contract was in writing; hence the question arising in this case is, Does the law of pleading require the plaintiff who brings an action on such a contract to allege in his petition that the same was in writing? The defense of the statute of frauds, like that of a plea of usury, is in the nature of a personal privilege, of which the defendant can avail himself or not, as he sees proper. Such defenses are not usually a subject matter of demurrer, but of pleading and proof. Where the statute, in derogation of the common law, requires certain contracts

to be executed in a prescribed manner in order to be binding upon the parties, the law will not presume, in the absence of proof, that either party has violated the statute. In the case of *Long v. Lewis*, 16 Ga. 154, the suit was upon a contract embraced within the provisions of the statute upon the subject of written agreements. Neither the declaration nor the proof showed whether or not the promise relied on for a recovery was in writing. A motion for nonsuit was made, and this court decided that the same was properly overruled. On page 162 Benning, J., delivering the opinion, said: "As to the first ground, it is sufficient to say that it does not appear, from the declaration or the proof, that the contract was not in writing. The contract may have been in writing. And as an illegal act is not to be presumed, it is not to be presumed that the contract was not in writing." We quote the following from the opinion⁶⁶⁴ delivered by the same judge in the case of *Printup v. Johnson*, 19 Ga. 75: "If the agreement was such a one that it was required to be in writing by the statute of frauds, then it is to be presumed, until the contrary be shown, that the agreement was in writing; for it is, in general, to be presumed, until something to the contrary be shown, that no man does what the law forbids, or what the law declares shall be invalid." In the case of *Piercy v. Adams*, 22 Ga. 109, the question we are now considering was directly decided in the following language: "Bill to enforce a contract concerning an interest in lands, not demurrable because it does not state whether the contract was or was not in writing." It is true, in the case of *Logan v. Bond*, 13 Ga. 192, a contrary rule was applied where it was sought to ingraft a parol trust upon a deed, and it did not appear upon the face of the bill that the agreement sought to be enforced was verbal only. The court in that case recognized the doctrine at common law, but said that it was otherwise in this state, where the cause of action is required to be "plainly, fully, and distinctly set forth." Perhaps the distinction between this case and the others above cited grows out of the fact that the acts involved in the last were valid at common law, but they were regulated as to the mode of performance by the statute. In *Stephen on Pleading*, page *374, that author declares that in such a case it is only necessary to use such allegation as was required before the statute. The same author (page *375) quotes from 1 Saund. 276 d. e. n. (2), as follows: "Where a thing is originally made by act of parliament, and required to be in writing, it must be pleaded with all the circumstances required

by the act; as in the case of a will of lands it must allege to have been made in writing; but where an act makes writing necessary to a matter where it was not so at the common law, as where a lease for a longer term than three years is required to be in writing by the statute of frauds, it is not necessary to plead the thing to be in writing, though it must be proved to be so in evidence." But whether the case in 13 Georgia is in conflict with the others or not, from the utterances and repeated rulings of this court made after the decision rendered in that case, we are unavoidably led to the conclusion ⁶⁶⁵ that the law announced in the headnote which precedes this opinion may be regarded as a well-established rule of pleading in this state. In the case of *Turner v. Stewart Mercantile Co.*, 94 Ga. 468, is embodied the idea that where the statute of frauds is relied upon as a defense, it should be pleaded, and cannot be taken advantage of after verdict.

The decisions of our court upon the subject are sustained by an unbroken line of authority, from some of which we will now proceed to quote: "It is now well settled in this country that in a suit at law or in equity upon a contract affected by the statute, the declaration or bill will be sufficient if it allege a contract generally, without stating whether it is in writing or not": *Browne on the Statute of Frauds*, sec. 505. The same author, in section 505a, states that the general tendency of judicial opinion in England has been against the sufficiency of a bill in equity unless it was alleged that the agreement was in writing. He adds, however: "At law, on the other hand, the rule in England has been (as both in equity and at law in this country) that it is sufficient since the statute, as it was before, to allege an agreement generally, which throws it on the defendant to allege that it is not in writing." *Bliss on Code Pleading*, section 312, after quoting the text from *Stephen* above cited, says: "The rule as thus given by Mr. *Stephen* referred especially to contracts and conveyances required by the statute of frauds to be in writing; and, under it, it was held to be sufficient to charge the defendant's liability as before its adoption, leaving it to be pleaded, or, if the contract be denied, to be enforced in submitting evidence. Thus, the statute, instead of affecting the statement of the facts constituting the cause of action, although an additional fact was rendered necessary, only required the party to show, upon the trial, that he had complied with it." 1 *Estee's Pleadings*, section 320, declares: "In pleading a contract which the statute of frauds requires to be in writing, e. g., a contract relating to

lands, it is not necessary to allege the facts relied on to take the case out of the statute. It is sufficient on demurrer to allege that a contract was made. Such an allegation is to be understood as intending a real contract—something which the law would recognize as such. ⁶⁰⁸ There is no reason for departing, under the code, from the former well-settled rules in law and equity. The existence of a writing in such case is a matter of evidence; it is not one of the pleadable facts." "Thus, a complaint upon an undertaking to answer for the debt of a third person is good, though it does not allege that either the promise or the consideration was in writing": See, also, 8 Am. & Eng. Ency. of Law, 745, and cases cited. Applying these well-established principles to the facts in this case, it follows that the court erred in sustaining the demurrer.

Judgment reversed.

All the justices concurring, except Lumpkin, P. J., and Cobb, J., who were disqualified.

STATUTE OF FRAUDS—PLEADING.—Compliance with the statute of frauds need not be pleaded either at law or in equity, because it is presumed. If the agreement is alleged to have been made between the parties, it will be presumed to have been in writing and signed, when such signature and writing are necessary to its validity: *Speyer v. Desjardins*, 144 Ill. 641; 86 Am. St. Rep. 473, and note, showing the nature of the statute of frauds as a defense.

MARSHALL v. MACON SASH, DOOR & LUMBER Co.

[108 GEORGIA, 725.]

NEGLIGENCE CAUSING DEATH—ACTION FOR, BY CHILD, FOR HOMICIDE OF ITS STEPFATHER.—Under a statute authorizing a child to recover for the homicide of a parent, it has no right of action for the homicide of its stepfather.

Action for damages.

Marion W. Harris, for the plaintiff in error.

Dessau, Bartlett & Ellis, for the defendant in error.

⁷²⁵ LEWIS, J. Suit was brought by three minor children, by their next friend, to recover damages from the defendant company by reason of its negligence, whereby Jim Price, the stepfather of the plaintiffs, was killed. It is alleged that plaintiffs are the only heirs of Price, he having left no widow and no other children, and that he married their mother eight years

prior to his death, and from the time of said marriage to the day of his death he maintained and supported plaintiffs as his children, rearing them in his own home, feeding, clothing, and schooling them, and exercising over them complete parental control by consent of their mother and of themselves; and that such relation continued up to the date of his death, up to ⁷²⁶ which time he not only contributed to their support, but they were entirely dependent upon him for a livelihood. The action was dismissed on demurrer on the ground that stepchildren have no right of action for a homicide of a stepfather under the law of Georgia. To this ruling of the court the plaintiffs excepted.

The plaintiffs base their action upon this provision of the Civil Code:

"Sec. 3828. A widow, or, if no widow, a child or children, may recover for the homicide of the husband or parent; and if suit be brought by the widow or children, and the former or one of the latter dies pending the action, the same shall survive in the first case to the children, and in the latter to the surviving child or children. The husband may recover for the homicide of his wife, and if she leaves child or children surviving, said husband and children shall sue jointly, and not separately, with the right to recover the full value of the life of the deceased, as shown by the evidence, and with the right of survivorship as to said suit if either die pending the action. A mother, or, if no mother, a father, may recover for the homicide of a child minor or sui juris, upon whom she or he is dependent, or who contributes to his or her support, unless said child leave a wife, husband, or child. Said mother or father shall be entitled to recover the full value of the life of said child."

The clear meaning of these words, in the first sentence quoted, is that a widow may recover for the homicide of her husband, and, if no widow, a child or children may recover for the homicide of the father. It is contended in this case that the stepfather stands in loco parentis as to his stepchildren, and that the latter may recover damages for the negligent homicide of the former. Our attention has been called to no authority in which it has ever been decided that the word "parent," either in the legal or ordinary acceptance of that term, includes a stepfather or stepmother. It is true that cases have arisen in which it has been held for some purposes that the stepfather may stand in loco parentis as to the children of his deceased wife. For instance, where he assumes the care and custody of his infant stepchildren, so long as he maintains them as members of his family under the

parental roof, the ⁷²⁷ law would give him a right to control and govern them as he would his own children; and he would also have the right to protect them against wrong and injury. But it would not follow from this, either that he was under any legal obligation to maintain and support them, or that the children would have any legal interest in his life. Plaintiff in error cites several authorities, and among them the case of *Holloway v. Holloway*, 86 Ga. 576, 22 Am. St. Rep. 484, where it was held that one who undertakes to care for stepchildren is the head of a family, and as such is entitled to a homestead. This right grows out of the statute which gives to each head of a family the right to a homestead, and does not confine the right simply to the parent of minor children. One who assumes the care and support of an infant brother, left fatherless and motherless by the death of its parents, stands in some respects in loco parentis as to such infant, but it certainly cannot be urged that on this account the minor would have a right of action for the homicide of the older brother under the provisions of section 3828 of the Civil Code. The word "parent" is used in the statute for the manifest reason that the child or children might, under certain circumstances, recover either for the homicide of the mother or the father. In the event of no widow, the statute gave them a right of action for the homicide of their father; in the event of the homicide of the mother, the statute gave them a joint right of action with the husband.

The right of action provided for in the above code section did not exist at common law. This statute is therefore, in derogation of the common law; and applying to it the universal rule of strict construction, we cannot see how there is any escape from the conclusion that the legislature never contemplated giving a child any right of action for the homicide of a step-parent.

Judgment affirmed.

All the justices concurring.

NEGLIGENCE—DEATH.—ACTIONS for negligence causing the death of a person are purely statutory, and can only be maintained in the name of the person in whom the right of action is vested by the statutes of the state where the injuries resulting in death are inflicted: *Note to Hindry v. Holt*, 65 Am. St. Rep. 238.

COLEMAN, BURDEN & WARTHEN COMPANY v.
DANNENBERG COMPANY.

[103 GEORGIA, 784.]

THE MAXIM THAT HE WHO COMES INTO EQUITY must come with clean hands applies where one using a deceptive trademark seeks relief against another who uses the same deceptive trademark on the same character of goods.

INJUNCTION—TRADEMARKS—DECEPTION.—A court of equity will not, by injunction, interfere to protect a person in the use of a trademark which is employed to deceive the public.

TRADEMARKS—DECEPTION.—A trademark placed upon shoes, which represents them to have been made by the "Old Colony Shoe Co., Rockland, Mass.," a place having a reputation for making fine shoes, when, in fact, there is no such company in existence, and the shoes were not made at Rockland, but at another place, and by another company, is calculated to deceive the public as to the manufacturer of the article and the place where it is manufactured, and one using it is not entitled, in a court of equity, to any relief against one who uses the same deceptive trademark on the same character of goods.

Equitable petition.

Steed & Wimberly, for the plaintiff in error.

Hardeman, Davis & Turner, for the defendant in error.

⁷⁸⁵ SIMMONS, C. J. It appears from the record, that in the year 1889 the S. T. Coleman & Burden Company of Macon, Georgia, a corporation dealing in shoes, adopted as a trademark for its shoes the words "Old Colony Shoe Company, Rockland, Mass." They sold shoes bearing this trademark up to the year 1893, when the company was dissolved. Subsequently a corporation by the name of the Coleman, Burden & Warthen Company was incorporated to do a shoe business in Atlanta, Georgia. This latter company purchased the trademark as one of the assets of the former company. In 1894 and prior to that time, the Dannenberg Company, of Macon, Georgia, were selling shoes bearing this trademark. Ascertaining this fact, the Coleman, Burden & Warthen Company demanded of the Dannenberg Company that it desist from using the trademark. This demand was refused, and the Coleman, Burden & Warthen Company thereupon filed an equitable petition, seeking to enjoin the Dannenberg Company from the use of the trademark, and to recover damages which it had sustained by reason of such use. Upon the trial of the case it appeared from the evidence that, at the time this trademark was adopted in 1889, Rockland, Massachusetts, had a reputation for making fine shoes; that the shoes upon which

this trademark was placed were not made in Rockland; they were not manufactured by the "Old Colony Shoe Co., Rockland, Mass." (there being in fact no such company in existence), but by the Commonwealth Shoe & Leather Company, of Boston, Massachusetts. The pleadings and the petitioner's evidence having shown these facts and others unnecessary here to mention, the court below ⁷⁸⁸ dismissed the action. The plaintiff excepts to this ruling and assigns it as error.

We have carefully considered the record, and are satisfied that the court did not err in dismissing the action. It is a well-recognized principle of equitable jurisprudence that he who comes into equity must come with clean hands. No person is entitled to equitable relief in a case where it is shown that his action is founded upon a matter in which his conduct is deceiving or is calculated to deceive the public. On the subject of trademarks, the rule as to misrepresentations by the plaintiff seems to be well settled. In so far as it relates to misrepresentation as to the place of manufacture, it is announced in 26 American and English Encyclopedia of Law, 462, as follows: "It has been decided in a number of cases, that a false statement with reference to the origin of an article . . . is such deceit as will disentitle the plaintiff to relief against infringement. So, also, with reference to the place of manufacture; if an article is made in one place, but claimed to be derived from another, such a statement will deprive the plaintiff of relief. Thus, where the plaintiff had resided at one place, but subsequently moved his factory to another near by; but failed to state upon his label that he had made the change, or that he was manufacturing at the new place, relief was denied him." In the case of *Joseph v. Macowsky*, 96 Cal. 518, it was held that: "A person who comes into a court of equity for an injunction in a case of this kind must come with clean hands; he cannot be granted relief upon a claim to the exclusive use of a trademark which contains a false representation, calculated to deceive the public as to the manufacturer of the article and the place where it is manufactured." In *Ex parte Farnum*, 18 Pat. Off. Gaz. 412, Marble, Commissioner, said: "Were I to admit the word 'Lancaster' to be an essential feature of the mark, the case would then be open to the further objection that the use of such word would convey a false impression to the public—viz., that the goods were manufactured in Lancaster, when in fact they were made in Philadelphia. . . . Words calculated to deceive the public as to the place of manufacture should not be allowed registration."

In the case of *Hobbs v. Francais*, 19 How. Pr. 787 567, it is said: "To secure to the plaintiff by injunction an exclusive use of such a label, and the exclusive privilege of thereby deceiving the public, is an object to which a court of equity will not lend its aid. The court does not refuse its aid in such a case from any regard to the defendant, who is using the same efforts and misrepresentations to deceive the public; but on the principle that it will not interfere to protect a party in the use of trademarks which are employed to deceive the public. In the case of *Palmer v. Harris*, 60 Pa. St. 156, 100 Am. Dec. 557, *Sharewood, J.*, said: "The party who attempts to deceive the public by the use of a trademark which contains on its face a falsehood as to the place where his goods are manufactured, in order to have the benefit of the reputation which such goods have acquired in the market, is guilty of the same fraud of which he complains in the defendant": See, also, *Manhattan etc. Co. v. Wood*, 108 U. S. 218; *Siegert v. Abbott*, 61 Md. 276; 48 Am. Rep. 101; *Kenny v. Gillett*, 70 Md. 574. In the present case, the trademark placed upon the shoes of the plaintiff represents such shoes to have been made by the Old Colony Shoe Co., Rockland, Mass. The evidence shows that there was no such company, and that the shoes were made, not at Rockland, but at another place and by the Commonwealth Shoe & Leather Company. The trademark of the plaintiff is, therefore, a misrepresentation which is calculated to deceive the public by leading consumers to believe that the shoes were manufactured at a place which had a reputation for making fine shoes and by a manufacturing company located at that place. Under the rulings of the above-cited cases, which are decisive of the question, we think that the plaintiff is not entitled to any relief in a court of equity against one who uses the same deceptive trademark on the same character of goods.

Judgment affirmed.

All the justices concurring.

EQUITY—MAXIM—INJUNCTION—TRADEMARKS.—If one resorts to deception, and the similarity of a trade name used by him is calculated to deceive the public, its use will be enjoined: Note to *Cady v. Schultz*, 61 Am. St. Rep. 767; but a party will not be permitted to come into a court of equity to enable him to reap the fruits of fraud: *Commercial Nat. Bank v. Burch*, 141 Ill. 519; 33 Am. St. Rep. 331; and a person will not be protected by a court of equity in the use of a trade name, when such use would only be to mislead and defraud the public: *Messer v. The Fadettes*, 168 Mass. 140; 60 Am. St. Rep. 371. The maxim that he who comes into equity must come with clean hands applies where one who simulates another's

trademark applies for relief against a third party simulating the trademark that he himself is using in fraud of the original owner's rights, for he is in no condition to complain: *Parlett v. Guggenheimer*, 67 Md. 542; 1 Am. St. Rep. 418.

BOYD v. SPENCER.

[108 GEORGIA, 828.]

CARRIERS—TICKET AS CONTRACT.—A ticket issued to a passenger by a common carrier does not constitute the contract between the parties unless made so by express agreement.

RAILROADS—TICKETS—LIMITATION AS TO TIME.—A railroad ticket, without a limitation as to time, is good for use at any time within the statute of limitations.

RAILROADS—TICKETS—EXPRESS CONTRACT AS TO TIME.—A statement, stamped upon a railroad ticket, showing when it expires, is not binding on the purchaser unless his attention is called to it and he assents to its terms. Otherwise, there is no express contract as to the time of use.

RAILROADS—TICKETS—LIMITATION AS TO TIME—NOTICE.—A railroad ticket, for which full fare has been paid, and which has a limitation as to time stamped thereon, but of which the purchaser has no notice at the time of the purchase, entitles him to a passage after the time stamped on the ticket has expired.

RAILROADS—TICKETS—LIMITATION AS TO TIME.—THE BURDEN of showing that there was an express contract limiting the use of a railroad ticket to a certain time is on the company.

NONSUIT.—IT IS ERROR TO GRANT a nonsuit where the record shows that the plaintiff has made out a prima facie case.

Action for damages.

Jones, Martin & Jones, for the plaintiff in error.

Shumate & Maddox, for the defendant in error.

828 COBB, J. Boyd sued the receivers of the railroad company for damages alleged to have been sustained on account of their refusal to honor a ticket for passage on their train, and ejecting him therefrom. It appears from the evidence that the plaintiff bought and paid full fare for the ticket in question, from the agent of the defendants at Dalton. The ticket had stamped upon it a statement that it would expire by midnight of the next day; but plaintiff's attention was not called to this fact by the agent, and he did not find it out until some time afterward. After buying the ticket the plaintiff discovered that he had made a mistake as to the ticket, he having intended to purchase one on another train which left Dalton about the same time for Atlanta, the place of his destination. Upon discovering the mistake he tendered the ticket to the agent, with a re-

quest that his money be refunded, which was refused. About three weeks after the purchase plaintiff attempted to use the ticket on defendants' train, but the conductor refused to receive it, and compelled him to leave the train. At the conclusion of the plaintiff's testimony the court granted a nonsuit, and the plaintiff excepted.

⁸²⁰ 1. A ticket issued to a passenger by a common carrier does not constitute the contract between the parties unless made so by express agreement. It is in the nature of a receipt for the passage money, and is generally only a token the purpose of which is to enable the carrier to recognize the bearer as the person entitled to be carried. Any other system by which the business of the carrier would be equally facilitated would answer the same purpose as the ticket system: Ray on Passenger Carriers, sec. 145, p. 515; Fetter on Carriers of Passengers, sec. 275; Quimby v. Vanderbilt, 17 N. Y. 306; 72 Am. Dec. 469.

In the absence of any express agreement as to the time in which the ticket may be used, it would undoubtedly entitle the purchaser to a passage over the road of the carrier issuing the same, at any time within the period in which the contract entered into between them might be enforced: Fetter on Carriers of Passengers, sec. 285; Hutchinson on Carriers, sec. 576; Pennsylvania R. R. Co. v. Spicker, 105 Pa. St. 142. The question for decision in the present case is, whether or not a ticket for which full fare has been paid, and which has a limitation as to time stamped thereon, but of which the purchaser has no notice at the time of the purchase, would entitle such purchaser to a passage on the road of the carrier issuing the ticket, after the time stamped on the ticket has expired. As above stated, the carrier would be bound to carry the purchaser of an unlimited ticket over its line of road at any time before the rights of such purchaser would be lost under the law. Section 2276 of the Civil Code provides that: "A common carrier cannot limit his legal liability by any notice given, either by publication or by entry on receipts given or tickets sold. He may make an express contract, and will then be governed thereby." The ticket in the present case not being the contract between the parties, because not made so by express agreement, no limitation as to time stamped thereon will be binding on the purchaser: See Phillips v. Georgia R. R. etc. Co., 93 Ga. 356. The testimony for the plaintiff makes substantially this case: He purchased a full fare ticket without any notice of limitation as to time, and did not discover this fact until some time afterward. Relying

upon the absence of any special contract as to the time ³³⁰ in which the ticket might be used, he boarded the train of the defendants and sought to secure a passage thereon on the faith of the ticket. Upon presentation of the ticket passage was refused, and upon his refusal to pay the fare demanded he was ejected from the train. Under these facts we think he was entitled to go to the jury.

It may be that where under an express agreement a ticket is sold at less than the usual rates, on condition that it shall not be used after a specified time, a purchaser would be bound by such a stipulation. The question in the present case, however, is not whether a carrier can by express agreement limit the time in which the ticket shall be used, but whether, under the plaintiff's evidence, it has been shown that he is not entitled to recover because a special contract had been made with him limiting the time in which his ticket should be used. A ticket without a limitation as to time being good for use any time within the statute of limitations, the burden of showing that there was an express contract limiting its use to a certain time is on the carrier. In order to make a prima facie case in controversies of the character now under consideration, it is only necessary for the plaintiff to prove that he had a contract of carriage which has been disregarded by the defendant. The carrier might defend by showing an express contract limiting the time in which it was to be performed. The plaintiff could, however, successfully meet this defense by proving that he had no notice of a limitation upon the ticket and did not assent to the same. The issues thus raised are properly for determination by a jury. The case of *Lewis v. Western etc. R. R. Co.*, 93 Ga. 225, does not conflict with the ruling here made. In that case the purchaser was furnished by the railroad agent with the character of ticket which he was accustomed to buy, from which knowledge of its contents might have been reasonably inferred, and the ticket was sold at a reduced rate. The evidence in the record showing that a prima facie case for the plaintiff was made out, it was error to grant a nonsuit.

Judgment reversed.

All the justices concurring.

RAILROADS—TICKETS AS CONTRACTS.—A railroad ticket is not a contract, but merely evidence of a contract: *Burdick v. People*, 149 Ill. 600; 41 Am. St. Rep. 329; *Johnson v. Concord R. R. Corp.*, 46 N. H. 213; 88 Am. Dec. 199. A contract between a railroad company and passenger is made when the ticket is bought, received and paid for: *Keut v. Baltimore etc. R. R. Co.*, 45 Ohio St. 284; 4 Am. St. Rep. 539.

RAILROADS—LIMITING TIME WITHIN WHICH TICKET MAY BE USED.—A railway company may limit the time within which a ticket issued by it may be used, and the passenger not using his ticket within the limited time, without any fault or failure of the company, cannot claim the right to ride on it afterward: *Notes to Commonwealth v. Power*, 41 Am. Dec. 479; *Boston etc. R. R. Co. v. Proctor*, 79 Am. Dec. 730; *Kansas City etc. R. R. Co. v. Rodebaugh*, 5 Am. St. Rep. 727. And the general rule is; that one who accepts a contract for the carriage of persons, and proceeds to await himself of its provisions, is bound by the stipulations and conditions expressed in it, whether he reads them or not: *Fonseca v. Cunard S. S. Co.*, 153 Mass. 553; 25 Am. St. Rep. 690. Compare note to *Kansas City etc. R. R. Co. v. Rodebaugh*, 5 Am. St. Rep. 727.

TRIAL.—A NONSUIT should not be granted if there is substantial evidence produced by the plaintiff in support of his case which should be weighed by the jury; *Note to Lowe v. Salt Lake City*, 57 Am. St. Rep. 713.

COSGROVE v. AUGUSTA.

[108 GEORGIA, 535.]

MUNICIPAL CORPORATIONS—POWER OF, UNDER "GENERAL WELFARE" CLAUSE OF CHARTER.—A city is not authorized, under the "general welfare" clause of its act of incorporation, to make it unlawful to carry on a lawful trade or business in a lawful manner.

MUNICIPAL CORPORATIONS—POWER OVER HACKMEN—INVALID ORDINANCE.—The exercise of a hackman's right to enter the depot grounds of a railroad company, to ply his trade by there soliciting patronage, may be regulated by a city, under the general welfare clause of its charter, so as to protect the traveling public from annoyance, but if there is no provision in its charter authorizing it to regulate hacks, or the hack business, the city cannot, by ordinance, under the power derived from its general welfare clause, completely take away such right, especially where the hackman has secured his privilege from the owner of the premises.

MUNICIPAL CORPORATIONS.—PROHIBITIVE ORDINANCE AS TO BUSINESS.—An ordinance which prescribes that certain persons shall not carry on their business, which would otherwise be legitimate, in a particular place or on certain premises, is, as to such place or premises, clearly prohibitive, and to authorize the passage of such an ordinance, where the power is undoubted, the injury to the public, which furnishes the justification for the ordinance, should proceed from the inherent character of the business when conducted at such place or upon such premises.

MUNICIPAL CORPORATIONS — WHAT BUSINESS SHOULD NOT BE PROHIBITED.—If a business can be conducted in a particular place, or on certain premises, by proper persons, without harm or inconvenience to the public, the prosecution of it should not be entirely prohibited, but such necessary police rules and regulations should be prescribed for carrying on such business in that particular locality as may be necessary for the public good.

Certiorari. Cosgrove was tried and convicted for the violation of an ordinance of the city of Augusta, prescribing that: "It shall not be lawful for any hotel or boarding-house drummer or runner, hackman, cabman, or for any other person, to solicit cus-

tom or patrons by entering the Union passenger depot in this city, or by standing at the entrance thereof; but such drummer, runner, or hackman, cabman, or other person, as aforesaid, may stand outside the wall of the depot, as hereinafter provided, and in a respectful manner solicit custom or patronage, provided that he or they shall not pull or otherwise annoy a passenger or passengers, or otherwise act in a disorderly manner." The defendant was an agent and employé of a company doing a general hack business. and, acting in the line of his duty to the company to solicit the business of passengers on railroad trains, he went to a passenger in the Union passenger depot, who had just alighted from a train, solicited his custom, and conducted him to an omnibus. The defendant acted under the permission of the railroad company in doing the act complained of. The judgment imposing a fine was, on certiorari, assigned as error. The certiorari was overruled, and the defendant excepted.

Joseph B. & Bryan Cumming, for the plaintiff in error.

M. P. Carroll, W. H. Davis, and W. K. Miller, for the defendant in error.

§36 FISH, J. 1. There is nothing in the charter of the city of Augusta delegating to its city council express power to regulate hacks or the hack business. The powers of the council in this respect are derived from the general welfare clause in the act of incorporation. It is elementary that a municipal corporation, in the exercise of police power conferred by the general welfare clause of its charter, for the purpose of promoting the comfort, health, convenience, good order, and safety of its citizens, may pass reasonable ordinances for the regulation of lawful trade and occupations within its limits. But it is not authorized under such power to make it unlawful to carry on a lawful trade or business in a lawful manner. There is quite a **§37** difference between prohibition of a trade and the regulation of it. Indeed, "a power to regulate seems to imply the continued existence of that which is to be regulated." An ordinance which prescribes that certain persons shall not carry on their business, which would otherwise be legitimate, in a particular place, or on certain premises, is, as to such place or premises, clearly prohibitive; and to authorize the passage of such an ordinance, where the power is undoubted, the injury to the public, which furnishes the justification for the ordinance, should proceed from the inherent character of the business when conducted

at such place or upon such premises. Where, however, the business can be conducted there by proper persons without harm or inconvenience to the public, the prosecution of it should not be entirely prohibited, but such necessary police rules and regulations should be prescribed for carrying on such business in that particular locality as may be necessary for the public good: *Toronto v. Virgo* [1897], A. C. 88; 73 L. T. Rep. 449. On appeal from the supreme court of Canada, the privy council held (affirming the judgment of the court below), that where a municipal council had power to make by-laws for "regulating and governing" hawkers, et cetera, they did not have power to prohibit hawkers from plying their trade at all in a substantial and important part of the city, and that a by-law to that effect was ultra vires; that when the legislature intended to give power to prevent or prohibit, it did so in express words, and that the provisions of the act did not intend to include a power to prevent or prohibit in a power to regulate or govern. It is stated in the opinion that it was argued that the by-law did not amount to prohibition, because hawkers might still carry on their business in certain streets of the city, but Lord Davey, speaking for the council, said: "The question is one of substance, and should be regarded from the point of view as well of the public as of the hawkers. The effect of the by-law is practically to deprive the residents of the most important part of the city of the power of buying their goods from, or trading with, the class of traders in question. . . . At the same time, the hawkers, et cetera, are excluded from exercising their trade in that part of the city."

838 As somewhat in point, see Dillon on Municipal Corporations, 4th ed., sec. 325; 17 Am. & Eng. Ency. of Law, 254, and notes; Tiedeman's Law of Police, 289, 290; Horr & Bemis on Municipal Ordinances, sec. 30. The case of *Napman v. People*, 19 Mich. 352, is very similar to the case at bar. *Napman* was convicted before the recorder's court of the city of Detroit of violating an ordinance of that city, providing that: "No porter, runner, hackman, . . . omnibus agent . . . shall, on the arrival of any . . . railroad cars in the city of Detroit, for a period of fifteen minutes thereafter, go upon, or approach within twenty feet of, the . . . depot where such . . . railroad cars have . . . stopped running, or are about to stop running, unless such porter, runner, hackman, . . . omnibus agent, . . . be requested by a passenger to remove some trunk or other baggage from said . . . depot," et cetera. The facts, as found

by the recorder, were that, by an agreement between the Detroit & Milwaukee Railroad Company and the omnibus company, the drivers and agents of the latter, and they alone, were authorized and permitted to go within the depot of the former, immediately on the arrival of any train, to invite passengers to ride in their omnibuses. Napman was a driver of the omnibus company, and as such, under the above agreement, within fifteen minutes after the arrival of a train at the Milwaukee depot, entered therein and solicited passengers to take one of the vehicles of his company. It was for this act he was convicted. The supreme court, to which the case was carried by certiorari, directed that the conviction be quashed; and in the opinion says: "The main question, however, calls for a decision upon the validity of a prohibition which would prevent railroad companies from making such arrangements as are found by the recorder to have been entered into here. We have no difficulty in deciding that the city cannot lawfully interfere to prohibit such arrangements. The acts done are done upon the private premises of the railroad companies, over which the city can have no general control; and we think there is no reason why these companies, in their character of carriers of passengers, may not properly make such arrangements as will facilitate their reaching their destination anywhere in the city as well as at the end ⁸³⁹ of the track in the depot. Passengers who are strangers in the city have no means of knowing the character of the runners they may encounter outside of the depot; and if they can deal without confusion and at their leisure with responsible agents, it will be much more convenient and safe than to compel them to select from among strangers and in the noise and bustle attendant on the arrival of the cars. Such contracts of employment, made in the cars and on the premises by the companies, cannot be lawfully restrained by the city authorities. No driver can without permission go, of right, on the private property of the railroad company, unless employed by a passenger, and the city could give him no authority to do so. And any arrangements for the delivery of passengers and their baggage—not unlawful in themselves—which are made by the railroads in their own cars, and on their own lands, are exempt from municipal interference; and the ordinances, so far as they may attempt such interference, are invalid."

This court held in *Fluker v. Georgia R. R. etc. Co.*, 81 Ga. 461, 12 Am. St. Rep. 328, that: "The dominion of a railroad corporation over its trains, tracks, and 'right of way' is no less com-

plete or exclusive than that which every owner has over his own property. Hence, the corporation may exclude whom it pleases, when they come to transact their own private business with passengers or third persons, and admit whom it pleases, when they come to transact such business. This applies to selling lunches to, or soliciting orders from passengers for the sale of lunches": See cases cited at the end of first paragraph of the opinion, page 464. Also, *Old Colony R. R. Co. v. Tripp*, 147 *Mass.* 35; 9 *Am. St. Rep.* 661; *Griswold v. Webb*, 16 *R. I.* 649; *Perth Gen. Station Com. v. Ross* [1897], *A. C.* 478; 8 *Am. & Eng. R. R. Cas.* 639, and cases cited in note. While it may be true that to permit all the hackmen in a city to go into the railroad depots upon the arrival of trains, and, without rules regulating their conduct, allow them to offer their services and solicit patronage, would naturally create great confusion and bewilderment, and be very annoying, embarrassing, and harassing to passengers, yet the railroad company has the right to prevent this by excluding them all (see *Fluker v. Georgia R. R. etc. Co.*, 81 *Ga.* 461, 12 *Am. St. Rep.* 328), or by making such ⁸⁴⁰ rules and regulations as would obviate the evils: See *Cole v. Rowen*, 88 *Mich.* 219; *Kalamazoo Hack etc. Co. v. Sootsma*, 84 *Mich.* 192; 22 *Am. St. Rep.* 693. If necessary, the municipality, by prescribing reasonable rules for the conduct of hackmen while plying their trade upon the premises of the railroad companies, could avoid the annoyance, et cetera, to which the public might otherwise be subjected. As we have already seen, the dominion of a railroad company over its depot grounds is no less complete and exclusive than that which any other owner has over his own property; and the corporation can admit or exclude whom it pleases, except when they may come to transact business with it as a common carrier: *Fluker v. Georgia R. R. etc. Co.*, 81 *Ga.* 461; 12 *Am. St. Rep.* 328. Therefore, the railroad company, if it should see fit, could keep all the hackmen out of its depot grounds, if they did not come to transact business with it as a common carrier, or, if it pleased, it could admit them all upon its premises, unless legally deprived of such right by the city ordinance in question. The right to permit hackmen to ply their trade upon its premises by there soliciting patronage is a valuable property right belonging to the railroad company, similar to its right to sell or lease to another the privilege of conducting a restaurant, news-stand, lunch counter, storage-room for parcels, et cetera, in its depot, which, although its exercise may be regulated, cannot be completely taken away by the municipality

under the power granted it in the general welfare clause of its charter. To do so would be to deprive the railroad company of its property without due process of law. Moreover, the carrying on of a public hack business, not having any inherent evils, is lawful in itself; and where the privilege of soliciting custom for one's hack upon the premises of another, much frequented by the public needing hacks, has been secured from the owner of the premises, such privilege also becomes a valuable property right, of which the owner cannot be entirely deprived by the city under the power granted in its general welfare clause. Of course, the city under such power may regulate the exercise of the right by such reasonable rules as may be necessary for the comfort, convenience, and safety of the public.

⁸⁴¹ 2. The question whether a railroad company can lawfully grant to one or more hackmen the exclusive privilege of entering its depot for the purpose of soliciting and obtaining patronage is not made in this case. The only point presented by the writ of error is: Did the city of Augusta, under the power conferred by the general welfare clause of its charter, have the authority to pass the ordinance prohibiting all hackmen from entering the depot to solicit patronage therein, although the railroad company might consent for them to enter for such purpose? Whatever may be the rights, if any, of hackmen who may have been excluded from the depot, they are not here complaining. The fact that the employer of the plaintiff may have secured from the railroad company the exclusive privilege of plying his trade in its depot can certainly shed no light upon the question as to whether or not the city, under its charter, could lawfully exclude all persons engaged in the same business from the depot. The question made is whether Cosgrove was rightfully there, and not whether others were wrongfully excluded.

Judgment reversed.

Simmons, C. J., and Little, J., dissented.

The other justices concurred.

MUNICIPAL CORPORATIONS—PROHIBITIVE ORDINANCES. unless free from legal and constitutional objection, cannot be permitted to prejudice the rights and privileges of the citizen in respect to the use and enjoyment of his private property: *Phillips v. Denver*, 19 Colo. 179; 41 Am. St. Rep. 230.

MUNICIPAL CORPORATIONS—HACKS.—AN ORDINANCE compelling hackmen to observe the orders of the police as to the stands which they and their vehicles may take while waiting for employment near any railway station is valid: *Veneman v. Jones*, 118 Ind. 41; 10 Am. St. Rep. 100; *St. Paul v. Smith*, 27 Minn. 364; 88 Am. Rep. 298.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

CICERO LUMBER COMPANY v. CICERO.

[176 ILLINOIS, 9.]

MUNICIPAL CORPORATIONS—STREETS—POWER OF THE LEGISLATURE TO RESTRICT THE USE OF TO PURPOSES OF PLEASURE.—A statute authorizing a municipal corporation to set aside, on the petition of the owners of more than two-thirds of the frontage of lands thereon, as many as two of the streets of such municipality as pleasure driveways, and to prohibit traffic teams, hearses, and funeral processions thereon, and to free such streets from all business traffic, is not unconstitutional. It does not deprive any person of his property without due process of law, nor take or damage property for a public use without compensation, nor involve any violation of trust on the part of the municipal authorities.

STREETS, PUBLIC, POWER OF THE LEGISLATURE OVER.—The legislature of a state represents the public at large, and has, in the absence of special constitutional limitation and subject to the property rights of the abutting owners, full and paramount authority over the public streets and public places, though they are within a municipal corporation.

STREETS, PUBLIC—CHANGE IN USE OF.—The power to vacate and discontinue a street necessarily involves the power to change its use, as by limiting it to a designated class of travel and excluding other modes of travel or use. When no property rights are involved, the legislature may close a highway altogether, or may regulate its use, or restrict it to peculiar vehicles, or to the use of a particular motive power.

MUNICIPAL ORDINANCES—WHEN VOID AS INVOLVING THE EXERCISE OF AN ARBITRARY DISCRETION.—An ordinance forbidding the taking of any omnibus or heavy vehicle or any traffic vehicle upon a specified street or boulevard, except upon special permission of the board of trustees, is unreasonable and void, because it undertakes to invest that board with an unregulated official discretion, when the whole matter should be regulated by permanent local provisions operating generally and impartially, and prescribes no conditions upon which the special condition shall be granted or withheld.

MUNICIPAL ORDINANCE, VOID IN PART, WHEN VOID IN WHOLE.—When an ordinance consists of several distinct and independent parts, although one or more of them be void, the rest are equally valid as if the void clauses had been omitted; but where the ordinance is entire, and each part has a general influence over the rest, and one part is void, the entire ordinance is void. If the ordinance undertakes to exclude traffic vehicles from a public street, except upon special permission of the board of trustees, it cannot be assumed that it would have been enacted if the unregulated authority to grant such permission had not been incorporated therein, and hence it is wholly void.

MUNICIPAL ORDINANCE—INJUNCTION AGAINST ENFORCEMENT OF, WHO MAY OBTAIN.—When a void municipal ordinance forbids travel upon a public street with traffic vehicles, one whose place of business is so situate that he cannot carry it on if excluded from such street has such a special interest as entitles him to an injunction against the attempted enforcement of the void ordinance, where it also appears that the officers against whom the injunction is sought are insolvent.

COSTS IN EQUITY.—Where, after a suit was brought to enforce the enforcement of a void municipal ordinance, it was repealed, and another ordinance passed which was free from objection, the suit should be dismissed, but at the cost of the defendant.

Suit against the town of Cicero and its captain of police to enjoin the prosecution of complainant's teamsters for alleged violations of a municipal ordinance purporting to prohibit the driving of traffic teams upon Austin Boulevard. The bill alleged that the complainant was engaged in dealing in lumber and other building materials, and that its lumber yard was so situate that it could not conduct its business without using the boulevard for driving thereon with vehicles loaded with lumber. After the defendants had answered, they filed an affidavit showing that the prosecutions under the ordinance complained of had been dismissed, and the ordinance repealed by another ordinance. The complainant then filed a supplemental bill praying that the suit to be dismissed at the cost of the defendants. The bill was dismissed, but at the cost of the complainant, and it appealed.

Whitehead & Stoker and Cutting, Castle & Williams, for the appellant.

George B. Finch and F. W. Pringle, for the appellees.

18 MAGRUDER. J. As will be seen from the statement preceding this opinion, the only question involved in this case is a question of costs. The court below dismissed the original, amended and supplemental bills at the costs of the appellant here, which was the complainant below. The appellant insists that the bill should have been dismissed at the costs of the present appellees, who were the defendants below. In order to de-

termine whether the costs should have been paid by the appellant or by the appellees, it is necessary ¹⁹ to consider whether the original and amended bills of the appellant presented such equities as entitled it to relief: *Booth v. Gaither*, 58 Ill. App. 263.

1. It is charged by the appellant in the original and amended bills that the act entitled "An act to provide for pleasure driveways in incorporated cities, villages and towns," approved March 27, 1889, in so far as it authorizes the corporate authorities of such municipalities to take public highways for pleasure driveways, and gives them power to prohibit traffic teams thereon, and to impose penalties for the violation of ordinances prohibiting the travel of such teams thereon, is unconstitutional and void; and that any ordinance passed by any city, village, or town under and in pursuance of said act is also illegal and void as being based thereon. The first question, therefore, presented for our consideration is whether or not the act of March 27, 1889, is constitutional.

Section 1 of the act provides "that the city council in cities, the president and the board of trustees in villages or the board of trustees in incorporated towns, whether incorporated under the general law or special charter, shall have the power to designate by ordinance the whole or any part of, not to exceed two streets, roads, avenues, boulevards, or highways, under their jurisdiction, as a public driveway, to be used for pleasure driving only, and to improve and maintain the same, and also to lay out, establish, open, alter, widen, extend, grade, pave, or otherwise improve and maintain not more than two roads, streets, or avenues, and designate the same as pleasure driveways, to be used for pleasure driving only, provided, said powers shall only be exercised when said corporate authorities are petitioned thereto by the owners of more than two-thirds ($\frac{2}{3}$) of the frontage of land fronting upon said proposed pleasure driveways."

Section 2 of said act provides that "said pleasure driveways may be laid out, extended, and improved under the provisions of article 9 of an act to provide for the incorporation ²⁰ of cities and villages, approved April 10, 1872, in force July 1, 1872, and any and all amendments thereto."

Section 3 of said act provides that "said corporate authorities may, by ordinance, regulate, restrain, and control the speed of travel upon said pleasure drives, and prescribe the kind of vehicles that shall be allowed upon the same, and in all things may regulate, restrain, and control the use of said pleasure drive-

ways by the public or individuals, and may exclude therefrom funeral processions, hearses, and traffic teams and vehicles, so as to free the same from any and all business traffic or objectionable travel, and make the same a pleasure driveway for pleasure driving only, and may prescribe in such ordinances such fines or penalties for the violation thereof as they are allowed by law to prescribe for the violation of other ordinances": Sess. Laws 1889, p. 83.

The town of Cicero, one of the appellees herein, is an incorporated town created by a special act of the legislature: 3 Private Laws 1869, p. 666. By its charter the town of Cicero has, among others, the following powers: "To control and regulate the highways, streets, alleys, and public places and abate any obstructions, encroachments, or nuisances thereon. . . . The board of trustees shall have power from time to time, first, to open and lay out any new street, alley, or highway, and to cause any street, alley, or highway to be altered, widened, extended, laid out, vacated, bridged, graded, macadamized, paved, planked, clayed, graveled or otherwise improved, and keep the same in repair."

It will be observed that, by section 1 of the act of 1889, not to exceed two streets or roads can be used for pleasure drives only; that is to say, the municipality may set apart and designate one or two streets as pleasure driveways, but not more than two. This restriction as to the number of streets or roads to be designated as pleasure driveways leaves all the other streets and roads in the municipality to be used for general travel and for traffic teams.

²¹ It is also to be observed that the power to set apart a street or road as a pleasure driveway can only be exercised when the corporate authorities are petitioned thereto by the owners of more than two-thirds of the frontage of land, fronting upon said proposed pleasure driveways. The power of the corporate authorities is thus limited and restrained by the wishes of a large proportion of the property owners, whose property fronts upon the road or street to be converted into a pleasure driveway.

Counsel for appellant take the ground that the right of each citizen to travel on and use the common public highways with an ordinary vehicle in the prosecution of his lawful business is a property right, of which he can not be deprived without due process of law. They also contend that, when this right is taken from the citizen by the provisions of the above act, there is thereby a taking of private property for public use without just com-

pensation. In other words, counsel invoke, in favor of their contention that the act is unconstitutional, sections 2 and 14 of article 2 of the constitution: 1 Starr & Curt. Ann. Stats., 2d ed., 100, 113. Counsel furthermore refer to many decisions which hold that the fee of the streets in cities or incorporated towns is held in trust by the corporation for the benefit of the public; and that a limitation of the use of such a street to the purposes of a pleasure driveway, instead of general traffic, is a violation of the trust.

Such an act as the act of 1889 does not in any way deprive a citizen of his property without due process of law, or take or damage private property for public use without just compensation, or involve any violation of trust upon the part of the municipal authorities.

"The legislature of the state represents the public at large, and has, in the absence of special constitutional restraint and subject . . . to the property rights and easements of the abutting owner, full and paramount authority over all public ways and public places": 2 Dillon ²² on Municipal Corporations, 4th ed., sec. 656. "The plenary power of the legislature over streets and highways is such that it may, in the absence of special constitutional restrictions, vacate or discontinue them, or invest municipal corporations with this authority. Without a judicial determination, a municipal corporation, under the authority conferred by its charter to locate and establish streets and alleys and to vacate the same, may constitutionally order a vacation of a street; and this power, when exercised with due regard to individual rights, will not be restrained at the instance of a property owner, claiming that he is interested in keeping open the streets dedicated to the public": 2 Dillon on Municipal Corporations, sec. 666.

While it is true that the public highways are for the use of the general public, it is at the same time true that the legislature is a representative of the public at large. As such representative, it may grant the use or supervision and control over the highways to a municipal corporation, so long as the highways are not diverted to some use, substantially different from that for which they were originally intended. There is no special restriction in the constitution of this state upon the power of the legislature in this regard. A city or incorporated town not only bears a property or private relation to the state, but it also bears a political relation thereto. In its political relation, it is merely an agency of the state. The municipal corporations of

the state are the mere creatures of the state, and exist by the authority of the legislature and subject to its control. Hence, when a city or incorporated town holds a street for the benefit of the public, it holds it for the benefit of that entire public, of which the legislature is the representative. As the municipality is a mere agent of the state, the legislature can direct the manner in which it shall control the streets within its limits. The property rights and easements which the municipality has in public streets and ways are held by it at the will of the legislature. Of course, ²³ this statement is subject to the further statement that such property as the municipality holds in its private capacity is as much protected by the constitution as the property of the private citizen. But, so far as it holds property as a mere agency of the government of the state, the constitutional provisions above referred to have no application, because the state can control the agencies created by it for the purpose of government. An act which limits the use of a street to the purposes of a pleasure driveway is in no sense class legislation. All the citizens are entitled to the use of the street for the purpose of a pleasure driveway. Neither the act of 1889 nor the ordinances passed by the town of Cicero in pursuance thereof unjustly discriminate between the rights of citizens to travel over Austin avenue or other streets of the town. The act is general in its operation upon all citizens who may think proper to employ their vehicles for other than traffic purposes over the street or streets of the city or town designated as pleasure boulevards. When an ordinance imposes restrictions upon citizens of a particular part of the city, or grants a particular privilege to a particular part of the citizens not given to all others, then it may be obnoxious to the charge of making an unjust discrimination between the citizens; but the act here under consideration is not subject to any such charge.

Section 22 of article 4 of the constitution provides that the general assembly shall not pass local or special laws "vacating roads, streets, alleys, and public grounds." This provision of the constitution recognizes the right of the general assembly to vacate roads and streets, provided that it does so by general laws, and not by local or special laws. Of course, the right of the legislature to vacate streets is subject to the condition that such vacation is not for the benefit of private parties, or for the purpose of devoting the streets so vacated to private uses. The right of the municipality to vacate the street is to ²⁴ be exercised only when the municipal authorities, in the exercise of

their discretion, determine that the street is no longer required for public use and convenience: *Smith v. McDowell*, 148 Ill. 51. The power to vacate or discontinue a street qualified in the manner thus stated necessarily involves the power to change the use of the street. The greater power of absolutely vacating necessarily includes the lesser power of regulating or restraining. If, therefore, the legislature had the power to confer upon the town of Cicero the authority to vacate one of its streets, it certainly had the power to confer upon that municipality the power to limit the use of a street to a particular purpose benefiting all the public, and not exclusively shared by any class of the citizens.

In *People v. Walsh*, 96 Ill. 232, 36 Am. Rep. 135, it was held that it is competent for the legislature to transfer the control of a street in a city or village to park commissioners, to be by them improved and controlled for boulevard and park purposes, where such purposes are not inconsistent with their use for ordinary travel. In *People v. Walsh*, 96 Ill. 232, 36 Am. Rep. 135, the case of *People v. Kerr*, 27 N. Y. 188, was referred to with approval and the following quotation was made therefrom: "So far as the existing public rights in these streets are concerned, such as the right of passage and travel over them as common highways, a little reflection will show that the legislature has supreme control over them. When no private interests are involved or invaded, the legislature may close a highway and relinquish altogether its use by the public, or it may regulate such use or restrict it to peculiar vehicles or to the use of particular motive power. It may change one kind of use into another, so long as the property continues devoted to public use. What belongs to the public may be controlled and disposed of in any way which the public agent sees fit": *Chicago v. Rumsey*, 87 Ill. 348; *Chicago v. Union Building Assn.*, 102 Ill. 379; 40 Am. Rep. 598. It is said by Dillon, in his work on Municipal Corporations, fourth edition, section 657: "As respects the public ²⁸ or municipalities, there is, in the absence of special constitutional restriction, no limit upon the power of the legislature as to the uses to which streets may be devoted." This court held to the same effect in *Meyer v. Teutopolis*, 131 Ill. 552; *True v. Davis*, 133 Ill. 522; *Barrows v. Sycamore*, 150 Ill. 588; 41 Am. St. Rep. 400; *Simon v. Northup*, 27 Or. 487.

This court has in many cases recognized the power of the city of Chicago to turn over a particular street to the control of park commissioners, and to permit the use of the street to be regu-

lated and governed by such commissioners. These cases concede the power of the legislature over the public streets, and its right to change the possession and control of the same when private rights are not violated. Ordinarily, such private rights are the rights of abutters, or property owners owning property fronting upon such street, and not the rights of citizens as to the character of the vehicles which they may drive over the streets: *McCormick v. South Park Commrs.*, 150 Ill. 516; *West Chicago Park Commrs. v. McMullen*, 134 Ill. 170.

There is nothing unreasonable in excluding traffic teams from a street designated and intended to be a pleasure driveway. Such a driveway must be constructed and paved in a particular manner; and if heavy teaming is allowed, injury would result and frequent repairing would be made necessary. Neither can it be said that pleasure and recreation are not as much for the good of the people as business and traffic: *Barrows v. Sycamore*, 150 Ill. 588; 41 Am. St. Rep. 400.

The legislative authority to do what is here objected to was conferred upon the town of Cicero under its charter before the passage of the act of 1889. But the act gave further protection to the rights of the people by requiring the assent of the owners of more than two-thirds of the frontage upon the street.

Our conclusion is that the act of 1889 is not unconstitutional for any of the reasons here urged against its validity.

²⁸ 2. It is next insisted by appellant that the ordinances of January 16, 1892, and of May 23, 1896, passed by the board of trustees of the town of Cicero, were illegal and void upon the alleged ground that no petition was presented to the corporate authorities of the town by the owners of more than two-thirds of the frontage of the land between the termini mentioned in said ordinances; and that the said ordinances are uncertain, unreasonable, not general and not impartial, as reserving to the corporate authorities the privilege of enforcing them or not at their pleasure.

The exhibits attached to the affidavits and answers show that petitions were filed for converting Austin avenue into a boulevard between the termini named in the ordinances; that these petitions were referred to a committee for verification; that such committee reported that all the signatures thereto had been verified, and that the signatures of the petitioners represented more than two-thirds of the frontage. The act of 1889 does not specify any particular kind of petition, and does not require that the petition shall be a single document. It appears here

that the town board was petitioned by the owners of more than two-thirds of the frontage of land fronting upon the driveway; and we are inclined to the opinion that the town board was sufficiently and legally petitioned to designate Austin avenue as a pleasure driveway between the termini mentioned in the ordinances.

But the other ground upon which the ordinance of May 23, 1896, is attacked as invalid is of a more serious character. By the ordinance of May 23, 1896, all persons are forbidden to take any omnibus or heavy vehicle or any traffic vehicle upon either of the boulevards therein named, except private wagons conveying families, "or upon special permission of this board." The meaning of this provision is that all traffic vehicles, except private wagons conveying families, are only forbidden the use of the boulevards in case their owners do not obtain the ²⁷ special permission of the board of trustees. In other words, the discretion is lodged with the board of trustees to permit or not to permit traffic vehicles to be used upon the boulevards in question. The ordinance, in so far as it invests the board of trustees with the discretion here indicated, is unreasonable. It prohibits that which is in itself and as a general thing perfectly lawful, and leaves the power of permitting or forbidding the use of traffic teams upon the boulevards to an unregulated official discretion, when the whole matter should be regulated by permanent local provisions operating generally and impartially. The ordinance is not general in its operation. It does not affect all citizens alike who use traffic vehicles. It is only persons driving traffic vehicles upon the boulevards without the permission of the board of trustees who are subjected to the penalties of the ordinance. The ordinance in no way regulates or controls the discretion vested thereby in the board. It prescribes no conditions upon which the special permission of the board is to be granted. Thus, the board is clothed with the right to grant the privilege to some and to deny it to others. Ordinances which thus invest a city council or a board of trustees with a discretion which is purely arbitrary, and which may be exercised in the interest of a favored few, are unreasonable and invalid. The ordinance should have established a rule by which its impartial enforcement could be secured. This position is sustained by the weight of authority: *Chicago v. Trotter*, 136 Ill. 430; *Rich v. Naperville*, 42 Ill. App. 222; *In re Frazee*, 63 Mich. 396; 6 Am. St. Rep. 310; *Plymouth v. Schultheis*, 135 Ind. 701; *State Center v. Barenstein*, 66 Iowa, 249; Commis-

sioners v. Northern Liberties Gas. Co., 12 Pa. St. 318; Austin v. Murray, 16 Pick. 126; Landis v. Vineland, 54 N. J. L. 75; State v. Mahner, 43 La. Ann. 496; State v. Dulaney, 43 La. Ann. 500; Yick Wo v. Hopkins, 118 U. S. 356; Newton v. Belger, 143 Mass. 598; 1 Dillon on Municipal Corporations, 4th ed., sec. 321; Baltimore v. Radecke, 49 Mo. 217; 33 Am. Rep. 239.

²⁸ It is insisted by appellees that the ordinance of May 23, 1896, is not void in the respect here indicated as to the whole of the ordinance, but only void as to the part of it which makes the use of traffic teams upon an avenue or boulevard dependent upon the special permission of the board of trustees. In support of this contention the well-known rule is invoked that, where certain provisions of an ordinance are void, the court will not declare void those provisions relating to the subject matter of the ordinance which are distinct and separate from the void provisions. If an ordinance, or even the same section of an ordinance, contains two separate provisions relating to different acts, with distinct penalties for each, one of which is valid and the other void, the ordinance may be enforced as to that part of it which is valid. When an ordinance consists of several distinct and independent parts, although one or more of them may be void, the rest are equally valid as if the void clauses had been omitted. But where an ordinance is entire, and each part has a general influence over the rest, and one part of it is void, the entire ordinance is void. The void part of the ordinance makes the whole ordinance void, if the void and valid parts are so connected as to be essential to each other: 1 Dillon on Municipal Corporations, 4th ed., sec. 141. We are inclined to think that the objectionable clause is here so intimately connected with the other portions of the ordinance, as to permeate the whole and make the whole void. The ordinance does not positively and absolutely exclude all traffic teams, but it only excludes such traffic teams as the board of trustees may not specially permit to pass over the avenue. But if it were true that the void portion of the ordinance can be separated from the valid portion so as to permit the latter to stand, it is nevertheless the fact that the portion of the ordinance, which confers upon the board of trustees the discretionary power already referred to, is the portion thereof which applies to the appellant in this case. The prosecutions were instituted ²⁹ against it or its employes because it was driving traffic vehicles over the boulevard, and not because it was driving private wagons containing families. The arrests of appellant's employes were made because of a violation

of that part of the ordinance, which confers the discretion upon the board, and which is, therefore, void.

Our conclusion upon this branch of the case is, that the ordinance of May 23, 1896, must be regarded as having been invalid, because of the discretionary power conferred upon the board of trustees.

3. It is claimed by the appellees that a court of equity had no jurisdiction in such a case as was made by the bill and amended bill of the appellant herein. The want of jurisdiction is sought to be established on two grounds. In the first place, it is said that the appellant did not allege in its bill any special damage to itself, different in degree and in kind from that suffered by the public at large. The general rule is that, when the duty about to be violated by the corporation or its officers is public in its nature, and affects all the inhabitants alike, one not suffering any special injury cannot, in his own name, or by uniting with others, maintain a bill for injunction. A private individual cannot maintain a bill to enjoin a breach of public trust without showing that he will be specially injured thereby. Where no injury results to the individual, the public only can complain. Hence, in the declaration or bill the party complaining must allege and prove some special damage, different in kind and degree from that suffered by the general public: *Chicago v. Union Building Assn.*, 102 Ill. 379; 40 Am. Rep. 598; *Barrows v. Sycamore*, 150 Ill. 588; 41 Am. St. Rep. 400; *Field v. Barling*, 149 Ill. 556; 41 Am. St. Rep. 311; *Smith v. McDowell*, 148 Ill. 51. If the rule thus announced is applied to the allegations of the bill in this case, it will be seen that facts are set up which show a special injury to the appellant, different in kind and degree from that suffered by the general public. The complaint made is not of the inconvenience suffered from being forbidden to travel upon the 20th boulevard with traffic wagons. Such inconvenience is suffered by all other persons using traffic wagons in common with the appellant. But the bill shows that there were only two avenues in the town of Cicero running north and south which could be used by the appellant for the purpose of delivering its lumber and building material to the persons to whom it was sold. These two avenues were Central avenue and Austin avenue. The bill alleges, that Central avenue was rendered impassable by the building of a sewer therein and a trench for the sewer, and the throwing up of dirt upon the sides of the trench. It also avers that the appellant was forbidden to use Austin avenue by the town authorities under the ordinances in question.

It was thus cut off from the use of any avenue, and thereby prevented from delivering the lumber and other material sold by it to the parties entitled to receive it. Its business was in this way injured and destroyed. The appellant, therefore, suffered a special injury different from that which was sustained by the general public.

In *Shero v. Cary*, 35 Minn. 423, which was an action for obstructing a highway, a complaint was held to be insufficient in the necessary averments of special damage which alleged generally that the plaintiff was compelled to travel by longer and worse roads, and could only reach certain places by trespassing upon private lands, and was thereby prevented from marketing his produce. The decision in that case, however, was based upon the decision in the case of *Houck v. Wachter*, 34 Md. 265; 6 Am. Rep. 332. Upon reference to the latter case, the declaration showed that, by reason of a certain obstruction in the highway, appellant was obliged to travel a longer and more circuitous route; and it was held that the declaration did not show such special damage as to entitle the appellant to maintain an action. It was, however, said in that case, that the declaration did not aver that the highway which was obstructed was the only way to and from appellant's ³¹ farm, or that such highway was necessary to enable him to pass and repass from his farm to mill and market. The plain intimation of the court there is that if the allegation had been that the highway obstructed was the only way to and from the farm, there would have been a sufficient allegation of special damage. But the mere fact that appellant was obliged to proceed by a very circuitous route was not a statement of any other inconvenience suffered by him than that which was common to the rest of the traveling community. It was also therein said that when a plaintiff had been delayed for four hours by an unlawful obstruction in the highway, and was thereby prevented from performing his journey as many times in a day as if the obstruction had not existed, there was a sufficient special or particular injury to entitle him to maintain the suit, because it appeared that he was engaged in carrying coal upon the highway, and the damage he suffered was in the conduct of his business and of a substantial nature, and was different in kind from that suffered by the public at large. So, in the case at bar, under the facts already stated, the appellant suffered damage of a substantial nature in the conduct of its business, which was different from that suffered by the general public.

In the second place, it is said that an injunction will not issue

to prevent the enforcement of an invalid ordinance; and that no case was made by the bills which justified the appellant in coming into a court of equity. It is true that where an ordinance has been enacted by the proper authorities, a court of equity will not interfere by injunction to restrain its enforcement in the appropriate courts upon the ground that such ordinance is illegal, or upon the alleged innocence of the parties charged; nor will the court enjoin proceedings for the enforcement of such an ordinance for the purpose of determining the validity of the ordinance when the defendant has an adequate remedy at law. But it is well settled that there ³³ are two exceptions to the rule that courts of equity will not interfere to restrain trespasses, whether committed under the forms of law or otherwise. These exceptions are: 1. To prevent irreparable injury; and 2. To prevent a multiplicity of suits. It may be that the bills of appellant could not be sustained for the purpose of preventing a multiplicity of suits, because the suits sought to be enjoined were not between different persons assailing the same right and thing, but were cases where the same right was disputed between two persons only for themselves alone. However this may be, the bills were sufficient upon the other ground; that is to say, for the purpose of preventing irreparable injury. The appellant showed that it had no means of transacting its business without the use of Austin avenue, and that, whenever one of its wagons went upon such avenue, the driver thereof was arrested under the ordinance and a number of prosecutions were instituted against it. The bill alleges that the officers of the town instituting these prosecutions were insolvent, so that no damages could be recovered against them in an action at law. In *Poyer v. Des Plaines*, 123 Ill. 111; 5 Am. St. Rep. 494; *Chicago Stock Exchange v. McLaughry*, 148 Ill. 372, and *Commissioners of Highways v. Green*, 156 Ill. 504, there were no allegations in the bills that the parties charged with the trespasses were insolvent. In this respect those cases are different from the case at bar. In *Owen v. Crossett*, 105 Ill. 354, it was said (page 357): "It is first urged in affirmance of the decree dismissing the bill that it will not lie to enjoin a trespass. Such is undoubtedly the rule where it is a simple trespass to property and is but a single act, and the person committing or threatening the trespass is able to respond in damages; but where he is insolvent and repeated trespasses of a grave character are threatened to be repeated, equity will interfere to prevent the wrong by restraining the threatened

trespass." This language expressly fits the facts in the case at bar.

²³ Our conclusion is, that a court of equity had jurisdiction to entertain the bills filed by the appellant, both upon the ground that the bills showed a special damage to the appellant different in kind and degree from that suffered by the general public, and also upon the ground that appellant, according to the showing of the bills, had suffered irreparable injury.

Inasmuch as the appellant was properly in a court of equity, and inasmuch as the ordinance, under which its employes were prosecuted, was void by reason of the discretion vested in the board of trustees, a case was made by the original and amended bills, which entitled the appellant to relief, even though its charge that the act of 1889 was unconstitutional was not sustained. The original, amended, and supplemental bills, therefore, should have been dismissed by the circuit court at the costs of the appellees, and not the cost of the appellant. Of course, after the ordinance of May 23, 1896, was repealed, and the new ordinance of July 27, 1896, was passed without the objectionable clause, and after all the prosecutions against appellant's employes were dismissed, there was no longer a necessity for continuing the litigation between the parties to these suits, except so far as it was necessary to dispose of the question of costs. The prayer of the supplemental bill, filed by the appellant, was for a dismissal of the suit at the costs of the defendants thereto, the present appellees. We are of the opinion that the prayer of the supplemental bill in this respect should have been granted and that the court erred in requiring the appellant, instead of the appellees, to pay the costs of the proceeding.

For the error thus indicated, the decree of the circuit court is reversed, and the cause is remanded to that court with directions to dismiss the bills at the costs of the defendants below.

MUNICIPAL CORPORATIONS—STREETS OF—POWERS OF LEGISLATURE OVER—DIVERSION FROM USE.—The legislature has power to vacate a public street without the consent of the persons whose private interests are or may be affected by it: *Paul v. Carver*, 24 Pa. St. 207; 64 Am. Dec. 649. It is competent for the legislature to transfer the control of the streets of a city or village to park commissioners, for the purposes of a boulevard and driveway, not inconsistent with the ordinary use of such street: *People v. Walsh*, 96 Ill. 232; 36 Am. Rep. 135. A city vested with power to regulate the use of its streets has no power to divert their uses from those to which they were dedicated: *State v. Murphy*, 134 Mo. 548; 56 Am. St. Rep. 515, and note.

MUNICIPAL CORPORATIONS—ORDINANCES VOID IN PART—VALIDITY.—An ordinance void in part is void altogether where

all its parts are connected with and essential to one another: *State v. Webber*, 107 N. C. 902; 22 Am. St. Rep. 920. An ordinance may be good in part and bad in part. It is only necessary that the good and the bad parts be so distinct and independent that the invalid parts may be eliminated and what remains constitute the essential elements of a complete ordinance: *Eureka City v. Wilson*, 15 Utah, 67; 62 Am. St. Rep. 904, and note.

INJUNCTION AGAINST VOID ORDINANCES.—The enforcement of a void municipal ordinance may be enjoined in equity although its invalidity has not been determined in an action at law: *Sylvester Coal Co. v. St. Louis*, 130 Mo. 323; 51 Am. St. Rep. 566. It should be granted when there is no plain, adequate remedy at law and it is necessary to prevent irreparable injury: *Austin v. Austin City Cemetery Assn.*, 87 Tex. 330; 47 Am. St. Rep. 114, and note.

BOYD v. BOYD.

[176 ILLINOIS, 40.]

COTENANTS—ADVERSE TITLE—ACQUISITION OF BY.

—One coming into the possession of lands under a common title with others cannot assert such title while he remains in possession, nor can he purchase an outstanding title and assert it against his cotenants.

COTENANTS—ADVERSE POSSESSION BY.—After a cotenant enters into the possession of the property of the cotenancy with nothing to show that his entry was hostile or that his subsequent possession became adverse, a state of facts must be proved from which an actual ouster may be inferred.

COTENANTS—KNOWLEDGE OF RIGHTS NECESSARY TO AN ADVERSE POSSESSION.—Where a cotenant was a minor when exclusive possession of the lands was taken by his cotenant, and he knew nothing of his interest in the lands, such possession, however long continued, does not amount to an ouster nor ripen into a prescriptive title until he obtains knowledge of his rights and that the cotenants in possession hold in hostility to him.

A. G. Crawford, for the appellant.

Matthews, Higbee & Grigsby, and Doocy & Bush, for the appellees.

⁴⁰ PHILLIPS, J. This was a proceeding in partition, begun October 5, 1889, by certain heirs of James Boyd, who died intestate in June, 1863, the owner of certain lands, leaving a widow but no children. He left surviving him a father, John Boyd, two brothers, Robert and William Boyd, one sister, Sally A. Crook, and the children of a deceased brother, John Boyd, who died in the army, intestate, April 2, 1862, among which children was appellant, then seven years old, and the other minor children, for which minors Robert Boyd was appointed guardian about the year 1869, in ⁴¹ the state of Indiana, where he and they at the time resided. The record is not clear, but it is under-

stood that he removed from Indiana to Pike county, Illinois, where the land in controversy is situated, bringing these minor children with him, about that time. Whether he removed to Illinois to look after his interest in the estate of his brother James as well as that of his wards is not stated, neither is it stated whether any letters were taken out of the estate of James Boyd. The widow inherited one half of the real estate, the father two-twelfths, the three brothers and a sister one-twelfth each. The maiden name of the widow was Williams. She, after marrying a man by the name of Smith, who died, married John Brawley, who survived her, she dying intestate February 14, 1868, without children. Brawley inherited one-half of her estate which had not been conveyed by her before her death, and the remainder passed to her brothers and sisters. The only real defendants in this case, as stated by both parties, are John W. and David Boyd.

The bill alleges that James Boyd died seised in fee of the southwest quarter of the northwest quarter of section 5; the south half of the northeast quarter and the west half of the southeast quarter of section 6; also, the east half of the southwest quarter and the northwest subdivision of the southwest quarter of section 6, said to contain fifty-eight acres, all in township 5, range 6, west of the fourth principal meridian, in Pike county, Illinois. The answer of defendants admits that James Boyd died seised in fee of all of said lands except the north one-third of the east half of the southwest quarter and the south two-thirds of the east half of the southwest quarter of said section 6, which it is alleged he never owned, but that it was owned by one James R. Dutton, who conveyed the same to the defendants June 4, 1887. It avers that the widow of James Boyd, and her surviving husband, John Brawley, conveyed certain of the lands, which title by mesne conveyances came to the defendants; that ⁴² John W. Boyd owns in fee simple, with a perfect chain of title, certain of said lands, and that the lands of which James Boyd died seised are held in fee by John W. and David Boyd and two others, who afterward conveyed to them; that complainants do not now have, and never had, any interest in said lands, et cetera. The answer does not set up the statute of limitations.

It is observed that the answer admits James Boyd was seised in fee, at the time of his death, of all of said lands except the east half of the southwest quarter of section 6. The evidence shows, as to this tract, that James Boyd was in possession of it at his death under claim of deed from the swamp land commis-

sioners; that his widow took possession thereof immediately after his death; that she conveyed an undivided one-half if it January 14, 1864, and that John Boyd, the father of James Boyd, deceased, and William Boyd, the brother, quitclaimed the east half of the southwest quarter of section 6, November 24, 1868, to Robert Boyd, who took possession, and died in 1887 or 1888. John W. Boyd now claims to own the north one-third of the east half of the southwest quarter of section 6, and David Boyd the south two-thirds of the same tract, both claiming title, as is understood, through judicial sales made to the latter in 1887, on sale of interest of one Kern, whose interest therein does not appear or how he acquired it; to the former, John W. Boyd, through a sheriff's sale of interest of one Purcell, who by mesne conveyances had acquired the interest of the widow. This latter deed was made in 1891.

In this proceeding these appellees do not claim title to the said tract through their father, but through these deeds, a deed from one Dutton of June 4, 1887, and the statute of limitations. The title to the other tracts they claim by adverse possession for twenty years, and by color of title, possession, and payment of taxes for seven years, et cetera. This defense was not set up in the answer, and leave is asked to file an amendment setting up such ⁴³ defense here, on leave taken in the court below at the time of trial but not made. The case seems to have been tried below as if this defense was interposed, and, as we understand the effect of the request of the appellant, the case is so to be heard here.

It appears that in the year 1868 one Purcell and Robert Boyd obtained a deed from the heirs of James Boyd, deceased, other than these complainants, to the land now under consideration; that on September 20, 1871, Purcell, who in the meantime had acquired the undivided one-half interest of Robert Boyd, conveyed by quitclaim deed to John W. and David Boyd, the sons of Robert, and at Robert's request, all his interest in and to the undivided three-fourths of said land, which was the full interest he then claimed to own, and thereupon they entered into possession of the same. In 1878 John W. Boyd, who in the meantime had acquired the interest of David Boyd in the said lands, permitted the undivided one-fourth interest thereof to be sold for taxes on the advice of his attorney, who bought the same in for him, but in the attorney's name, and thereafter, on March 4, 1881, obtained a tax deed therefor, and on the same day quitclaimed it to John W. The explanation of this proceeding is,

that years before the Williams heirs, who inherited from the widow of James Boyd, deceased, had agreed to make a deed of their interest but had failed to do so. It further appears that John W. and David Boyd had continued in possession of these premises from the time they took possession, in 1871, had paid the taxes and received the rents according to their respective interests, and had made improvements in the premises.

The evidence shows that in 1863, when James Boyd, the owner of the common source of title to the land last above described, died, under which title Robert Boyd, as well as these defendants, took possession, this appellant and his uncle, Robert Boyd, resided in Indiana. After the death of appellant's father, John Boyd, and when appellant ⁴⁴ was about eleven years of age, Robert Boyd was appointed his guardian. His mother had died some time before, in 1861, and his father had remarried. When asked his stepmother's name he replied: "I think her name was Sarah. My uncle (Robert Boyd) was our guardian, and took us away when I was not very large, and I have not seen her since." The appellant was born in 1855, and therefore was not of age until 1876. The guardian, as understood, brought the children to Illinois when he removed from Indiana, and, as inferred, continued to exercise some sort of parental control over them until they were of age. John W. Boyd, one of these defendants, testified he was their guardian during their minority. There is no evidence in this record that he, or these defendants, their cousins, ever informed these wards of their interest in any of this land, and there is no evidence to show when they discovered it. This guardian, as well as his sons, evidently knew that these children of John Boyd inherited the interest of their father, who was a brother of James Boyd, deceased, under whose claim of title, directly or indirectly, they, the said John Boyd and sons, had taken possession, and it would require harsh criticism if we were to assume that this guardian, or his sons, intended to take advantage of their dependent condition and ignorance. They resided in Indiana at the time of their uncle's, James Boyd's, death. It appears from the evidence they had never seen him, and, of course, knew nothing in regard to his property or their relation to or interest in it. They were brought to Illinois by their guardian when mere children, and had no one to look after their interests other than their guardian and these cousins, their father and mother both being dead. The fact that as late as 1878 the interest of the Williams heirs in this land, who stood in no such relation to them as did this appellant, was attempted to be ob-

tained, avowedly through a tax deed, on a failure to comply with an agreement made on a consideration passed, as claimed, indicates a recognition ⁴⁵ of an outstanding interest in these heirs, for concededly their interest had never been acquired nor an agreement made to acquire it. If, therefore, this appellant, who alone appealed, was a cotenant of appellees the tax deed would be void (*Bracken v. Cooper*, 80 Ill. 221), and the other deeds obtained from strangers to the common title, under which they took possession, would be considered as obtained for his interest.

In *Freeman on Cotenancy*, second edition, section 152, the rule is laid down, that where one comes into possession of lands under a common title, with others, such title cannot be assailed while he so remains in possession, the principle being the same as that a tenant cannot assail the landlord's title. Nor, as laid down in section 154, can such cotenant so holding possession purchase an outstanding title and assert it against his companion in interest. This rule as to taking possession under common title is approved in *Sontag v. Biglow*, 142 Ill. 143. It is further said by the above author (section 154) that if such cotenant enters into possession under an outstanding title the rule is different, and in such case he can invoke the statute of limitations as a bar. This section 154 is quoted with approval in *Montague v. Selb*, 106 Ill. 49. Where one alone so takes such possession, pays taxes, receives rents, and makes some improvements, it will not be presumed to be adverse, but will ordinarily be held to be for the benefit of all: *Sontag v. Biglow*, 142 Ill. 143, and cases there cited. As held in *Bracken v. Cooper*, 80 Ill. 221, it is not necessary, in order to enforce the above rules, that the interest of the cotenant should accrue under the same instrument or act of the law. This doctrine is approved in *Montague v. Selb*, 106 Ill. 49.

It is true the law recognizes that a cotenant does not always continue to remain in possession as a cotenant only, but may assert, with direct or implied notice to the cotenant, an adverse holding. Whether he has declared by words or acts that he holds adversely is a question of fact. That is often a difficult matter to determine, when ⁴⁶ the original entry was apparently or confessedly that of a cotenant. As is said by *Freeman (Freeman on Cotenancy, sec. 232)*: "In such cases, as there is nothing to give notice that the entry was hostile, in order to show that a subsequent possession became adverse a state of facts must be proved from which an actual ouster is directly established or from which such ouster may be inferred." Manual ousting, to

the denial of the rights of a cotenant made to him directly or brought to his knowledge, when accompanied by an exclusive possession, is sufficient to warrant a finding of ouster: Freeman on Cotenancy, secs. 237, 238. It is said in section 242 that "the facts which will sufficiently prove such ouster and adverse possession (by inference) will vary according to the different circumstances of the parties, and no definite rule can be laid down by which all cases can be governed."

It is said, however, as a rule, long continued possession, uninterrupted, with the knowledge of the other cotenants, and without claim or demand for possession or participation in profits, will ordinarily furnish sufficient evidence of ouster. This doctrine, however, is not based on a legal, but on a natural, presumption that one will assert his rights. But he must first know his rights. This rule is recognized in *Littlejohn v. Barnes*, 138 Ill. 478, and *Baldwin v. Ratcliff*, 125 Ill. 376. In the latter case, the one setting up the bar of the statute first entered as absolute owner, and in the former case the grantor of the appellee took possession under his grantor, who claimed to be the owner at the time. In both these cases the important element existed that the claimants knew their rights at the time, and knew of the attitude the parties in possession always had assumed toward the land. There is no such relation between those parties as existed between the parties in this case. There is no evidence, as heretofore stated, that the appellant, though brought from Indiana by Robert Boyd, his guardian, when a mere child, was informed of his interest in this land,⁴⁷ which information it was both a moral and legal duty to impart to him. He not having this knowledge, and it not appearing that the assertion of title made by appellees was absolutely hostile to his title, he is not precluded from having his interests protected under the decree of the court.

There was error in the decree of the circuit court of Pike county. That decree is reversed and the cause is remanded.

COTENANCY—ADVERSE POSSESSION BY COTENANT.—As between cotenants, evidence of long-continued, visible, uninterrupted, and even exclusive occupation by one cotenant does not bar the rights of others. To constitute an adverse possession in such a case, there must be an actual ouster, and an exclusion of the other cotenants by the one in possession: *Mansfield v. McGinness*, 86 Me. 118; 41 Am. St. Rep. 532. The burden is upon the one claiming to hold adversely to establish such a state of facts, known to his cotenant, as will amount to an adverse claim of title. Notorious possession alone is not sufficient: *Stewart v. Stewart*, 83 Wis. 364; 35 Am. St. Rep. 67, and note.

PEOPLE v. SIMON.

[176 ILLINOIS, 165.]

TORRENS LAND LAW—REGISTRAR'S DUTIES, WHEN MINISTERIAL.—If a statute provides for the determination of titles by a decree of a court of equity and the issuing thereon of a certificate by the registrar of titles, his duties are ministerial merely.

TORRENS LAND SYSTEM—DUTIES WHICH MAY BE DEVOLVED ON THE REGISTRAR.—A statute which provides: 1. For the determination of titles by a court of competent jurisdiction and the issuing of a certificate thereon by the registrar of titles; and 2. That he must keep a record, to be known as the registry of titles, in which must be entered the original and all subsequent certificates of title and such notation as to liens, encumbrances, and the like as are required to show the condition of the title, and that the registrar, on it appearing to him that a person intending to create a charge or to make a transfer as to the title of the estate proposed to be transferred or against which he proposes to create a lien, shall enter upon the folium of the registry and upon the owner's certificate a memorial of the lien, in case a lien is to be created, and make out and register a new certificate if the title is to be transferred, does not confer forbidden judicial powers on such registrar.

CONSTITUTIONAL LAW—CONFERRING JUDICIAL AUTHORITY ON AN OFFICER NOT A MEMBER OF THE JUDICIARY.—A legislature is not prohibited from vesting some judicial functions in persons who do not hold judicial offices. Certain functions of a quasi judicial character may, by statute, be vested in ministerial officers.

CONSTITUTIONAL LAW—JUDICIAL POWER WHICH MAY BE GRANTED TO A MINISTERIAL OFFICER.—The mere fact that an officer is required by law to inquire into the existence of certain facts and to apply the law thereto in order to determine what his official conduct shall be, and that these acts may affect private rights, does not constitute an exercise of judicial powers, strictly speaking.

CONSTITUTIONAL LAW—TORRENS LAND LAW.—A statute providing that when land is held subject to a trust, condition, or limitation, the original certificate of title shall contain the words "in trust," or "upon condition," or "with limitations," as the case may be, that when the land is transferred, the registrar shall not issue a new certificate, nor shall any transfer or charge upon or dealing with the land be made unless pursuant to the order of some court or upon the written opinion of two examiners, that such a transfer, charge, or dealing is in accordance with the true intent and meaning of the trust, condition, or limitation, whereupon he shall proceed to register the title, and such registration shall be conclusive in favor of the grantee and those claiming under him in good faith and for valuable consideration, does not confer upon the registrar forbidden judicial functions.

CONSTITUTIONAL LAW—TORRENS LAND LAW.—The fact that the proceedings in court to ascertain title for the purpose of registration may take place without any other than a constructive service against a person in interest who is a resident of the state does not render the whole law unconstitutional.

CONSTITUTIONAL LAW—TORRENS LAND LAW.—The fact that, after the initial registration, an owner may be deprived of his property without due process of law, does not establish that

the act is unconstitutional, for the state has the power to provide the terms and conditions upon which land may be acquired and held by individuals, and the methods of its acquisition and transfer.

CONSTITUTIONAL LAND LAW—TORRENS LAND LAW—LIMITATIONS UPON ACTIONS.—A provision of a statute providing for the determination of titles and the issuing of certificates thereof, and that all persons having an interest in the land, whether served with process or not, must, within two years after the entry of the decree, appear and file an answer, otherwise it shall be binding upon them, may, as to all persons having merely a right of action, be sustained as a statute of limitations.

CONSTITUTIONAL LAW—CONSTRUCTION OF STATUTES.—Whenever a statute can be so construed as to avoid conflict with the constitution and give force to the law, such construction will be adopted by the courts.

CONSTITUTIONAL LAW—LOCAL OPTION.—The provisions of the statute known as the Torrens land law, providing that it shall take effect only after a favorable vote by counties, is not an attempt to delegate legislative power.

Pence & Carpenter, Shobe, Mathis, Barrett & Rogers, and Charles S. Deneen, state's attorney, for the appellant.

Harvey B. Hurd, George W. Smith, Theodore Sheldon, Oliver & McCartney, and Robert S. Iles, for the appellee.

¹⁶⁶ **WILKIN, J.** This action originated in the court below upon an information in the nature of a quo warranto against appellee, requiring him to show by what authority of law he was exercising the powers and duties of the office of registrar of titles in and for the county of Cook. In answer to the information, the defendant set up the act of the legislature entitled "An act concerning land titles," approved and in force May 1, 1897, commonly known as the "Torrens law": Laws 1897, p. 141. The relator ¹⁶⁷ filed a general demurrer to this answer, which was overruled and the information dismissed. The ground of the demurrer was, that the act under which the respondent sought to justify is unconstitutional and void, and that is the question now presented for our decision.

The act is very voluminous, and some of its provisions are not skillfully drafted. Its validity is attacked on numerous grounds, and the briefs and arguments on either side are very extended. We will endeavor to consider the objections raised to the law in the order in which they are discussed by counsel.

It is first insisted that the act confers judicial powers upon the registrar of titles, or upon him and the examiners of title, in violation of the constitution of this state. A somewhat similar act passed in 1895 was held invalid on that ground in *People v. Chase*, 165 Ill. 527. By the provisions of the law of 1895 the

registrar was clothed with power to determine the ownership of land when application was made for the initial registration thereof, and to issue his certificate accordingly. The present act provides that the ownership shall be determined by a decree in equity entered in a court of competent jurisdiction, upon which decree the registrar shall issue the first certificate of registration. In this regard his duties under the present law are clearly ministerial only, and the fatal objection to the former act is therefore removed.

But it is insisted that the law is still vulnerable, in that it vests judicial power in the registrar in the performance of his duties as to subsequent registrations. Waiving the question whether this would, if true, necessarily vitiate the whole act, is the position tenable? Like a mere recorder, the registrar is required to file all deeds, mortgages, leases, and other instruments affecting the title to land, and make proper notations upon the instruments and upon the record. He is to keep a record to be known as the "register of titles," in which must be entered the original and all subsequent certificates of title, ¹⁰⁸ and such notations as to liens, encumbrances, and the like as are requisite to show the true condition of the title. When any instrument is filed with him which is intended to create a charge, lien or encumbrance upon the land, it is made his duty, by section 60, to enter a memorial upon the register and also upon the original certificate. Thus far his duties are clearly and simply ministerial. But it is contended this section 60 authorizes him to determine the validity of liens, encumbrances, or charges, and the argument is, that this is an exercise of judicial power, which, under our constitution, can be conferred upon no officer or tribunal save those which belong to the judicial department. The language of the section applicable to this question is as follows: "It appearing to the registrar that the person intending to create the charge has the title and right to create such charge, and that the person in whose favor the same is sought to be created is entitled by the terms of this act to have the same registered, he shall enter upon the proper folium of the register, and also upon the owner's certificate, a memorial of the purport thereof," et cetera. It will be noticed that the provisions in case of a transfer of the property are substantially the same. Section 47 says: "Upon its being made to appear to the registrar that the transferee [evidently intending transferrer] has the title or estate proposed to be transferred and is entitled to make the conveyance, and that the transferee has the right to have such es-

tate or interest transferred to him, he shall make out and register as hereinbefore provided, a new certificate," et cetera. Article 3 of the constitution of 1870 reads as follows: "The powers of the government of this state are divided into three distinct departments—the legislative, executive, and judicial; and no person or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted": Rev. Stats., p. 60. The question therefore is, Can the legislature devolve ¹⁰⁰ the duties named, upon an officer not a member of the judicial department?

That the duties mentioned are judicial in their nature may be admitted, but it does not necessarily follow that their exercise is prohibited by the constitutional provision to all but officers belonging to the judicial department. Numerous instances may be cited, as is done in *Owners of Lands v. People*, 113 Ill. 296 (referred to in *People v. Chase*, 165 Ill. 527), where executive and legislative officers are authorized to exercise powers which in a sense are judicial, and the laws imposing such duties held not to be in violation of the constitutional provision quoted. These duties or powers are generally and properly termed "quasi judicial," to distinguish them from those which are judicial in the sense of belonging to the judicial department exclusively. In theory all governmental power is divided into the three named divisions, and upon a casual consideration the division would seem to present no difficulty, but in the practical application of the principles involved courts have been compelled to observe that the line of demarcation between the exclusive powers of the three departments is far from clear: 6 Am. & Eng. Ency. of Law, 2d. ed., 1007. Judge Cooley, in his work on *Constitutional Limitations on the Legislative Branch of the Government*, has given a definition of "judicial power." It is this: "The power which adjudicates upon and protects the rights and interests of individual citizens, and to that end construes and applies the laws." As a general definition of the functions of the judicial department it is sufficiently accurate, and we adopted it in the case of *People v. Chase*, 165 Ill. 527. We then thought, and are of the opinion still, that it was applicable to that case, the functions of the registrar, under the act of 1895, being not quasi judicial merely, but strictly so, and such as are usually exercised by the courts alone, constituting the exercise of judicial power within the constitutional prohibition. Under the present

act, his duties more nearly ¹⁷⁰ resemble those frequently exercised by members of the executive department.

The definition given by Judge Cooley does not attempt to mark the line between those quasi judicial functions which may be vested elsewhere, and those strictly judicial which can be reposed nowhere save in the courts, and for that reason it cannot be properly adopted in this case. As we said in another case: "It may in many cases be a matter of difficulty to determine the precise line which divides the executive and judicial functions. It has been said that where the functionary hears, considers, and determines, then he performs judicial acts. This definition is not strictly accurate. . . . It embraces cases that are not judicial, and hence is too comprehensive": *Donahue v. Will County*, 100 Ill. 94, 108. And appreciating the difficulty of defining the limits of the several departments of government we also said in an earlier case: "Nevertheless, when we come to apply them to actual controversies growing out of the varied relations which the citizens sustain to the state and to one another, we encounter doubts and difficulties of the gravest character. Just where the dividing line is to be drawn between judicial and legislative power, with respect to certain subjects, often presents questions about which enlightened courts of eminent jurists widely differ. So while the powers of courts seem so very simple and clearly defined, yet in the application of them to actual cases, their proper limits are often difficult to determine": *Dodge v. Cole*, 97 Ill. 338, 357; 37 Am. Rep. 111. Also: "The first and second sections of the first article of the constitution (of 1818) divide the powers of governments into three departments—the legislative, executive, and judicial—and declare that neither of these departments shall exercise any of the powers properly belonging to either of the others, except as expressly permitted. This is a declaration of a fundamental principle, and, although one of vital importance, it is to be understood in a limited ¹⁷¹ and qualified sense. It does not mean that the legislative, executive, and judicial power should be kept so entirely distinct and separate as to have no connection or dependence, the one upon the other; but its true meaning, both in theory and practice, is that the whole power of two or more of these departments shall not be lodged in the same hands, whether of one or many": *Field v. People*, 2 Scam. 79, 83.

Judge Story, in his work on the Constitution, says: "But when we speak of a separation of the three great departments of government, and maintain that their separation is indispensable to

public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly separate and distinct and have no common link of connection or dependence, one upon the other, in the slightest degree. The true meaning is, that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments, and that such exercise of the whole would subvert the principles of a free constitution": 1 Story on the Constitution, 5th ed., sec. 525. "Notwithstanding the memorable terms in which this maxim of a division of powers is incorporated into the bills of rights of many of our state constitutions, the same mixture will be found provided for, and, indeed, required, in the same solemn instruments of government. . . . Indeed, there is not a single constitution of any state in the Union which does not practically embrace some acknowledgment of the maxim and at the same time some admixture of powers constituting an exception to it": Story on the Constitution, sec. 527, p. 395.

In the case of *Murray v. Hoboken Land etc. Co.*, 18 How. 272, 280, in discussing whether the issuing of a distress warrant by the solicitor of the treasury was the exercise of executive or judicial power, the supreme court of the United States say: "It is not sufficient to bring such matters under the judicial ¹⁷² power that they involve the exercise of judgment upon law and fact. . . . That the auditing of the accounts of a receiver of public moneys may be, in an enlarged sense, a judicial act must be admitted. So are all those administrative duties the performance of which involves an inquiry into the existence of facts and the application to them of rules of law. . . . We do not doubt the power of Congress to provide by law that such a question shall form the subject matter of a suit in which the judicial power can be exerted. The act of 1820 makes such a provision for reviewing the accounting officers of the treasury, but until it is reviewed it is final and binding; and the question is, whether its subject matter is necessarily, and without regard to the consent of Congress, a judicial controversy, and we are of opinion it is not."

From these authorities it is apparent that the mere fact that the registrar is required by this act to inquire into the existence of certain facts and to apply the law thereto in order to determine what his official conduct shall be, and that his action may affect private rights, does not constitute the exercise of judicial power, strictly speaking. It is not the intention of these

two sections (60 and 47) to provide a tribunal for the adjudication of disputes concerning land titles. The primary purpose is the issuing of the certificate, and the exercise of the judgment of the registrar is incidental. The prohibition in question "has never been held to apply to those cases where judgment is exercised as incident to the execution of a ministerial power": *Owners of Lands v. People*, 113 Ill. 296. The powers exercised by the registrar under this law are analogous to those exercised by the commissioner of patents. A power of decision is given to that officer in many matters, not only between the government and the patentee, but also between different claimants, as to priority, patentability, and like matters, and in the performance of these duties it has never been considered that he was encroaching upon the judicial domain. ¹⁷³ They are also, in a measure, like the duties performed by officers of the landoffice. Duties of a similar nature, involving judgment or discretion and the application of the law to the facts, are devolved both under the state and federal laws upon many other executive officers, legally. In some instances it is even held that in the exercise of such judgment the officer is free from judicial interference. But in the case of the registrar this act provides that any person feeling himself aggrieved by the act or neglect of this officer, in any matter pertaining to the duties required of him, may file a petition in equity in the proper court, making the registrar and other persons interested parties defendant, and that the court may proceed therein as in other cases in equity, and may make such order or decree as shall be according to equity in the premises and the purport of the act. This, with the well-known jurisdiction of the courts in mandamus, injunction, rescission, cancellation, bills of relief, and the like, will effectually protect the citizen against any arbitrary conduct on the part of the officer.

Recurring to the duties of the registrar, we find that in case of a tax sale or judgment, or levy under an attachment or execution, or in case of a mechanic's lien, the registrar, upon the filing of the proper certificate, enters a memorial thereof upon his record, and in case the lien ripens into a title the former certificate of title is canceled and a new one issued to the proper party. These duties do not differ in character from those already mentioned, and what has been said is equally applicable thereto also. Particular stress, however, is laid by counsel for appellant upon the contention that the duties of the registrar as to the subsequent registration of land held in trust upon conditions or limitations, are the exercise of judicial power, in violation of the

terms of the constitution. The act requires, where the land is subject to a trust, condition, or limitation, that the original certificate issued shall contain the words "in trust," "upon ¹⁷⁴ conditions" or "with limitations," as the case may be. When such land is to be transferred, it is provided that the registrar shall not issue a new certificate, nor shall any transfer of or charge upon or dealing with the land be made, unless pursuant to the order of some court, or upon the written opinion of the two examiners that such transfer, charge, or dealing is in accordance with the true intent and meaning of the trust, condition, or limitation, whereupon he shall proceed to register the title, and such registration is to be conclusive in favor of the grantee, and those claiming under him in good faith and for a valuable consideration, that such transfer, charge, or other dealing is in accordance with the true intent and meaning of the trust, condition, or limitation: secs. 68, 69. If the registration be made pursuant to the order or finding of a court of competent jurisdiction the acts of the registrar are purely ministerial, but if made upon the opinion of the two examiners he is required to exercise a judgment of his own. These duties do not differ materially from those already examined, except that here the decision is made conclusive in favor of the person taking the transfer in good faith and for a valuable consideration, that the transfer or charge is in accordance with the true intent and meaning of the trust, condition or limitation. This does no more than abrogate the rule in equity which requires the purchaser of trust property to see to the application of the purchase money, and the inclination of courts now is to withdraw from that rule. We recently said, quoting from Judge Story: "These are some of the most important and nice distinctions which have been adopted by courts of equity upon this intricate topic, and they lead strongly to the conclusion, to which not only eminent jurists but also eminent judges have arrived, that it would have been far better to have held in all cases that the party having the right to sell had also the right to receive the purchase money, without any further responsibility on the part of the purchaser as to its application": ¹⁷⁵ *Seaverns v. Presbyterian Hospital*, 173 Ill. 414, 424; 64 Am. St. Rep. 125. This statute also changes the rule of law as to notice. We know of no reason why the legislature might not change either or both of these rules without violating the constitution. Certainly, as to the future all trusts could be entirely abolished by the legislature, as was done in cases of uses by the statute of uses. As the law now stands, cases frequently

arise in which bona fide purchasers take property free from existing trusts, and are not held bound to see to the application of the consideration.

The second point insisted upon in the argument is, that the provisions of the act permit the taking of private property without "due process of law." In the initial registration the provisions are for an application to a court of chancery, and that the fee must be first registered. To this application the following persons are to be made defendants: The occupant, if the land is occupied by any other person than the applicant; the holder of any lien of encumbrance; other persons having any estate or claiming any interest in the land in law or in equity, in possession, remainder, reversion, or expectancy: Sec. 11. All other persons are to be made parties defendant by the name and designation of "all whom it may concern": Sec. 16. Summons is to issue against all persons mentioned as defendants, and is to be served as in other cases in chancery. Notice is also to be published and mailed to such defendants substantially as in other chancery cases, and the court may direct further notice to be given: sec. 19-21. Upon a failure to answer default may be entered, and upon the hearing a decree entered finding in whom the title is vested, and declaring the same subject to such liens, encumbrances, trusts, or interests, if any, as are shown to exist, and directing the registration to be made: Secs. 23, 25. The exception taken to these provisions is, that they authorize judgment to be taken against a resident of the state ¹⁷⁶ upon mere constructive service. It is certainly fundamental that no man shall be condemned unheard or without notice. While a substituted service is permitted in some instances, particularly in case of nonresidents, this is because of the necessities of the case. The act does contemplate, in some contingencies at least, actual personal service, and the general law provides for publication as to unknown owners and persons in interest, and nonresidents. An applicant may proceed in this way, and in strict accordance with the act obtain a decree or finding as to his title which will be binding beyond all question, so that even if the proper construction of the provision were that it attempted to authorize judgment against a resident notified only by publication, yet the law can be given practical effect, in which event only the particular provision would fail, and not the whole law.

It is further insisted that by proceedings subsequent to the initial registration an owner may be deprived of his property without due process of law. In the consideration of this point

it must be remembered that the right to alienate or inherit property is always dependent upon the law. So long as vested rights are not disturbed, the law may at any time change the tenure upon which land is held, and may alter the conditions under which it may be alienated and modify the rules of evidence by which the title is to be determined. The true theory of this act, as we understand it, is that all holders of vested rights shall be subjected to an adjudication in a court of competent jurisdiction, upon due notice, in order that the true state of the title may be ascertained and declared, and that thereafter the tenure of the owner, the right of transfer and encumbrance, and all rights subsequently accruing, shall be determined in accordance with the rules now prescribed. "A state may, by statute, prescribe the remedies to be pursued in her courts, and may regulate the disposition of the property of her citizens by descent, devise or alienation": 3 Washburn on Real ¹⁷⁷ Property, 4th ed., 187. "The right of ownership which an individual may acquire must, therefore, in theory, at least, be held to be derived from the state, and the state has the right and power to stipulate the conditions and terms upon which the land may be held by individuals": Tiedeman on Real Property, 2d ed., sec. 19. "The power of the state to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted": Arndt v. Griggs, 134 U. S. 316, 321. "The power of the legislature in this respect [as to changing the rules of evidence as to the burden of proof], whether affecting proof of existing rights or as applicable to rights subsequently acquired or to future litigation, so long as the rules of evidence sought to be established are impartial and uniform in their application, is practically unrestricted": Gage v. Caraher, 125 Ill. 447, 455.

It being true that the law may prescribe rules of property and rules of evidence by which the title is to be shown, we see no reason why the transfer of real estate may not be made in the way contemplated, and why it may not be made compulsory to make it in that way, if the legislature so determines.

In our view of the case, the indemnity fund feature of the law need not be considered. The law can, as we think, stand and accomplish its purpose without it.

Objection is also made that by section 26 any person who has any interest in the land, whether personally served, notified by publication, or not served at all, must, within two years after

the entry of the decree, appear and file an answer, and that after the expiration of that term of two years the decree shall (with certain exceptions) be "forever binding and conclusive upon all persons." This provision seems to attempt to make a decree binding upon persons not parties to the suit, and, if given effect literally, would deprive persons of vested rights ¹⁷⁸ without due process of law. A limitation may be placed upon the time within which a person who has a mere right of action shall bring it, but "limitation laws cannot compel a resort to legal proceedings by one who is already in the complete enjoyment of all he claims": Cooley's Constitutional Limitations, 366 To the extent that the act attempts to transfer property without due process of law it cannot be upheld. On all parties to the suit properly before the court the decree may, after the lapse of two years, become conclusive and forever binding, and as to all who have merely a right of action the expiration of two years may complete the bar. Even though the language of this section may be broad enough to amount to an attempt to transfer an estate by the law or by decree, yet it is possible to carry out the purposes of the act without violating the constitution in the respect complained of. Such objectionable features, or those calling for construction, must be left to future legislation, or determination by the courts in cases where the conflict is apparent and the question directly involved.

We are also of the opinion that sections 26 and 40 can be sustained by construing them as a limitation law. "Whenever an act of the legislature can be so construed and applied as to avoid conflict with the constitution, and give to it the force of law, such construction will be adopted by the courts. Therefore, acts of the legislature in terms retrospective, and which, literally interpreted, would invalidate and destroy vested rights, are upheld by giving them prospective operation only, for, applied to and operating upon future acts and transactions only, they are rules of property, under and subject to which the citizen acquires property rights, and are obnoxious to no constitutional limitation, but as retroactive laws they reach to and destroy existing rights, through force of the legislative will, without a hearing or judgment of law. So will acts of the legislature having elements of limitation, and capable of being so applied and administered, ¹⁷⁹ although the words are broad enough to, and do, literally read, strike at the right itself, be construed to limit and control the remedy, for as such they are valid, but as weapons destructive of vested rights they are void, and such force

only will be given the acts as the legislature could impart to them": *Newland v. Marsh*, 19 Ill. 376.

The recent case of *State v. Guilbert*, 56 Ohio St. 575, 60 Am. St. Rep. 656, is relied upon by counsel for appellant in support of the position taken by them on both of the above points. We have given that case careful consideration. With its conclusion, viz., that the Ohio statute was unconstitutional, we agree, but what is said in argument cannot be adopted as applicable to this case. The main ground upon which that decision rests is, that the statute, in providing for the initial registration, attempts to give jurisdiction to the court without service of summons, and this, it is held, falls short of that due process of law guaranteed by the constitution. The only notice which that act required was to be given by the applicant himself, and in the application it was unnecessary to name any person claiming an adverse interest, as party defendant. On the other feature of the case, viz., as to what constitutes the exercise of judicial power, the opinion is not clear. In the reasoning on that point Judge Cooley's definition of judicial power is adopted, which we have seen does not serve to distinguish between such quasi judicial powers as may be properly exercised by executive or ministerial officers and those powers which belong solely to the judicial department.

The third point made against the law is, that the provision which says that the law shall take effect only after a favorable vote by counties, is an attempt to delegate legislative power; and the fourth is, that the law is not a general but special law. It is unnecessary to discuss these points. It is sufficient to say that both have been decided adversely to the contention of appellant in the case of *People v. Hoffman*, 116 Ill. 587; 56 Am. Rep. 793. That decision has ¹⁸⁰ become the rule of law in this state, and we see no sufficient reason for overruling it.

We are not impressed with the soundness of the objections to those sections of the statute which relate to the descent of lands on the death of a registered owner, and to the sale and mortgage of real estate belonging to minors or others under disability. They are, however, objections which do not go to the validity of the entire law. They involve a construction of those sections, and can only be satisfactorily determined if cases shall arise involving their validity. It would be alike impracticable and unprofitable to attempt now to give a construction to every provision of this law. The question here is, Does the act violate the constitution so far as to render it void, and therefore furnish no justification for the exercise of the acts of the

respondent challenged? In the determination of that question every reasonable doubt must be resolved in favor of the validity of the law.

We have endeavored to give the case that deliberate consideration its importance demands, and have reached the conclusion that the judgment of the criminal court should be affirmed.

Mr. Justice Boggs, dissenting.

STATUTES—TORRENS SYSTEM OF LAND TITLES.—A statute providing for the registration of land titles, and for the determination of adverse interests in land upon notice by publication, without requiring or contemplating that summons or equivalent process shall issue from a court advising those who claim an interest in land to be registered that their alleged interest is to be the subject of adjudication in the proceedings before a county recorder, being in effect the "Torrens system of land titles," is unconstitutional and void, because it permits the divesting of vested rights in property without due process of law, and because it permits the taking of private property for a private use without the owner's consent and without compensation, and because it attempts to confer judicial power upon a county recorder who is a purely ministerial officer: *State v. Guilbert*, 56 Ohio St. 575; 60 Am. St. Rep. 756, and note.

STATUTES CONFERRING JUDICIAL FUNCTIONS UPON MINISTERIAL OFFICERS—WHAT ARE.—Where an inquiry to be made involves questions of law, as well as of fact, and fixes a legal right, and its decision may result in terminating or destroying that right, the powers to be exercised and the duties to be discharged are essentially judicial: *Payton v. McQuown*, 97 Ky. 757; 53 Am. St. Rep. 437. A ministerial act is one which a person performs under a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, and without regard to, or the exercise of his own judgment upon, the propriety of the act being done: *Flournoy v. Jeffersonville*, 17 Ind. 169; 79 Am. Dec. 468, and monographic note discussing the distinction between judicial and ministerial functions.

STATUTES—UNCONSTITUTIONALITY—WHEN DECLARED BY COURTS.—Courts will not declare a statute unconstitutional unless it is clearly so: *State v. Tibbetts*, 52 Neb. 228; 66 Am. St. Rep. 492, and note. If a statute can be so construed as not to offend against any constitutional limitation, such construction will be indulged: *Fox v. McDonald*, 101 Ala. 51; 46 Am. St. Rep. 98.

CHICAGO GENERAL RAILWAY COMPANY v. CHICAGO.

[176 ILLINOIS, 252.]

MUNICIPAL CORPORATIONS—STREET RAILWAYS—POWER TO EXACT MONEY AS CONDITION OF A FRANCHISE.—An ordinance granting the right to construct and operate a street railway over a designated route upon condition that the grantee and its successors shall pay into the treasury of the municipality five hundred dollars annually for each and every mile of their track laid under the provisions of the ordinance, is valid, and a corporation, having accepted the franchise or grant, cannot avoid the condition.

MUNICIPAL CORPORATION—MONEY CONSIDERATION—RIGHT OF TO EXACT FOR THE USE OF THE STREETS.—A municipal charter providing that street railways may be constructed and operated with the consent of the city council authorizes it to exact a money consideration as a condition to granting such consent as that the corporation shall grant a sum designated annually for each mile of railway constructed.

CONSTITUTIONAL LAW.—AN ORDINANCE GRANTING SPECIAL PRIVILEGES to a street railway corporation to construct and operate its road over a designated route on the payment annually of a sum specified for each mile does not violate the fourteenth amendment to the constitution of the United States nor any provision of the constitution of the state of Illinois. Where the municipality is authorized by statute to consent to the construction and operation of such roads, it is not required nor expected to do so by general ordinances applicable to all roads, but to give its consent in each case upon such terms as may seem proper.

MUNICIPAL CORPORATIONS—CONSENT TO A VOID ORDINANCE MAY MAKE IT EFFECTIVE AS A CONTRACT. Whether or not a municipal corporation had authority to impose, as a condition of its consent to a grant of a right to construct and operate a street railway, that a specified sum per mile should be paid into the municipal treasury, the acceptance of the ordinance with the condition attached, agreeing thereby to perform it, made it a valid contract between the city and the corporation, and estopped the latter from questioning its validity.

Jesse B. Barton and Charles L. Bonney, for the plaintiff in error.

Charles S. Thornton, corporation counsel, for the defendant in error.

254 WILKIN, J. This is an action of debt brought by the city of Chicago, against plaintiff in error, to recover damages on its bond in the sum of twenty-five thousand dollars. Damages were assessed at two thousand two hundred and fifty dollars, and judgment rendered for that amount and costs, from which plaintiff in error prosecutes this writ.

The facts in the case are uncontroverted. In February, 1892, the city passed an ordinance granting to plaintiff in error authority to construct, maintain, and operate a street railway on

Twenty-second and other streets in the city, upon certain terms and conditions, among which was the following:

"Sec. 8. Per mile tax.—The rights, privileges, and franchises herein conferred are granted upon the further condition and consideration that on or after December 1, 1895, the said company or their legal assigns, or any person, firm, company, or corporation in any way claiming under or through them, or operating the road herein authorized, shall pay into the city treasury of the city of Chicago, annually, for each and every lineal mile of their track laid under the provisions of this ordinance, and a proportionate amount of any fraction of a mile laid as herein authorized, the sum of five hundred dollars (\$500)," et cetera.

Section 11 required the company to give bond in the sum of twenty-five thousand dollars, conditioned for the faithful observance and performance of the conditions of the ordinance. Plaintiff in error accepted the ordinance, and in pursuance of its terms caused the bond sued on to be executed. Four and a half miles of track were laid by it, but it refused to pay the sum provided by section 8 when due, and thereupon this suit was brought.

²⁵⁵ The principal question to be determined in the case is, whether the city had the power to impose the condition prescribed in section 8 of the ordinance granting the right to the defendant railway company to occupy the street with its tracks.

Our constitution, article 11, section 4, provides: "No law shall be passed by the general assembly granting the right to construct and operate a street railway within any city . . . without requiring the consent of the local authorities having control of the street or highway proposed to be occupied by such street railroad." The twenty-fourth clause of section 1 of article 5 of the city and village act (then in force) gave the city power "to permit, regulate, or prohibit the locating, constructing, or laying a track of any horse railroad in any street, alley, or public place; but such permission shall not be for a longer time than twenty years": Rev. Stats., p. 219. Section 3 of the horse and dummy act provides that no company shall have the right to construct its road along any street or alley, et cetera, without the consent of the corporate authorities of such city, and that "such consent may be granted for any period not longer than twenty years, on the petition of the company, upon such terms and conditions, not inconsistent with the provisions of this act, as such corporate authorities or county board, as the case may be, shall deem for the best interest of the public": Rev. Stats., p. 571.

It is not denied that the city had the power to impose a money condition as a license fee, or to protect it against liabilities and expenses occasioned by reason of the construction of the railroad in its streets, or for expenses and the like of defendant in error, but it is earnestly insisted that this ordinance shows an unlawful attempt on the part of the municipality to sell its license, and that it is also an unauthorized attempt to raise revenue for the purposes of municipal government; also, that because the ordinance contains other terms and conditions for the protection of the city against loss or disbursements, such as ²⁵⁶ a license fee of fifty dollars per annum for each car operated, there is no room for the presumption that the condition for the payment of this amount per mile was with a view to such purposes. We are unable to agree with counsel in these contentions. It was clearly within the power of the council, by its ordinance, to make this additional condition if it so desired, and the courts cannot indulge the presumption that the act was done for an illegal purpose, it being apparent that it could be done legally. It is not claimed the condition is unreasonable or against public policy, and therefore void. It is not for this court to review the acts of the city council which are within its discretion and within the grant of power to it: *People v. Chicago West Division Ry. Co.*, 118 Ill. 113.

But if it were true, as contended by counsel, that the purpose of the mileage tax was to compensate the city for granting the privilege to the plaintiff in error to lay down its tracks and operate its street railway, it is still, in our opinion, a valid condition, and comes fully within the scope of the power granted to the city by section 3 of the horse and dummy act, *supra*. In *Providence v. Union Ry. Co.*, 12 R. I. 473, it is said: "The defendant corporation also contends that it is not liable because the city had no power to exact a pecuniary compensation for the use of the streets. We do not think this defense is tenable. The charters of the horse railroad companies contain a provision that nothing in the charters shall be construed to allow the companies to construct, use, or continue their roads into, over, or through any street or highway of the city unless with the consent of the city council of said city, and upon such terms and conditions and under such rules and regulations as said city council may impose. The defendant cites certain cases which hold that a municipal corporation has no right, under a simple authority to license, to demand money for the license beyond a small fee for incidental expenses. The ground of decision of those

cases is, that the power to ²⁵⁷ license is a mere police power, and therefore cannot be exercised with a view to revenue, unless conferred in terms which plainly authorize it. But the power here conferred is not a police power. Evidently it was conferred, not only for the general good, but also to enable the city to protect itself as the body charged with the maintenance and repair of the streets, and it is to be construed fairly in view of its purpose. Rails in streets are a serious annoyance. They divert travel to other streets, and so necessitate an increase of care and expense, not only where they are laid, but also in such other streets. It is therefore not unreasonable to require the companies to pay something for their privileges. The city, in giving its assent, has required it, and the companies, in accepting the assent, have agreed to comply with the requirements. We think the agreement binds them." The following cases, under statutes not materially different from ours, are to the same effect: *Allegheny v. Millville etc. Ry. Co.*, 159 Pa. St. 411; *Federal Street Ry. Co. v. Allegheny*, 14 Pittsb. L. J., N. S., 259; *Covington Street Ry. Co. v. Covington*, 9 Bush, 127.

Booth, in his work on Street Railways, section 284, deduces from the authorities the conclusion that the municipality has a right to exact a money consideration for its consent to the occupancy of its streets, and says: "The right to exact compensation in money, otherwise called a bonus, is justified on the ground that the right to use a street already graded, as a roadbed, is a valuable privilege, and because the occupation of the streets by cars interferes to some extent with their use by other travelers. Where the enjoyment of the franchise depends upon the consent of the local authorities, their right to impose conditions authorizes them to exact the payment of a bonus." Judge Elliott, in his recent and able work on Railroads, section 1081, lays down substantially the same doctrine.

It is said the public, for the best interests of which the city council must act, is not the public within the ²⁵⁸ limits of the city, but that by the term "public" is meant "the body of the people at large; the people of the neighborhood; the community at large, without reference to geographical limits": Citing *Baker v. Johnson*, 21 Mich. 319. We do not deem it important to here determine the meaning of the word "public," as used by the legislature. Certainly, there is nothing shown in this record to justify the presumption that the city council used the word in a sense other than that placed upon it by the legislature.

It is again insisted that the condition embodied in section 8

of the ordinance is violative of the fourteenth amendment to the constitution of the United States, of section 2 of the bill of rights of the constitution of this state, and of section 22 of article 4 of the latter constitution. The position is, that each of these are violated because the railway company is, by the condition, denied the equal protection of the laws of its property without due process of law; that a general law may be made, applicable to all street railways in the city, but no special ordinance can be enacted, and it is insisted that because other ordinances have been adopted by the city granting privileges to other railway companies to occupy the streets without exacting this condition, the latter provision has been violated. We think, with counsel for the city, that the statute having given the municipality power to grant or withhold its consent as "it shall deem for the best interest of the public"—the power being discretionary—it is manifestly not to be exercised by a general ordinance applicable alike to all cases, but each case must be acted upon with reference to its peculiar conditions and circumstances. If, in the exercise of its sound discretion, the city council shall determine that the best interests of the public do not require the imposition of any conditions whatever, it may grant its license without qualification; but if, on the other hand, the public interest requires that the occupancy of particular streets, under peculiar conditions, demands that certain exactions ²⁵⁹ shall be made of the company for the privilege conferred, then the city council has a right to so provide, and no constitutional right or privilege is interfered with. There is no general law of the state of Illinois, nor is there an ordinance of the city of Chicago, requiring all street railway companies to pay a mileage tax, but, as we have before said, discretionary power is conferred by the legislature upon the city council to impose such a condition upon giving its consent to any particular company to occupy its streets.

We are also of the opinion that even though it might be held that the condition upon which the permit or license was granted to the defendant railway company was *ultra vires*, the city not having the power to impose it, nevertheless, the ordinance having been accepted by the company with the condition attached, agreeing thereby to perform it, it became a valid contract between it and the city, the validity of which the defendant is now estopped to deny. The act of the city in imposing the condition cannot be treated as against public policy or prohibited by statute, and void, and therefore, having accepted the contract in its entirety and enjoyed the benefits for which it agreed to

pay the amount prescribed, it cannot now repudiate that contract: *Kadiash v. Garden City etc. Bldg. Assn.*, 151 Ill. 531, 42 Am. St. Rep. 256; *Cook County v. Chicago*, 158 Ill. 526; *Fulton v. Northern Illinois College*, 158 Ill. 333.

It is well settled in this state that while the granting of authority to occupy the public streets of a city for other than the ordinary purposes of a street is, in the first instance, a mere license, still, when that license is granted upon conditions, and the licensee has accepted the privilege and performed the conditions, it becomes a contract between the parties. Here it must be admitted that the defendant could only occupy the streets of the city with its tracks by the consent of the municipal authorities. That consent could be given or withheld, as these authorities deemed proper; and upon such conditions as ²⁶⁰ they considered for the best interests of the public they granted the privilege and named the conditions. The defendant accepted, without qualification. It has availed itself of the benefits of the contract, and now seeks to repudiate the conditions. We are unable to see upon what principle, under the law of contracts, it can be allowed to do so. We think, however, that the liability of the defendant upon its bond may be properly placed upon the broad ground that the city council was vested with full power and authority to impose the condition and require the bond for its faithful performance.

The judgment of the circuit court will be affirmed.

MUNICIPAL CORPORATIONS—GRANTING OF FRANCHISES—IMPOSITION OF TERMS.—A city may, in granting to a gas company a franchise to use its streets, prescribe and impose terms and conditions which become, when accepted and complied with, a binding contract: *Indianapolis v. Consumers' Gas Trust Co.*, 140 Ind. 107; 49 Am. St. Rep. 183. Compare *Daly v. Georgia Southern etc. R. R. Co.*, 80 Ga. 703; 12 Am. St. Rep. 286; *State v. Corrigan etc. Ry. Co.*, 85 Mo. 263; 55 Am. Rep. 361. A resolution of the common council of a city authorizing private persons to construct and operate a railroad in the public streets thereof, upon certain conditions, without limitation as to time, and without reserving any power of revocation, is not a license, but a contract, which, if valid, could not be abrogated after it had been once accepted and acted upon: *Milhau v. Sharp*, 27 N. Y. 611; 84 Am. Dec. 314.

BELL v. FARWELL.

[176 ILLINOIS, 432.]

CONSTITUTIONAL PROVISIONS, WHEN NOT SELF-EXECUTING.—The provision of the constitution of Kansas that dues to a corporation shall be secured by the individual liability of stockholders to an additional amount equal to the stock owned by each stockholder and such other means as shall be provided by law is not self-executing.

STATUTORY LAW.—IF A STATUTE OF A STATE HAS RECEIVED A CONSTRUCTION by its highest court, this construction will ordinarily be accepted by the courts of other states, though they would, upon finding similar language in a statute of their own, give it a different and even a reverse construction.

CONFLICT OF LAWS.—IN THE CONSTRUCTION OF CONTRACTS and in ascertaining their validity the law of the country wherein they were made or are to be performed governs.

CORPORATIONS—STATUTES IMPOSING LIABILITY ON STOCKHOLDERS ARE NOT PENAL.—A statute of Kansas providing that if a corporation shall have suspended business for a year it shall be deemed dissolved, and its stockholders shall be liable to its creditors in an additional amount equal to the amount of their stock, to be recovered directly in an action against them without joining the corporation, is not penal in its nature or purpose. Hence, the liability created thereby may be enforced in the courts of other states.

CORPORATIONS—LIABILITY OF STOCKHOLDERS, WHEN CONTRACTUAL.—If a statute provides that stockholders of corporations shall be liable to their creditors, such liability must be regarded as contractual and not as penal.

CORPORATIONS, FOREIGN—ACTION AGAINST STOCKHOLDERS ON THEIR LIABILITY.—If, by the law of a state in which a corporation was organized, each of its stockholders is personally liable to its creditors, and such liability is, by the courts of that state, deemed contractual, an action to enforce it may be maintained in the courts of another state against a stockholder resident therein.

Action by the plaintiff, Bell, against the defendant, Farwell, to enforce a liability claimed to exist against the latter by reason of his being a stockholder in the Abilene Central Land Company, a corporation of the state of Kansas. The complaint showed that the corporation was organized and doing business in the year 1890 in the state of Kansas; that it was not a railroad, religious, nor charitable corporation, and that at the time of its organization and when the liability sued upon was incurred there was a provision in the constitution of the state of Kansas declaring that "dues from corporations shall be secured by individual liability of stockholders to an additional amount equal to the stock owned by each stockholder, and such other means as shall be provided by law; but such individual liability shall not apply to railway corporations, nor corporations for religious

or charitable purposes"; that there was a statute of Kansas as follows: "If any execution shall have been issued against the property or effects of the corporation, except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be levied against any of the stockholders to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder except upon an order of the court in which the action, suit, or proceedings shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged, and upon such motion such court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment." The complaint further alleged that the defendant was the owner of ten shares of the capital stock of the corporation of the par value of five hundred dollars each, and for which he paid the sum of five thousand dollars; that on February 26, 1890 a judgment was recovered in the Dickinson district court of Dickinson county, Kansas, in favor of the plaintiff against the corporation for thirty-nine thousand, seven hundred and fifty-five dollars; that an execution issued on such judgment had been returned no property found, and that there now remained due thereon twenty-seven thousand, eight hundred and fifty-six dollars and seventy-seven cents. The complaint also pleaded another statute of Kansas, declaring that a corporation is dissolved for the purpose of enabling any creditor thereof to prosecute suit against the stockholders to enforce their individual liability, if it be shown that such corporation has suspended its business for more than one year, or that any corporation not so suspended from business shall, for three years after the passage of the statute, fail to resume its usual and ordinary business, and that if any corporation be dissolved leaving unpaid debts, suits may be brought against any person or persons who are stockholders of the corporation without joining the corporation in the suit, and if judgment be rendered and execution returned not satisfied, the defendant or defendants may sue all who were stockholders at the time of the dissolution for the recovery of the portion of such debt for which they were liable, and the execution upon the judgment shall direct the collection to be made from the property of each stockholder respectively, and that if any number of stockholders shall not have property sufficient to satisfy his or

their portion of the execution, the amount of the deficiency shall be divided equally among the remaining stockholders, and collection made accordingly, deducting from the amount a sum in proportion to the amount of stock owned by the plaintiff at the time the corporation dissolved; and further that no stockholder shall be liable to pay debts of the corporation beyond the amount of his stock and an additional amount equal to the stock owned by him. It was also alleged that the supreme court of Kansas had construed the statutes relied upon, and decided that thereunder each stockholder was severally and individually liable to each creditor of such corporation in an additional amount equal to the amount of his or her stock, to be recovered in an action brought by such creditor directly against such stockholder without joining the corporation or other stockholders as defendants to such action; and that prior to July 1, 1891, the corporation had suspended business and had not since resumed, and thereby it had been dissolved before the commencement of this action. To this complaint the defendant demurred. The demurrer was sustained, and, the plaintiff refusing to amend, judgment was entered against him for the costs, and he thereupon appealed.

Cratty Bros., Jarvis & Cleveland, for the plaintiff in error.

Tenney, McConnell & Coffeen, and William E. Church, for the defendant in error.

493 CRAIG, J. It is first insisted in the argument that the provision of the constitution of Kansas set out in the declaration is self-executing, and intended to take effect without any legislation. We do not concur in that view. It is apparent from the reading of the provision itself that legislation was contemplated in order that it might be properly enforced, otherwise the last clause, "and such other means as shall be provided by law," would never have been incorporated in it. Moreover, this provision of the constitution of Kansas was involved in *Tuttle v. National Bank of Republic*, 161 Ill. 497, and upon careful consideration it was expressly held that it was not self-executing. The same doctrine was announced in *Marshall v. Sherman*, 148 N. Y. 9; 51 Am. St. Rep. 654, and *Western Nat. Bank v. Lawrence* (Mich., July 18, 1898), 76 N. W. Rep. 105, where the same provision of the constitution of Kansas was involved.

The right, however, of the plaintiff to maintain this action does not depend upon the disposition of this question. As has been seen, in the second count of the declaration it is averred

that the corporation in which the ⁴⁹⁴ defendant was a stockholder had suspended business for more than one year. It is then averred that there was in full force in the state of Kansas a statute which provides that "any corporation shall be deemed to be dissolved for the purpose of enabling any creditor of such corporation to prosecute suit against the stockholders thereof to enforce their individual liability, if it be shown that such corporation has suspended business for more than one year." It is also averred that the statute further provides: "If any corporation created under this or any general statute of this state, except railway or charitable or religious corporations, be dissolved leaving debts unpaid, suits may be brought against any person or persons who are stockholders at the time of such dissolution, without joining the corporation in such suit." It was further averred in the declaration: "That the supreme court of said state of Kansas, being the court of last resort of said state, have passed upon and construed the foregoing provisions of said statute, holding that thereunder each stockholder in corporations organized under said statute is severally and individually liable to each creditor of such corporation in an additional amount equal to the amount of his or her stock, to be recovered in an action brought by such creditor directly against such stockholder without joining said corporation or other stockholders therein as defendants to such action."

The facts set up in the declaration are admitted by the demurrer, and the question presented is, Admitting the facts as pleaded to be true, is the plaintiff entitled to maintain his action against the defendant to enforce his liability as a stockholder in the corporation?

Where a statute of another state has received a construction by the highest court of such state, such construction will, ordinarily, in the courts of this state, be adopted as binding and conclusive, and this, although the examining court finds that upon similar language in a statute within its own sovereignty it would place a different ⁴⁹⁵ or even reverse construction: *Van Matre v. Sankey*, 148 Ill. 536; 39 Am. St. Rep. 196.

It is, however, said that the legislation in Kansas relates only to the remedy, and, as the remedy is special to the state of Kansas, it will not be enforced here. It may be regarded as a well-settled rule that the courts of one country will not enforce either the criminal or penal laws of another. Nor will they carry out or be guided by the laws of another regulating the forms of actions or the remedies provided for civil injuries; but it is also well

settled that in the construction of contracts, and in ascertaining whether they are valid, the law of the country where the contract was made or to be performed shall, in general, govern: *Sherman v. Gasset*, 4 Gilm. 521. The statute in question is neither a criminal nor a penal law. There is no ground for holding that the liability imposed by the constitution and statute of Kansas is penal in its nature or purpose.

In *Diversey v. Smith*, 103 Ill. 378, 42 Am. Rep. 14, we had occasion to consider when a statute might be regarded as penal and when the liability might be regarded as primary and based on contract. In that case the statute declared that the corporation should not transact business until certain specified things had been done, and if it did transact business in violation of the statute the trustees and corporators should be liable to the creditors in a specified amount. The court, in the decision of the case, among other things said: "But the statute under consideration . . . prohibits the making of all contracts. It imposes the liability upon the trustees and corporators, not because the company was authorized to contract in their names or on their behalf, or so as to otherwise bind them, but because it prohibited the commencing of business and issuing of policies, and the trustees and corporators, in violation of their duty, caused or permitted business to be commenced and policies to be issued. Sedgwick says: 'Penal statutes are acts by which a forfeiture ⁴⁹⁶ is imposed for transgressing the provisions of the act.' He moreover adds: 'A penal law may also be remedial, and a statute may be remedial in one part and penal in another.' In *Potter's Dwarries on Statutes*, 74, it is said: 'A penal statute is one which imposes a forfeiture or penalty for transgressing its provisions or for doing a thing prohibited.' It is the effect—not the form—of the statute that is to be considered, and when its object is clearly to inflict a punishment on a party for violating it—i. e., doing what is prohibited or failing to do what is commanded to be done—it is penal in its character." In the decision the distinction between a penal and a contractual liability is made. In the one case the liability arises by a violation of the law. But where the statute declares that the corporation may transact business and the stockholders shall be liable for debts contracted, then the liability is primary and based upon contract.

It will be observed that *Fuller v. Ledden*, 87 Ill. 310, *Culver v. Third Nat. Bank*, 64 Ill. 529, and *Corwith v. Culver*, 69 Ill. 502, are referred to by the court in the above case, and it is said that the liability of the stockholder in those cases was contractual, and

not penal. Upon examination it will be found that the language of the statute under which the corporations were organized in those cases was substantially the same as in the case under consideration.

Nor does the act in question undertake to provide any form of action whatever. It merely provides that suits may be brought against any persons who are stockholders, without undertaking to determine the character or kind of action that shall be brought. It is true, the liability of the stockholder to the creditors is one imposed by statute; but at the same time the liability is one arising out of contract. Where the charter of the corporation provides that the stockholder shall be liable to creditors individually, as was the case here, all persons who became stockholders agreed to become liable to all who ⁴⁹⁷ might give credit to the corporation. The stockholders offer to the public to be liable as a corporation to the extent of the capital invested in the corporation, and they agree to become liable individually to an amount specified in the act of incorporation. Persons who give credit to the corporation do so upon the faith of the personal liability of the stockholders, and upon what principle can it be said that the liability is not contractual? In the discussion of this question Morawetz on Private Corporations, section 870, says: "If the company's charter provides that the shareholders shall be subject to a special individual liability to creditors, persons becoming shareholders agree to become liable, both in their corporate capacity and individually, to all persons who shall give credit to the corporation. They offer to all the world to become liable, in their corporate capacity, to the extent of the capital which they have agreed to contribute for the purpose of carrying on the company's business, and they offer to become liable individually to the amount expressly provided by their charter or incorporation law. Parties who contract with the corporation contract upon the faith of this liability held out as their security, and the offer of the shareholders, being thereby accepted, ripens into a binding contracts": See, also, Thompson on Private Corporations, sec. 3056; Cook on Stock and Stockholders, sec. 223.

In *Western Nat. Bank v. Lawrence* (Mich., July 18, 1898), 76 N. W. Rep. 105, the supreme court of Michigan held that under the Kansas constitution and statute the stockholder was individually liable to a creditor; that the action was transitory, and might be enforced in any state where personal service could be had on the stockholder.

In *Hancock Nat. Bank v. Ellis*, 166 Mass. 414, 55 Am. St. Rep.

414, the supreme court of Massachusetts held that an action might be maintained in that state by a creditor against a stockholder, under the constitution and statute of Kansas, to enforce the personal liability of the stockholder. In the ⁴⁹⁸ decision of the case the court said: "This case comes up on demurrer to the plaintiff's declaration. It is averred, in substance, that under the statute of Kansas, as interpreted by the decisions of the supreme court of that state, the liability of the defendant as a stockholder is a contractual liability, and arises upon the contract of subscription to the capital stock made by the defendant in becoming a stockholder, and that in subscribing to said stock and becoming a stockholder he thereby guaranteed payment to the creditors of an amount equal to the par value of the stock held and owned by him, which should be payable to the judgment creditors of said corporation who first pursued this remedy under the statute, and that an action to enforce said liability is transitory, and may be brought in any court of general jurisdiction in the state where personal service can be made upon the stockholder. The liability of the stockholders must be determined according to the law of Kansas: *New Haven Horse Nail Co. v. Linden Springs Co.*, 142 Mass. 349; *Halsey v. McLean*, 12 Allen, 439; 90 Am. Dec. 157; *Flash v. Conn*, 109 U. S. 371. We now have a case where the declaration, as we interpret it, sets forth that according to the law of Kansas the defendant is liable to a judgment creditor of the corporation as upon a contract, which is suable anywhere. The facts alleged in this respect are different from those in any case heretofore presented to this court (see *Bank of North America v. Rindge*, 154 Mass. 203, 26 Am. St. Rep. 240), and the alleged liability of stockholders is of a different character from that which exists in this commonwealth. We are, however, to adopt the construction which is given in Kansas to the liability and undertaking of stockholders in Kansas corporations, and to give force and effect to the same as there established."

It is said, however, assuming a liability which the courts might undertake to enforce, they will refuse to do so except by a proceeding in consonance with the judicial policy of our state. *Thompson on Liability of Stockholders*, ⁴⁹⁹ sections 82, 83, says: "If the liability sought to be enforced is in the nature of contract, and is not opposed to the legislation or public policy of the state in which it is sought to be enforced, the courts of such state will give effect to it. If the statute creating such liability is penal in its nature, it will not be enforced outside of the gover-

eighty enacting it." Under this rule we see no reason why the action brought in the case under consideration might not properly be maintained. The statute creating the liability, as we have seen, is not penal, and while the liability is one imposed by statute, it arises out of a contract of subscription entered into by the stockholder when he became a stockholder in the corporation. Morawetz on Corporations, section 875, says: "The right to maintain a suit of this character outside of the jurisdiction of the state by which the corporation was chartered does not depend upon the comity of the state where the suit is brought, or its willingness to recognize and give effect to the laws of a foreign state; it depends upon the willingness of the courts to enforce a contract validly entered into between the parties in another jurisdiction."

The policy of a state is to be determined, in a great measure, from its legislation and from the decisions of its courts, and under our decisions a liability of a stockholder has been frequently enforced in an action at law, where the liability of the stockholder did not arise under the general incorporation act of the state: *Wincock v. Turpin*, 96 Ill. 135; *Schalucky v. Field*, 124 Ill. 617; 7 Am. St. Rep. 399; *Corwith v. Culver*, 69 Ill. 502; *Fuller v. Ledden*, 87 Ill. 310; *Culver v. Third Nat. Bank*, 64 Ill. 529; *McCarthy v. Lvasche*, 89 Ill. 270; 31 Am. Rep. 83. Where a liability arises under the general incorporation act of the state (Rev. Stats., c. 32), the remedy of the creditor is in equity, as provided by section 25 of that statute, as held in *Low v. Buchanan*, 94 Ill. 76. But in *Wincock v. Turpin*, 96 Ill. 135, it was held that the remedy in equity was confined to corporations organized under that act, hence the fact that a remedy in equity was established in a particular ⁵⁰⁰ class of cases could have no special bearing on the question involved.

The defendant, however, relies upon *Tuttle v. National Bank of Republic*, 161 Ill. 497, as an authority that the action cannot be maintained. There is a marked distinction between this case and the *Tuttle* case. In the second count of the declaration will be found three provisions of the Kansas statute set out and relied upon which were not before the court in the *Tuttle* case. In addition, the construction placed upon the constitution and statutes of Kansas by the supreme court of that state is pleaded in this case, which was not before the court in that case. It is averred in the declaration, and the averment is admitted to be true by the demurrer, "that the supreme court of Kansas, being the court of last resort of said state, has passed upon and con-

strued said statute, and holds that any stockholder in a corporation organized thereunder is severally and individually liable to each creditor of such corporation in an amount equal to the amount of his stock, to be recovered in an action brought by the creditor directly against the stockholder, without joining said corporation or other stockholders therein as defendants." Had the statutes set up in this case and their construction by the court of last resort been before us in the Tuttle case, a different result might have been reached on the question of remedy.

The liability imposed is not to the corporation nor to all the creditors of the corporation, but, on the other hand, the liability is to each individual creditor. Nor is the liability of the stockholders a joint one, but each stockholder is severally liable. Under such circumstances, a resort to a court of equity in the state of Kansas does not seem to be required before bringing an action here to enforce the individual liability of the stockholder. The rule established in *Young v. Farwell*, 139 Ill. 326, and *Patterson v. Lynde*, 112 Ill. 196, does not apply to the case made by the declaration here.

501 The judgments of the appellate and superior courts will be reversed and the cause will be remanded, with directions to the superior court to overrule the demurrer to the declaration.

CONSTITUTIONS—PROVISIONS NOT SELF-EXECUTING.—A constitutional provision is not self-executing which declares that dues from corporations shall be secured by individual liability of stockholders to an additional amount equal to the stock owned by such stockholders, and such other means as shall be provided by law. The liability of stockholders must, therefore, be ascertained by examining such state statutes as have been enacted by the legislature in discharging the duty imposed upon it by such constitutional provision: *Marshall v. Sherman*, 148 N. Y. 9; 51 Am. St. Rep. 654, and note.

STATUTES OF OTHER STATES — CONSTRUCTION BY COURTS.—If a statute of a state has been construed by its highest judicial tribunal, such construction will ordinarily be received as conclusive in the courts of other states: *Van Matre v. Sankey*, 148 Ill. 536; 39 Am. St. Rep. 196; *Case v. Cushman*, 3 Watts & S. 544; 39 Am. Dec. 47; *American Print Works v. Lawrence*, 23 N. J. L. 590; 57 Am. Dec. 420, and note.

CONTRACTS—CONFLICT OF LAWS.—The law of the place where a contract is to be performed governs, subject to the rule that a contract void in the place where made is void everywhere: *Western Union Tel. Co. v. Eubanks*, 100 Ky. 591; 66 Am. St. Rep. 361. See monographic note to *McGarry v. Nicklin*, 55 Am. St. Rep. 44-55.

STATUTES—PENAL—WHAT ARE.—A statute is clearly penal where it imposes a liability upon a person for its violation, and the only object of an action under it is to recover a penalty or forfeiture: *Aylsworth v. Curtis*, 19 R. I. 517; 61 Am. St. Rep. 785. A penal statute of one state will not support a civil action in another: *Adams v. Fitchburg R. R. Co.*, 67 Vt. 76; 48 Am. St. Rep. 800, and note.

CORPORATIONS—STOCKHOLDER'S LIABILITY—ENFORCEMENT IN ANOTHER STATE.—If the statutes of a state in which a corporation is organized create a liability against its stockholders for their proportion of its debts, this liability may be enforced by an action against them, or any of them, in any other state in which jurisdiction over them can be obtained: *Aldrich v. Anchor etc. Coal Co.*, 24 Or. 32; 41 Am. St. Rep. 831, and note; *Hancock Nat. Bank v. Ellis*, 168 Mass. 414; 55 Am. St. Rep. 414. See *Marshall v. Sherman*, 148 N. Y. 9; 51 Am. St. Rep. 654, and note; *Fowler v. Lamson*, 146 Ill. 472; 87 Am. St. Rep. 163, and monographic note.

DOREMUS v. HENNESSY.

[176 ILLINOIS, 608.]

BUSINESS OF ANOTHER—LIABILITY FOR INTERFERING WITH.—No person or combination of persons has the right, directly or indirectly, to interfere with or disturb another in his lawful business, or to threaten to do so for the purpose of compelling him to do some act which, in his judgment, his interest does not require. For any loss sustained by him for such interference he is entitled to recover.

BOYCOTTING—LIABILITY FOR.—It is unlawful and actionable for one man, from unlawful motives, to interfere with another's business, by fraud or misrepresentation, or by molesting his customers or those who would be his customers, or by preventing others from working for him, or causing them to leave his employ by fraud or misrepresentation, or physical or moral intimidation or persuasion, with intent to inflict an injury which causes loss.

CONSPIRACY—CIVIL LIABILITY FOR.—A conspiracy may, when accompanied by an overt act, create a liability by reason of the fact that one or more conspirators may do an unlawful act which causes damage to another by which all those engaged in the conspiracy for the accomplishment of the purpose for which the injury was done in pursuance of the conspiracy would be alike liable, whether actively engaged in causing the injury or not.

BUSINESS COMPETITION—WHAT IS NOT.—An act maliciously done with the intent and purpose of injuring another is not lawful competition. Acts done for the purpose of breaking up the business of another, because he will not join in making a scale of prices, must be deemed malicious, and, therefore, the doers of them are personally liable to the person injured thereby.

CONTRACTS—CAUSING PERSON TO VIOLATE, LIABILITY FOR.—Though a person who violates a contract is personally liable, yet if he is induced to do so by the acts and persuasion of another, who intended thereby to injure the other contracting party or to coerce him to adopt a line of business against his will and judgment, he also has a right to recover against the persons thus inducing the breaking of the contract.

BOYCOTTING—DAMAGES—QUESTION FOR THE JURY. Where, in an action to recover damages from persons for persuading and inducing others to break, and to refuse to perform, their contract with the plaintiff, it is claimed that the wrongs complained of could not have produced the injury alleged without the intervention of some independent force, to wit, the acts of the parties in breaking their contracts, the question thus presented is one of fact for the determination of the jury, and its verdict in favor of the plain-

tiff will be sustained, where the evidence tends to show that the defendants persuaded, or sought to procure, the breaking of the contracts for the purpose of injuring the plaintiff, and that they were so broken and such injury resulted.

Howard Henderson and Francis W. Walker, for the appellants.

Tuttle & Grier, for the appellee.

611 PHILLIPS, J. Appellee instituted an action on the case, alleging that in 1890, and several years prior thereto, she was conducting a laundry office in the city of Chicago, where she received clothing from various customers, to be laundered; that she did not own a laundry plant herself, but employed other operating laundries, who, when the work was done, returned the same to her for delivery to her customers; that she had built up a good and profitable business; that appellants conspired to injure her in her good name and credit, and to destroy her business, because she would not increase the price charged by her 612 to customers in accordance with the scale of prices fixed by an organization known as the Chicago's Laundrymen's Association, and to that end willfully and unlawfully, by intimidation and unlawful inducements, caused parties who were doing her work (five of whom were mentioned in the declaration) to refuse to longer do the same, and by threats, intimidation, false representations, and unlawful inducements caused others who were operating laundries (who were specifically designated in a bill of particulars) to refuse to take or do her work; that this was done for no justifiable purpose, but to cause loss to the plaintiff and injure and destroy her business; that various persons with whom she had engagements to so do her work, in consequence of the acts of the appellants, broke their contracts with her, and the business she had built up as a laundry agent was destroyed and entirely broken up, and she thereby sustained great loss and damage by reason of appellants so contriving, plotting, and conspiring, by the means aforesaid, to break up and destroy her said business.

The evidence shows that plaintiff had a contract with one Miller, who operated a laundry, and who agreed to do her work and give her two weeks' notice before he would quit doing it, and that through the interference of appellants he refused to do her work without giving the notice agreed on. Subsequently she applied to other laundrymen, who agreed to do her work as long as the laundry association did not interfere. She made arrangements with other laundries, by written agreement, by

which her work was to be done. In one case, the contract was for a year, and according to the testimony in this record that contract was broken by the party contracting with her almost as soon as made. One contract with Joseph Apple, by which her laundry work was to be done for one year, was violated. The officers of this association, as testified to by the witness who entered into the contract with appellee, interfered, and sought to injure the plaintiff by ⁶¹³ having him keep back her work, retaining it as long as possible, to her detriment, and also by having him retain parts of the work. He testifies: "They told me that they would give me three hundred dollars, a horse and wagon, and enough work to keep me going, provided I would keep back her work and retain it as long as I possibly could, to the detriment of her patronage. That was at the first meeting, and I agreed to that. I kept a bundle out. At the second meeting they made threats to me if I didn't accept that they would ruin my business at any rate, as well as hers." Another witness who agreed to do her work as long as the laundry association would let him alone, was induced, by threats of destroying his business, to cease connection in business with appellee. The evidence shows that appellants were active in inducing these various breaches of contract, as well as other contracts entered into between her and various parties engaged in operating laundries.

Issues were joined, and upon a trial in the circuit court of Cook county defendants were found guilty and the plaintiff's damages were assessed by a jury at six thousand dollars. Motions for a new trial and in arrest of judgment were overruled, and judgment was entered on the verdict, to which defendants excepted. On appeal to the appellate court for the first district the judgment was affirmed, and this appeal is prosecuted.

The contention of appellants is, that they cannot be held liable for merely inducing others to break their contracts; that the parties who broke their contracts were the only ones liable, they being free agents and not coerced or influenced by force or fraud; that their acts in inducing parties to break their contracts with appellee were not mere malicious acts, done solely with the intent to injure her, but were in the line of legitimate trade competition, for which they cannot be held liable; nor can they be held liable, they claim, for acts which are charged to have been done in pursuance of a conspiracy, as it is insisted that a conspiracy does not create a liability in ⁶¹⁴ a civil action, as the

damage illegally done, and not the conspiracy, must be the gist of the action.

The common law seeks to protect every person against the wrongful acts of others, whether committed alone or by combination, and an action may be had for injuries done which cause another loss in the enjoyment of any right or privilege or property. No persons, individually or by combination, have the right to directly or indirectly interfere or disturb another in his lawful business or occupation, or to threaten to do so, for the sake of compelling him to do some act which, in his judgment, his own interest does not require. Losses willfully caused by another, from motives of malice, to one who seeks to exercise and enjoy the fruits and advantages of his own enterprise, industry, skill, and credit will sustain an action. It is clear that it is unlawful and actionable for one man, from unlawful motives, to interfere with another's trade by fraud or misrepresentation, or by molesting his customers or those who would be customers, or by preventing others from working for him or causing them to leave his employ by fraud or misrepresentation or physical or moral intimidation or persuasion, with intent to inflict an injury which causes loss. A conspiracy may, when accompanied by an overt act, create a liability, by reason of the fact that one or more conspirators may do an unlawful act which causes damage to another, by which all those engaged in the conspiracy for the accomplishment of the purpose for which the injury was done, and which was done in pursuance of the conspiracy, would be alike liable, whether actively engaged in causing the loss or not. For acts illegally done in pursuance of such conspiracy, and consequent loss, a liability may exist against all of the conspirators. Appellants, and those persons who refused to do appellee's work, had each a separate and independent right to unite with the organization known as the Chicago Laundrymen's Association, but they had no right, separately or in the aggregate, ¹⁵ with others, to insist that the appellee should do so, or to insist that appellee should make her scale of prices the same as that fixed by the association, and make her refusal to do this a pretext for destroying and breaking up her business. A combination by them to induce others not to deal with appellee or enter into contracts with her or do any further work for her was an actionable wrong.

Every man has a right, under the law, as between himself and others, to full freedom in disposing of his own labor or capital

according to his own will, and anyone who invades that right without lawful cause or justification commits a legal wrong. and. if followed by an injury caused in consequence thereof, the one whose right is thus invaded has a legal ground of action for such wrong. Damage inflicted by fraud or misrepresentation, or by the use of intimidation, obstruction, or molestation, with malicious motives, is without excuse and actionable. Competition in trade, business, or occupation, though resulting in loss, will not be restricted or discouraged, whether concerning property or personal service. Lawful competition that may injure the business of another, even though successfully directed to driving that other out of business, is not actionable. Nor would competition of one set of men against another set, carried on for the purpose of gain, even to the extent of intending to drive from business that other set and actually accomplishing that result, be actionable unless there was actual malice. Malice, as here used, does not merely mean an intent to harm, but means an intent to do a wrongful harm and injury. An intent to do a wrongful harm and injury is unlawful, and if a wrongful act is done to the detriment of the right of another it is malicious, and an act maliciously done, with the intent and purpose of injuring another, is not lawful competition. In this case it is clear the evidence sustained the allegations of the plaintiff's declaration, and there is here no contention on the facts. The principles herein announced are sustained by the weight of ⁶¹⁶ authority in England and in this country: *Lumley v. Gye*, 2 El. & B. 216; *Blake v. Lanyon*, 6 Term. Rep. 22; *Sykes v. Dixon*, 9 Ad. & E. 693; *Pilkington v. Scott*, 15 Mees. & W. 657; *Hartley v. Cummings*, 5 Com. B. 247; *Bowen v. Hall*, L. R., 6 Q. B. Div. 333; *Carew v. Rutherford*, 106 Mass. 1; 8 Am. Rep. 287; *Walker v. Cronin*, 107 Mass. 555; *Chipley v. Atkinson*, 23 Fla. 206; 11 Am. St. Rep. 367; *Delz v. Winfree*, 6 Tex. Civ. App. 11; *Curran v. Galen*, 2 Misc. Rep. 553; 22 N. Y. Supp. 826; *Van Horn v. Van Horn*, 52 N. J. L. 284.

In *Mogul S. S. Co. v. McGregor*, L. R. 15 Q. B. Div. 476, Lord Coleridge said: "It seems that a large number of important and rich shipowners joined together and have issued two circulars or documents to the different traders and their agents with whom they had been in the habit of dealing in the tea and other trades in China, to the effect that if the persons whom that circular reached and was meant to affect should deal with the plaintiffs or plaintiff's ship, they, the defendants, would deny them all

the benefits, or at least a very large and substantial benefit, which had accrued to them in their dealing with the defendants; that if the persons to whom they addressed the circulars would deal exclusively with them they should have certain advantages at their hands. . . . It is conceivable that if such a conspiracy—because conspiracy undoubtedly it is—were proved in point of fact, were made out to be, not the mere honest support of a defendant's trade, but the destruction of the plaintiff's trade and their consequent wrong as merchants, it would be an offense for which an indictment for conspiracy, and if an indictment then an action for conspiracy, would lie; . . . that the conspiracy to do the thing which has been called by the name of 'boycotting' is unlawful and an indictable offense, and if so, then a thing for which an action will lie. An action may well lie for that which is complained of here."

It is urged by appellants that they cannot be held liable for inducing certain persons named in the declaration to terminate their contractual relations with appellee, because ⁶¹⁷ their acts could not produce the injuries complained of without an independent force which was the act of the parties themselves, and these appellants, it is urged, cannot be held liable for an intervening cause of damages sufficient to cause the injury; and that the refusal of different persons to work for the appellee was sufficient, of itself, to occasion injury, for which the appellants cannot be held responsible. The first branch of this proposition has been disposed of by what we have heretofore said, and the authorities above cited. In *Lumley v. Gye*, 2 El. & B. 216, it was said: "He who maliciously procures a damage to another by a violation of his right ought to be made to indemnify." In *Bowen v. Hall*, L. R. 6 Q. B. Div. 333, it was said: "Merely to persuade the person to break his contract may not be wrongful in law or in fact, but if the persuasion be used for the direct purpose of injuring the plaintiff, . . . it is actionable, if injury ensues from it." The second branch of the proposition, in which it is urged that appellants could not produce the injuries complained of without the intervention of an independent force, presents the question whether the proximate cause of the injury is a question of fact. It has been settled by the adjudication of this state, so far as this question is here concerned, that in this state what was the cause of the injury, or the combination of causes producing it, is a question of fact. Whether the injury and damage sustained by plaintiff resulted from the acts of the defendant or were the result of a new, in-

dependent factor for which appellants were not responsible, cannot be determined by the court as a question of law, unless the fact be conceded or the proof be substantially all to that effect: *Pullman Palace Car Co. v. Bluhm*, 109 Ill. 20; 50 Am. Rep. 601; *Mt. Carmel v. Howell*, 137 Ill. 91; *Meyer v. Butterbrodt*, 146 Ill. 131. The finding of the trial and appellate courts on this question is not subject to review in this court.

It is next insisted that the damages are excessive. This has so repeatedly been held to be an error which can ⁶¹⁸ not be assigned in this court that citation of authority will be unnecessary.

What has been said in the discussion of the questions heretofore presented effectually disposes of all questions raised on giving, refusing, and modifying instructions.

The judgment of the appellate court for the first district affirming the judgment of the circuit court of Cook county is affirmed.

Subsequently, upon considering the petition for a rehearing in this case, the following additional opinion was delivered by Mr. Justice Phillips:

PHILLIPS, J. Appellants present their petition for a rehearing of this cause, and have brought to the attention of the court the case of *Allen v. Flood*, decided by the house of lords in Great Britain, which was not accessible at the time the opinion in this case was written. Since the petition for rehearing was presented counsel have procured a full report of that case and brought the same to the attention of the court. From that case it appears that boiler-makers in common employment with the respondents, Flood and another, who were shipwrights working on wood, objected to working with the latter on the ground that in a previous employment they had been engaged on ironwork. The appellant, an official of the boilermakers' union, in response to a telegram from one of the boiler-makers, came to the yard and dissuaded the men from immediately leaving their work, as they threatened to do, intimating that if they did so he would do his best to have them deprived of the benefits of the union and also fined; that they must wait till the matter was settled. The appellant, Allen, then saw the managing director, to whom he said that if the respondents, who were engaged from day to day, were not dismissed, the boilermakers would leave their work or be called out. Respondents were thereupon dismissed. The men so discharged instituted their action against the official of the boiler-makers' ⁶¹⁹ union, and

obtained judgment, which was affirmed by the court of appeal, and on appeal to the house of lords the assistance of the judges was requested, and the question submitted to the judges was: "Assuming the evidence to be given by the plaintiffs' witnesses to be correct, was there any evidence of a cause of action fit to be left to the jury?" Six of the eight judges answered in the affirmative and two in the negative. It appears there was no contract, as the men were engaged by the day, and were liable to be discharged at the close of any day without a breach of contract; that the only question presented by that case was, "Did Allen maliciously induce the company to discharge the plaintiffs, and did he maliciously induce the company not to engage them?" and it was held if the defendant's action was in itself lawful it was not made unlawful by the motive. It is a very different thing to do a lawful act with a proper motive, and to do an illegal act with a malicious motive. The facts in the case of *Allen v. Flood* are entirely different from the facts presented in this record. There was no contract in that case, the breach of which was induced by the defendant. Here, existing contracts, which were a property right in the plaintiff (the appellee), were broken; and this was brought about by the action of the defendants in inducing those contracting with her to violate their contracts. This caused a right to be taken away, in consequence of which she was injured and damaged.

After a careful consideration of the case of *Allen v. Flood*, and with a full recognition of the importance of the principles involved in the questions presented by this record, we are constrained to adhere to what has been said in our opinion heretofore, and must deny the petition for rehearing.

CONSPIRACY—INTERFERENCE WITH ONE'S BUSINESS—BOYCOTT.—Interference with the free exercise of another's trade or occupation or means of livelihood by fraud or force, such as preventing people, by threats or intimidation, from trading with or continuing him in their employment, is an actionable wrong: *Lucke v. Clothing Cutters' etc. Assembly*, 77 Md. 396; 39 Am. St. Rep. 421, and note. See *Delz v. Winfree*, 80 Tex. 400; 28 Am. St. Rep. 755. The means by which it is generally sought to accomplish a boycott are not only unlawful, but in some degree criminal: *State v. Glidden*, 55 Conn. 48; 3 Am. St. Rep. 23. Every trader is left to conduct his business in his own way, and cannot be held accountable to a rival who suffers a loss of profits by anything he may do, so long as the methods he employs are not of the class of which fraud, misrepresentation, intimidation, coercion, obstruction, or molestation of the rival or his servants or workmen, and the procurement of the violation of contractual relations are instances: *Macauley v. Tierney*, 19 R. I. 255; 61 Am. St. Rep. 770, and note.

CONSPIRACY—CIVIL ACTION FOR—WHEN LIES.—At common law, a conspiracy cannot be made the subject of a civil action,

although damages result, unless something is done which, without the conspiracy, would give a right of action. The true test as to whether such action lies is whether or not the act accomplished after the conspiracy has formed is itself actionable: *Deitz v. Winfree*, 80 Tex. 400; 28 Am. St. Rep. 755; *Beechley v. Mulville*, 102 Iowa, 602; 63 Am. St. Rep. 479.

CONTRACTS—BREACH INDUCED BY THIRD PERSON.—An action lies against a third person for wrongfully procuring a party to break his contract with the plaintiff to the latter's injury, and the employment of unlawful or improper means to induce him to do so is unlawful: *Perkins v. Pendleton*, 90 Me. 166; 60 Am. St. Rep. 252. This is so, although the contract could not have been enforced by action: *Lucke v. Clothing Cutters' etc. Assembly*, 77 Md. 396; 39 Am. St. Rep. 421. Compare *Glencoe Land etc. Co. v. Hudson Bros. etc. Co.*, 138 Me. 439; 60 Am. St. Rep. 560.

CASES
IN THE
SUPREME COURT
OF
INDIANA.

MITCHELL v. RINGLE.

[151 INDIANA, 16.]

EXECUTION OR FORECLOSURE SALE—REDEMPTION FROM—EFFECT OF.—When real property sold under a decretal order for less than the amount due is redeemed from the sale, it is wholly vacated, and the property becomes subject to a resale for the amount remaining unpaid.

EXECUTION—EFFECT OF ISSUING AN ORDINARY EXECUTION INSTEAD OF AN ALIAS ORDER OF SALE.—If a plaintiff entitled to an alias decretal order for the balance remaining unpaid under a decree of foreclosure instead thereof takes out an ordinary execution and sells thereunder the property subject to such decree, while such execution might have been vacated on motion, a sale thereunder is valid in the absence of any precedent objection to the writ.

EXECUTION, ISSUING, WAIVER OF IRREGULARITIES IN.—An ordinary execution, instead of an order of sale, issued upon a decree of foreclosure, is irregular, but the defendant, by failing to object until long after the sale, waives the irregularity.

EXECUTION FOR A MORTGAGE DEBT.—The provisions of a statute of Indiana that whenever an execution shall issue upon a judgment recovered for a debt secured by a mortgage of real property, the plaintiff shall indorse thereon a brief description of the mortgaged premises, and the equity of redemption shall in no case be sold on such execution, applies only to a judgment at law where there is no foreclosure of the mortgage. Hence an execution on a decree foreclosing a mortgage need not be so indorsed.

H. G. Zimmerman, L. E. Goodwin, and A. B. Young, for the appellant.

T. L. Graves and L. W. Welker, for the appellee.

16 MONKS, J. Upon the trial of this cause, instituted by appellee against appellant, the court made a special finding of

the facts and stated conclusions of law thereon in favor of appellee, and, upon motion, rendered judgment in favor of appellee. The errors assigned call in question the correctness of the conclusions of law.

The special finding, so far as is necessary to the determination ¹⁷ of the question presented, is substantially as follows: On June 6, 1889, appellant recovered a judgment in the Noble circuit court against Peter Ringle for two thousand and four dollars and sixteen cents, and a decree of foreclosure of a mortgage on certain real estate in Noble county securing the said indebtedness against said Peter Ringle and appellee, his wife. It was provided in said judgment and decree that said mortgaged real estate, or so much thereof as should be necessary, should be sold by the sheriff upon a certified copy of said judgment and decree, in like manner as lands are sold upon execution, for the satisfaction of said judgment, interest, and costs; and that in the event said mortgaged real estate failed to sell for a sum sufficient to pay said judgment, interest, and costs, the residue thereof remaining unpaid shall be levied of the goods and chattels, lands, and tenements of said Peter Ringle, subject to execution. That an order of sale was issued on said decree of foreclosure, and the real estate described therein advertised and sold by the sheriff on January 2, 1891, to appellant for fourteen hundred and thirty-six dollars and seventy cents. On the first day of January, 1892, said Peter Ringle, the judgment debtor, under the provisions of the statute, redeemed the property sold under said decree, and on the same day, by deed, conveyed to appellee, his wife, that part of said real estate in controversy in this action. Afterward, on April 13, 1892, an execution against Peter Ringle was issued on said judgment and decree of foreclosure to the sheriff of said county, who, after advertising the real estate ordered sold in said decree, of which the real estate conveyed by Peter Ringle to appellee was a part, sold the same on the ninth day of September, 1892, to appellant, the tract in controversy being bid off at three hundred dollars; and afterward, on March 15, 1894, the sheriff, by virtue of such ¹⁸ sale, executed a deed to appellant for said real estate. The court stated, as a conclusion of law on said facts, that the sale under said execution and the sheriff's deed were void, and rendered judgment in favor of appellee, quieting her title in and to said real estate conveyed to her by her husband, as against said sheriff's deed.

It is clear that when the real estate sold by the sheriff on said decretal order was redeemed from such sale by Peter Ringle, the owner thereof, that such sale was wholly vacated as to said real estate and the same was subject to sale upon a decretal order for the payment of the sum unpaid, the same as if no sale had been made: Burns' Rev. Stats. 1894, sec. 782; Rev. Stats. 1881, sec. 770; Green v. Stobo, 118 Ind. 334; Hervey v. Krost, 116 Ind. 268; Ewing v. Bratton, 132 Ind. 345.

After the redemption of said real estate appellant was entitled to an alias decretal order to make the balance due on said judgment and decree by the sale of the mortgaged property. An ordinary execution, however, was issued on said judgment and decree of foreclosure, and the property in controversy was sold thereon. Did the sale on such execution and the sheriff's deed thereunder give any title to appellant to the property in controversy? In this state the holder of a mortgage may either sue upon the mortgage and obtain a personal judgment against any party to the same liable upon any agreement for the indebtedness secured by the mortgage, and also a decree of foreclosure of the mortgage and sale of the mortgaged property to pay said mortgage and judgment and cost of the action (Burns' Rev. Stats. 1894, sec. 1111; Rev. Stats. 1881, sec. 1097), or he may sue and recover judgment on the debt secured by the mortgage without a foreclosure of the mortgage. If he forecloses his mortgage and takes a personal judgment as provided ¹⁰ in section 1111 of Burns' Revised Statutes of 1894 (Rev. Stats. 1881, sec. 1079), the court orders that the mortgaged real estate, or so much thereof as may be necessary, be first sold before levy of execution upon other property of the defendant. And in such cases the statute provides that a copy of the order of sale and judgment shall be issued and certified by the clerk under seal to the sheriff, who shall sell the mortgaged premises, or as much thereof as may be necessary to satisfy the judgment, interest, and costs, as upon execution, and if any part thereof remain unsatisfied, the sheriff shall forthwith proceed to levy the residue of the other property of the person or persons against whom the personal judgment was rendered. Sections 1113 and 1114 of Burns' Revised Statutes of 1894 (Rev. Stats. 1881, secs. 1099, 1100.). There must be a sale of the mortgaged property under such decree, and the balance due on the judgment ascertained before any of the other property of the mortgagor can be levied upon and sold to satisfy said judgment: Thomas v. Simmons, 103 Ind. 538, 542-545. If he pursues the course last men-

tioned, and takes a personal judgment on the indebtedness without a foreclosure of the mortgage, the mortgagor's equity of redemption in the mortgaged real estate cannot be sold on an execution issued on such judgment: Burns' Rev. Stats. 1894, sec. 1119 (Rev. Stats. 1881, sec. 1105); Reynolds v. Shirk, 98 Ind. 480; Pence v. Armstrong, 95 Ind. 196, 209; Boone v. Armstrong, 87 Ind. 168; Linville v. Bell, 47 Ind. 547. Such judgment is not a lien on the mortgaged real estate: Rooker v. Benson, 83 Ind. 250, 254.

The judgment and decree were rendered as required by sections 1111 and 1113 of Burns' Revised Statutes of 1894 (Rev. Stats. 1881, secs. 1111, 1113). The second sale of the mortgaged real estate, the one assailed by appellee, was made in all respects as required by the decree and the statute, except the writ on which the same was sold, which was ²⁰ in form an ordinary execution instead of a copy of the order of sale and judgment. This was a mere irregularity, for which the execution might, perhaps, have been set aside in a direct proceeding brought for that purpose by the proper party before the sale. In Sowle v. Champion, 16 Ind. 165, the process issued on a judgment and decree of foreclosure was not in the form required by statute; it contained no copy of the order of sale, but simply stated the rendition of the judgment and decree of foreclosure, and commanded the sheriff "to levy the money of the defendant's property and the sale of said premises in his county subject to execution," et cetera. This court held in that case that said writ was not void but merely voidable for irregularity, and that, as no motion was made to set it aside, the sale thereon was valid.

When any property levied upon by execution remains unsold, and the sheriff returns said execution, it is provided by statute that the lien of the levy shall continue, and the clerk, unless otherwise directed by the plaintiff, shall forthwith issue another execution, reciting the return of the former execution, the levy, and the failure to sell, and directing the sheriff to satisfy the judgment out of the property unsold, if the same is sufficient; if not, then out of any other property of the judgment debtor subject to execution: Burns' Rev. Stats. 1894, secs. 752, 753; (Rev. Stats. 1881, secs. 740, 741).

It was held under said sections by this court in Richey v. Merritt, 108 Ind. 347, that the levy of an execution upon property of sufficient value to pay the judgment creates a presumption of the satisfaction of the judgment, and operates as such until the

levy is legally disposed of, and an alias execution issued upon such judgment before the levy is disposed of is irregular and voidable, and may be set aside upon ²¹ motion, before the property is sold under it; but if the execution defendant waives his right to have such alias execution set aside, he cannot, after the sale, question the validity thereof on account of the irregular and voidable character of the execution: See, also, *Kerr v. South Park Commrs.*, 8 Biss. 276, 283; 1 Freeman on Executions, sec. 50.

It would seem clear, therefore, that if an alias execution is issued instead of a venditioni exponas, which is an order to sell the property taken under a former execution, as provided by section 753 of Burns' Revised Statutes of 1894 (Rev. Stats. 1881, sec. 741), is only irregular and voidable, and not void, that an execution issued upon a judgment and decree of foreclosure would be irregular and voidable, but not void. Here the process was issued under the seal of the court, and stated the recovery of judgment, and when and in what court recovered, and fully identified the proceeding upon which it was issued, a reference to which would disclose the fact that the same was a judgment and decree of foreclosure, and that the real estate described therein must be first sold before any other property of the mortgagor could be levied upon. The sale of the mortgaged real estate was made on said process in all respects as required by the decree and the statute. The facts stated in the special finding do not show any excuse for the failure of appellee to take proper steps to set aside the execution, or to otherwise prevent the sale of said real estate thereon. The reasonable inference is, that appellee had notice of all the irregularities of said writ, and that she made no objection thereto until the commencement of this action, after the deed was executed, which was two years after said writ was issued.

A defendant may waive irregularities in an execution, and if he do not procure the same to be set aside before sale he will be presumed to have waived them: ²² *Doe v. Dutton*, 2 Ind. 309; 52 Am. Dec. 510. Appellee took no steps to have the execution set aside, but permitted the property in controversy to be sold thereunder to satisfy said judgment and decree, and she cannot in this action, commenced long after said execution was issued and sale had thereon, question the validity of such sale on account of the irregularities and voidable character of the writ upon which the sale was made: *Richey v. Merritt*, 108 Ind. 347, 352, and cases cited; *Johnson v. Murray*, 112 Ind. 154; 2 Am.

St. Rep. 174; *Rose v. Ingram*, 98 Ind. 276; *Martin v. Prather*, 82 Ind. 535; *Mavity v. Eastridge*, 67 Ind. 211; *Lindley v. Kelly*, 42 Ind. 294; *Culbertson v. Milhollin*, 22 Ind. 362; 85 Am. Dec. 428; *Sowle v. Champion*, 16 Ind. 165; *Doe v. Dutton*, 2 Ind. 309; 52 Am. Dec. 510.

Appellee insists that the sale of said real estate upon said execution was void under section 1119 of Burns' Revised Statutes of 1894 (Rev. Stats. 1881, sec. 1105), which provides that whenever an execution shall issue upon a judgment recovered for a debt secured by a mortgage on real property, the plaintiff shall indorse thereon a brief description of the mortgaged premises, and the equity of redemption shall in no case be sold on such execution. Construing this section with the other sections concerning the foreclosure of mortgages, it is evident that the same only applies to a judgment at law where there is no foreclosure of the mortgage.

Where there is a personal judgment against the mortgagor or other person for the debt secured by the mortgage, and a decree of foreclosure under the provisions of sections 1111 and 1113 of Burns' Revised Statutes of 1894 (Rev. Stats. 1881, secs. 1097, 1099), the said section could not apply for the reason that the equity of redemption of the mortgagor in the mortgaged premises cannot be sold on any writ issued on such judgment and decree. The same gives no authority to sell such equity of redemption. On the contrary, the decree expressly provides, and the statute ²³ requires, that "the mortgaged premises or so much thereof as necessary to be sold to satisfy the mortgage and judgment and cost, be first sold, before levy of execution upon other property of the defendant," and that any balance then remaining unsatisfied after the sale of the mortgaged premises shall be levied on any property of the mortgage debtor. A sale of the mortgaged premises on any writ, issued on such judgment and decree, though said writ may have been voidable for irregularities, and a sheriff's deed thereunder conveys to the purchaser the title covered by the mortgage, the same as if the writ had contained a certified copy of the judgment and order of sale. This court in *Linville v. Bell*, 47 Ind. 547, in speaking of said section, said: "This section, as we understand it, contains a prohibition against the sale of the equity of redemption on an execution issued on a judgment recovered for the mortgage debt, without a foreclosure of the mortgage." Besides, in this case, as we have shown, the estate sold and conveyed by the sheriff on said writ issued on said judgment and

decree of foreclosure was that covered by the mortgage, and the sale was made on and by virtue of the decree of foreclosure the same as if said writ had contained a certified copy of judgment and order of sale, and not merely the mortgagor's equity of redemption therein.

It follows that the court erred in its conclusions of law. The death of the appellee since the submission of the cause having been shown, the judgment is reversed as of the term at which the submission was made, with instructions to the court below to restate its conclusions of law, and render judgment in favor of appellant in accordance with this opinion.

EXECUTION—REDEMPTION FROM SALE—EFFECT.—Redemption by the judgment debtor of his lands sold under execution for less than the judgment reinstates the lien for the unpaid balance, and a resale of the land may be had to satisfy such balance if the judgment lien has attached at the time that the transfer is made: *Flanders v. Aumack*, 32 Or. 19; 67 Am. St. Rep. 504, and monographic note.

EXECUTION—ISSUANCE OF ORDINARY WRIT INSTEAD OF ALIAS WRIT.—To issue a second fieri facias before the return of the first is irregular, but does not render the second void: *State v. Page*, 1 Spear, 408; 40 Am. Dec. 608. The issuance of a second execution after the expiration of a year and a day from the issuance of the first is a mere irregularity, and will not invalidate the title of a bona fide purchaser under a subsequent execution: *Sydnor v. Roberts*, 13 Tex. 598; 65 Am. Dec. 84. See *Pennington v. Yell*, 11 Ark. 212; 52 Am. Dec. 262.

EVANSVILLE v. SENHENN.

[151 INDIANA, 42]

INFANTS—NEGLIGENCE OF.—An infant of tender years is deemed, in law, not possessed of sufficient discretion to be guilty of negligence for its failure to exercise due care for its safety.

NEGLIGENCE OF PARENTS PRECLUDES THEIR RECOVERY FOR INJURIES TO THEIR CHILD.—In an action by a parent on account of the death of his child of tender years, caused by the negligence of the defendant, the parents' negligence, through which the child was exposed to injury, defeats the action.

STARE DECISIS.—An inconsiderate judgment inadvertently establishing a rule of law, without consideration of the real question involved and decided, will not be followed when it does not establish a rule of property, and the adherence to it would be productive of more evil than would follow the adoption of a better and sounder rule.

CONTRIBUTORY NEGLIGENCE OF A PARENT OR CUSTODIAN OF AN INFANT should not be attributed to it, and hence does not preclude recovery by an infant in an action brought for its benefit to obtain compensation for its injuries suffered from the negligence of the defendant.

MUNICIPAL CORPORATIONS—LIABILITY OF FOR PERMITTING OBSTRUCTIONS TO REMAIN ON THE PUBLIC

STREETS.—If a city suffers an obstruction or other cause of danger to remain for an unreasonable time upon its streets or sidewalks, so that the city may be presumed to have notice thereof, it is answerable for injuries resulting therefrom, to the same extent as if it had itself placed the obstruction or other cause of danger there in the first instance.

MUNICIPAL CORPORATIONS—LIABILITY OF FOR THE ACT OF AN INDEPENDENT CONTRACTOR.—If a city has a contract with a person to furnish it with lumber to be delivered in the city, and he delivers it and piles the lumber, his act in so doing is not the act of the city, and it is not liable for his negligence unless it has notice thereof, express or implied.

A MUNICIPAL CORPORATION IS NOT LIABLE for the act of a person not one of its officers or agents in piling lumber in a street, and if this is done negligently and injury results to another therefrom, the city is not liable unless it had notice, express or implied, that the lumber was in the street and the same was in an unsafe and dangerous condition.

George A. Cunningham, for the appellant.

J. E. Williamson and D. C. Givens, for the appellee.

42 McCABE, C. J. The appellee sued the appellant in the superior court of Vanderburg county for damages arising from a personal injury caused by the falling of 43 a pile of lumber through the alleged negligence of appellant, resulting in the loss of appellee's foot, in August, 1874, when she was but about five years old. The venue was changed to the Warrick circuit court, where a trial resulted in a verdict and judgment for the defendant. On an appeal to this court that judgment was reversed for error in instructing the jury: *Senhenn v. Evansville*, 140 Ind. 675. On the return of the case to the circuit court, another trial resulted in a verdict and judgment for the plaintiff over defendant's motion for a new trial. The only error assigned is upon the action of the trial court in overruling appellant's motion for a new trial. The only errors complained of and urged by appellant under that motion are the giving and refusal of certain instructions by the trial court.

One of the most important questions in the case arises upon the court's refusal to give instruction No. 13 asked by the appellant, reading as follows: "If the plaintiff's parents knew that the pile of lumber was in the street, and was dangerous and liable to fall, then it was their duty to exercise reasonable care in keeping the plaintiff away from the same; and if they failed to exercise such reasonable care, and such failure directly contributed to the injury, then the plaintiff cannot recover." The evidence was such as to make this instruction applicable if it expresses the law correctly on the facts. This instruction raises

one of the most vexed questions in the law. It is well settled that an infant of tender years is deemed in law not possessed of sufficient discretion to make it guilty of negligence for its failure to exercise due care for its own safety: Shearman and Redfield on Negligence, 3d ed., 48, and note 1; 2 Thompson on Negligence, 1181. On that point there is no conflict of opinion. But there is a sharp conflict of opinion between courts of last resort ⁴⁴ as to whether the negligence of the parent or guardian having the custody and control of such infant in exposing it to danger from the negligence of others whereby it is injured can be attributed to such infant so as to defeat its right of recovery therefor. It is contended by appellee's counsel, in support of the correctness of the court's action, that the overwhelming weight of judicial decisions condemns the instruction, while appellant contends that this court is committed to the doctrine expressed by the instruction in a long line of its own decisions, in proof of which we are cited to the cases of *Pittsburg etc. Ry. Co. v. Vining*, 27 Ind. 513; 92 Am. Dec. 269; *Lafayette etc. R. R. Co. v. Huffman*, 28 Ind. 287; 92 Am. Dec. 318; *Jeffersonville etc. R. R. Co. v. Bowen*, 40 Ind. 545; *Hathaway v. Toledo etc. Ry. Co.*, 46 Ind. 25; *Evansville etc. R. R. Co. v. Wolf*, 59 Ind. 89; *Mayhew v. Burns*, 103 Ind. 328; *Indianapolis etc. Ry. Co. v. Pitzer*, 109 Ind. 179; 58 Am. Rep. 387; *Louisville etc. Ry. Co. v. Shanks*, 132 Ind. 395; *Indianapolis etc. Ry. Co. v. Wilson*, 134 Ind. 95; *Cleveland etc. Ry. Co. v. Keely*, 138 Ind. 600.

But it is contended by appellant's counsel that the question here involved, namely, whether the contributory negligence of the parents of an infant plaintiff of such tender years as incapacitates it to exercise due care is imputable to the child, was not presented, considered, or decided in any of these cases. This claim is a little too broad. That question may not have been presented or considered in any of those cases, and we are inclined to think that is true. But in two of the cases only was it decided. It is recognized as established law everywhere that in an action by a parent on account of the death of such an infant of tender years under statutes for the death of the child caused by the negligence of the defendant and for loss of services where death did not ensue, at common law, ⁴⁵ the parent's negligence through which the child was exposed to the danger contributing to the injury defeats the parent's action, it being recognized that there is no difference in the effect of such negligence on the part of the parent in such an action and the effect

of his negligence contributing to an injury to his own person or property. In either case he attempts to found an action for damages on his own negligence and wrong, which would be manifestly unjust as well as against principle and authority. But where the child brings the action to recover damages for its own injury, where the judgment recovered must inure to its own exclusive benefit, where its improvident actions contributed to such injury, manifestly a very different question is presented. The law taking cognizance of its want of discretion, and that its tender years renders it impossible for it to know any better, exempts it from the charge of negligence.

Upon what principle, then, are we led to inquire, may its parent's, guardian's or custodian's negligence be imputed to it so as to take away its property in its cause of action for defendant's negligence making it a cripple for life? We know of none, unless this court is by its previous decisions irretrievably committed to that doctrine.

The first case cited above, viz., *Pittsburg etc. Ry. Co. v. Vining*, 27 Ind. 513, 92 Am. Dec. 269, was a case where the father, as administrator, recovered the judgment for the death of his son through the negligence of the defendant railway company. The judgment was reversed for error in overruling a demurrer to the complaint assigning for cause insufficiency of facts; that the plaintiff had no legal capacity to sue as administrator of his infant son. It was held that the right of action by the statute was in the father as such, and not in the administrator, and it was further ⁴⁶ held that the complaint was bad for failure to allege that the parents of the infant, which was seven years of age, were free from contributory negligence, and it was also held that the evidence was insufficient. This decision was clearly right, because under the statute the cause of action, if any existed, belonged to the father as such. That right of action for the negligence of the defendant could only be maintained by him by allegation and proof that his own negligence did not contribute to the injury sued for, as in any other suit by him for negligence. There was not any question made, as there could not have been made any question in the case as to the imputability of the parent's negligence to the injured child. Yet this court, in support of its conclusion, cited the leading case, and the one which originated the doctrine of imputing the negligence of the parent or custodian to the child, namely, *Hartfield v. Roper*, 21 Wend. 615, 34 Am. Dec. 273, decided by the supreme court of New York in 1839. While that case decides that the contribu-

tory negligence of the parent may defeat an action for injury through negligence to an infant who is non sui juris, making it to that extent applicable, and affords support to the conclusion reached in the *Vining* case, yet *Hartfield v. Roper*, 21 Wend. 615, 34 Am. Dec. 273, goes further, and originates the doctrine of the imputability of the parent's negligence to the child so as to defeat its right of action, a proposition not involved in the *Vining* case.

The next case in which any question of the sort was involved, coming up before this court, was *Lafayette etc. R. R. Co. v. Huffman*, 28 Ind. 287, 92 Am. Dec. 318, and that case did involve the precise question here involved, but it appears from the case that this court did not think any other or different question was presented than that presented and decided in the *Vining* case. There is not a word in the case that indicates that this court intended ⁴⁷ to decide that an infant non sui juris injured by negligence is chargeable with the negligence of its parents contributing to its injury. The case is decided upon the theory, simply, that the parent's negligence contributing to the injury defeats the action. The only authority cited for such conclusion is the *Vining* case, and that this court supposed it was deciding nothing but the same question that had been decided by it in that case is clearly evidenced by the language in reference thereto in the *Huffman* case as follows: "We are clear that the law was correctly stated [in the *Vining* case], and its application to this case cannot be questioned." That case was correctly decided, as we have already seen, and that seems to be all this court supposed it was deciding in the *Huffman* case, the opinion being delivered in both cases by the same judge, Ray. But the latter case necessarily decides an entirely different question than the former, namely, that the negligence of the parent may be imputed to the injured child who is non sui juris so as to defeat its action for its own injury caused by a defendant's negligence.

The most cogent reasons ought to be shown why such an inconsiderate judgment should bind this court to a rule thus inadvertently established, and without consideration of the real question involved and decided. We are now for the first time in the history of our court asked to give the question consideration, and say whether, in our judgment, the law imputes the parent's negligence to the child non sui juris in such an action. The decision in the *Huffman* case is the principal barrier to such consideration and decision, and while it is the policy of the law not

to depart from decisions previously made by a court of last resort, yet the same law does require such departure where adherence to such decisions would be productive of more ⁴⁸ evil than the departure therefrom, and the establishment of the better and sounder rule. It is very seldom that a departure from decisions which establish a rule of property can be justified. But the decision in the Huffman case does not establish a rule of property. The only other case in this court that can be construed into holding to the doctrine necessarily involved in the decision in the Huffman case is Hathaway v. Toledo etc. Ry. Co., 46 Ind. 25. That case did necessarily involve the same question involved and decided in the Huffman case. And for the first time this court seemed to realize what had been decided without consideration in the Huffman case in the following language by Downey, J., delivering the opinion of the court, namely: "It seems harsh to apply this doctrine to a case where damage occurs to a child, and yet the application is made, and this whether the fault is that of the child itself, or the negligence of the person under whose immediate care it is. . . . This doctrine is sanctioned in several decisions of this court: Pittsburgh etc. Ry. Co. v. Vining, 27 Ind. 513; 92 Am. Dec. 269; Lafayette etc. R. R. Co. v. Huffman, 28 Ind. 287; 92 Am. Dec. 318; Jeffersonville etc. R. R. Co. v. Bowen, 40 Ind. 545." This decision sounds more like an apology than the decision of a great principle.

All the other cases decided by this court to which we have been referred, named in the fore part of this opinion, including the Bowen case in 40 Indiana, the last case cited in the foregoing quotation, with certain exceptions hereinafter mentioned, are cases where the parent sues for damages to him on account of loss of services at common law or under the statute, and the rule was correctly applied that his negligence in exposing his child contributing to the injury defeated his action, which has no influence whatever on the question now before us. But the marked distinction ⁴⁹ between the two classes of cases was wholly lost sight of by this court in deciding the Huffman case and the Hathaway case. The observations of C. J. Beasley in discussing Hartfield v. Roper, 21 Wend. 615, 34 Am. Dec. 273, speaking for the supreme court of New Jersey, are so pertinent that we adopt them. "The problem is, whether an infant of tender years can be vicariously negligent, so as to deprive itself of a remedy that it would otherwise be entitled to. In some of the American states this question has been answered by the courts in the af-

firmative, and in others in the negative. To the former of these classes belongs the decision in *Hartfield v. Roper*, 21 Wend. 615, 34 Am. Dec. 273. This case appears to have been one of first impression on this subject, and it is to be regarded, not only as the precursor, but as the parent of all the cases of the same strain that have since appeared.

"The inquiry with respect to the effect of the negligence of the custodian of the infant, too young to be intelligent of situations and circumstances, was directly presented for decision in the primary case thus referred to. . . . It is obvious that the judicial theory was, that the infant was, through the medium of its custodian, the doer, in part, of its own misfortune, and that consequently, by force of the well-known rule, under such conditions he had no right to an action. This, of course, was visiting the child for the neglect of the custodian, and such infliction is justified in the case cited in this wise: 'The infant,' says the court, 'is not *sui juris*. He belongs to another, to whom discretion in the care of his person is exclusively confided. That person is keeper and agent for this purpose; in respect to third persons his act must be deemed that of the infant; his neglects the infant's neglect.'

⁵⁰ "It will be observed that the entire context of this quotation is the statement of a single fact, and a deduction from it—the premise being, that the child must be in the care and charge of an adult, and the inference being that, for that reason, the neglects of the adult are the neglects of the infant. But surely this is, conspicuously, a non sequitur. How does the custody of the infant justify, or lead to, the imputation of another's fault to him? The law, natural and civil, puts the infant under the care of the adult, but how can this right to care for and protect be construed into a right to waive or forfeit any of the legal rights of the infant? The capacity to make such waiver or forfeiture is not a necessary, or even convenient, incident of this office of the adult, but on the contrary, is quite inconsistent with it, for the power to protect is the opposite of the power to harm, either by act or omission. In this case in *Wendell* it is evident that the rule of law enunciated by it is founded in the theory that the custodian of the infant is the agent of the infant; but this is a mere assumption without legal basis, for such custodian is the agent, not of the infant, but of the law. If such supposed agency existed, it would embrace many interests of the infant, and could not be confined to the single instance where an injury is inflicted by the co-operative tort of the guar-

dian. And yet it seems certain that such custodian cannot surrender or impair a single right of any kind that is vested in the child, nor impose any legal burden upon it. If a mother, traveling with her child in her arms, should agree with a railway company that in case of an accident to such infant by reason of the joint negligence of herself and the company, the latter should not be liable to a suit by the child, such an engagement would be plainly invalid on two grounds: 1. The contract would be *contra bonos mores*; ⁵¹ and, 2. Because the mother was not the agent of the child authorized to enter into the agreement. Nevertheless, the position has been deemed defensible, that the same evil consequences to the infant will follow from the negligence of the mother in the absence of such supposed contract, as would have resulted if such contract should have been made and should have been held invalid.

"In fact this doctrine of the imputability of the misfeasance of the keeper of the child to the child itself is deemed to be a pure interpolation into the law, for until the case under criticism it was absolutely unknown; nor is it sustained by legal analogies. Infants have always been the particular objects of the favor and protection of the law. In the language of an ancient authority this doctrine is thus expressed: 'The common principle is, that an infant in all things which sound in his benefit shall have favor and preferment in law as well as another man, but shall not be prejudiced by anything in his disadvantage': 9 Viner's Abridgement, 374. . . . Nothing could be more to the prejudice of an infant than to convert, by construction of law, the connection between himself and his custodian into an agency to which the harsh rule of respondeat superior should be applicable. The answerableness of the principal for the authorized acts of his agent is not so much the dictate of natural justice as of public policy, and has arisen, with some propriety, from the circumstances, that the creation of the agency is a voluntary act, and that it can be controlled and ended at the will of its creator. But in the relationship between the infant and its keeper all these decisive characteristics are wholly wanting. The law imposes the keeper upon the child, who, of course, can neither control nor remove him, and the injustice, therefore, of making the latter responsible, ⁵² in any measure whatever, for the torts of the former, would seem to be quite evident. Such subjectivity would be hostile, in every respect, to the natural rights of the infant, and consequently cannot, with any show of

reason, be introduced into that provision which both necessity and law establish for his protection. Nor can it be said that its existence is necessary to give just enforcement to the rights of others. When it happens that both the infant and its custodian have been injured by the co-operative negligence of such custodian and a third party, it seems reasonable, at least in some degree, that the latter should be enabled to say to the custodian, you and I, by our common carelessness, have done this wrong, and therefore, neither can look to the other for redress; but when such wrongdoer says to the infant, your guardian and I, by our joint misconduct, have brought this loss upon you, consequently you have no right of action against me, but you must look for indemnification to our guardian alone, a proposition is stated that appears to be without any basis either in good sense or law. The conversion of the infant, who is entirely free from fault, into a wrongdoer, by imputation, is a logical contrivance uncongenial with the spirit of jurisprudence. The sensible and legal doctrine is this: an infant of tender years cannot be charged with negligence, nor can he be so charged with the commission of such fault by substitution, for he is incapable of appointing an agent, the consequence being that he can, in no case, be considered to be the blamable cause, either in whole or in part, of his own injury. There is no injustice nor hardship in requiring all wrongdoers to be answerable to a person who is incapable either of self-protection or of being a participator in their misfeasance.

“Nor is it to be overlooked that the theory here repudiated, 53 if it should be adopted, would go the length of making an infant in its nurse’s arms answerable for all the negligences of such nurse while thus employed in its service. . . . If the neglects of the guardian are to be regarded as the neglects of the infant, as was asserted in the New York decision, it would, from logical necessity, follow that the infant must indemnify those who should be harmed by such neglects. That such a doctrine has never prevailed is conclusively shown by the fact that in the reports there is no indication that such a suit has ever been brought.

“It has already been observed that judicial opinion, touching the subject just discussed, is in a state of direct antagonism, and it would, therefore, serve no useful purpose to refer to any of them. It is sufficient to say that the leading text-writers have concluded that the weight of such authority is adverse to the doctrine that an infant can become, in any wise, a tort-

feason by imputation: 1 Shearman and Redfield on Negligence, 75; Wharton on Negligence, sec. 311; 2 Wood's Railway Law, 1284": *Newman v. Phillipsburgh Horse Car R. R. Co.*, 52 N. J. L. 446.

In the states of Alabama, Connecticut, Pennsylvania, North Carolina, Tennessee, Texas, Georgia, Vermont, Louisiana, Virginia, Maryland, Michigan Mississippi, New Hampshire, Iowa, Illinois, Missouri, Nebraska, Ohio, New Jersey, and perhaps others, the doctrine of *Hartfield v. Roper*, 21 Wend. 615, 34 Am. Dec. 273, has been distinctly repudiated. The supreme court of North Carolina says: "The imputation of the negligence of parents and guardians to children of tender age is, says 1 Shearman and Redfield on Negligence, 74, an invention of the supreme court of New York in the . . . case of *Hartfield v. Roper*, 21 Wend. 615, 34 Am. Dec. 273, and has been followed in many of the decisions of that state, although it is said ⁵⁴ by these authors to be founded upon a dictum, which has only been assumed to be the law by the court of last resort, but never squarely presented to that tribunal for decision. And they further remark that it may well be doubted whether the question has ever been fully argued anywhere, and that the result of their examination of the cases is to satisfy them 'that the last of the long series of so-called decisions on this point is like the first, a mere dictum, uttered without hearing argument, and without consideration': *Bottoms v. Seaboard etc. R. R. Co.*, 114 N. C. 699; 41 Am. St. Rep. 799.

In reviewing the case of *Hartfield v. Roper*, 21 Wend. 615, 34 Am. Dec. 273, Mr. Beach says that the doctrine, as applied to children too young to exercise discretion, is an anomaly, and in striking contrast with the case of a donkey which is carelessly exposed in the highway, and negligently run down and injured, and also with the case of oysters carelessly placed in the bed of a river, and injured by the negligent operation of a vessel, in both of which cases actions have been maintained. And he forcibly observes that, under the principle referred to, the child, were he an ass or oyster, would secure a protection which is denied him as a human being of tender years: Beach on Contributory Negligence, sec. 415. This author, in his examination of the doctrine, remarks: "It is not true than an infant is not *sui juris*. In the sense of being entitled to maintain an action for his own benefit, he is *sui juris*. As far as his right of action is concerned he is in no respect the chattel of his father. . . . The judgment [when suing by guardian or next

friend], if any is recovered, is the property of the minor": Beach on Contributory Negligence, 2d ed., sec. 128. The supreme court of Illinois was classed by text-writers and other courts, as was Indiana, as holding to the doctrine of *Hartfield v. Roper*, 21 Wend. 615; 34 Am. Dec. 273. But the supreme court of Illinois, in *Chicago etc. Ry. Co. v. Wilcox*, 138 Ill. 370, after reviewing twelve Illinois decisions, decided in 1891 against the rule in *Hartfield v. Roper*, 21 Wend. 615; 34 Am. Dec. 273, and said: "It seems to be assumed by several of the writers on the subject that this court is committed to the doctrine that in a suit by a child to recover damages caused by the negligence of the defendant, the negligence of the plaintiff's parents or custodians may be imputed to the plaintiff in support of the defense of contributory negligence. While there is in some of the cases some foundation for this assumption, yet, in our opinion, the question has never been so considered or determined by this court as to make it the settled rule in this state. Most of the cases to which reference is made as supporting said doctrine were suits brought by a parent in his own right or as the legal representative of the child, where the death of the child was alleged to have been caused by the negligence of the defendant." After reviewing the Illinois cases, that court goes on to say: "It is apparent that in none of the cases above mentioned was there any occasion for the court to determine whether, as a rule of law, the negligence of the plaintiff's parents or custodian would sustain the defense of contributory negligence, nor is there any attempt in any of them to consider or discuss the rule. In several of them language is used which would seem to imply a tacit recognition of the doctrine of imputed negligence, but in none of them was the adoption of that doctrine essential to the decision, nor can we suppose from the language used that the court intended to commit itself definitely to an affirmation of that doctrine."

The rule denying the doctrine of imputed negligence is now recognized and enforced by the courts of many of the states, and is supported by the reasoning⁵⁰ and authority of text-writers whose opinions are justly entitled to a high degree of consideration. Among them may be mentioned Mr. Bishop, who in his recent treatise of Noncontract Law, section 582, says: "This new doctrine of imputed negligence, whereby the minor loses his suit, not only where he is negligent himself, but where his father, grandmother, or mother's maid is negligent, is as flatly in conflict with the established system of the common law

as anything possible to be suggested. The law never took away a child's property because his father was poor, shiftless, or a scoundrel, or because anybody who could be made to respond to a suit for damages was a negligent custodian of it. But, by the new doctrine, after a child has suffered damages, which, confessedly, are as much his own as an estate conferred upon him by gift, and which he is entitled to obtain out of any one of several defendants who may have contributed to them, he cannot have them if his father, grandmother, or mother's maid happens to be the one making the contribution. In these and other respects, it is submitted, the established principles stated in a preceding section are conclusive of the proposition that the doctrine now in contemplation does not belong to the common law." To the same effect see Wharton on Negligence, sec. 314, et seq.; Beach on Contributory Negligence, secs. 38-48.

The supreme court of Georgia, in *Atlanta etc. Ry. Co. v. Gravitt*, 93 Ga. 369; 44 Am. St. Rep. 145, in an able opinion condemning *Hartfield v. Roper*, 21 Wend. 615, 34 Am. Dec. 273, and speaking of this Illinois case, says: "In many of the text-books it is stated that the opposite view prevails in Illinois, and numerous decisions of the supreme court of that state are cited in support of this statement—seemingly with good reason. Be this as it may, however, that state, by its recent decisions, has 'wheeled into ⁶⁷ line,' and joined the procession of those jurisdictions which have repudiated the doctrine of *Hartfield v. Roper*, 21 Wend. 615; 34 Am. Dec. 273."

Iowa was also classed as one of the states holding to the doctrine of *Hartfield v. Roper*, 21 Wend. 615; 34 Am. Dec. 273, until *Wymore v. Mahaska County*, 78 Iowa, 396; 16 Am. St. Rep. 449, was decided in 1889. In that case the Iowa cases were reviewed, and it was held that the previous decisions of that court had assumed, without deciding, that the true doctrine was that of *Hartfield v. Roper*, 21 Wend. 615; 34 Am. Dec. 273, but in this latter decision the court distinctly and emphatically repudiated that doctrine.

We therefore conclude that these authorities announce and declare the only correct rule of law upon the subject, and hence the cases of *Lafayette etc. R. R. Co. v. Huffman*, 28 Ind. 287; 92 Am. Dec. 318, and *Hathaway v. Toledo etc. Ry. Co.*, 46 Ind. 25, in so far as they conflict with the conclusion here reached, are overruled. It follows that the court did not err in refusing the thirteenth instruction.

One of the cases decided by this court and cited by appellant's

counsel as sustaining the doctrine of *Hartfield v. Roper*, 21 Wend. 615; 34 Am. Dec. 273, is *Louisville etc. Ry. Co. v. Shanks*, 132 Ind. 395. But that case does not so decide, but simply assumes that doctrine to be the law, both parties seeming to concede that such was the law.

Another one of the list of cases cited by appellant calling for special mention is that of *Indianapolis etc. Ry. Co. v. Wilson*, 134 Ind. 95. The complaint was held bad in that case because it showed that the plaintiff, a boy nine years of age, was guilty of contributory negligence, notwithstanding its general averment that he was free from contributory negligence, the complaint having proceeded on the theory that he had sufficient age and discretion to be chargeable with negligence. No question about the imputability ^{ss} of negligence is hinted at in the case, much less decided.

The only other case in the list cited by appellant not embraced in the class where the parent sues as parent for the death of the child under the statute or at common law for loss of services is *Cleveland etc. Ry. Co. v. Keely*, 138 Ind. 600. No question of the imputability of the negligence of the parents or custodians was involved or decided in that case. The plaintiff was a boy, who was eleven years old when the injury occurred, suing by next friend. This court, in answer to the objection that the complaint did not allege due care on part of the boy's parents, observed: "The appellee in this case is suing for his own injury. He was himself capable of going to school across the railroad, and his parents are not in the case, nor is it necessary that they should be."

The refusal of two other instructions is complained of by the appellant, reading as follows: "7. If, at the time of the injuries complained of, the defendant had a contract with any person to furnish it with lumber by the year or otherwise, and to deliver the same to the city, and such person did in fact, under such contract, deliver said lumber and pile the same in the street, then the act of such person or persons in delivering and piling the same was not the act of the city, and the city would not be liable for any negligence of such person in placing the same in the street, unless it had notice thereof, either express or implied." "12. If the lumber mentioned in the complaint was not placed in the street by the city, but was placed there by someone else, to be used in the construction or repair for a building, or for any other purpose, then the city is not liable for any accident resulting therefrom, unless it had notice, either express

or implied, that the same was in the street, ⁶⁰ and that the same was in an unsafe and dangerous condition."

The first paragraph of the complaint proceeded upon the theory that the city itself placed the lumber in the street, and the second that it suffered it to exist after notice. There was evidence from which the jury might have inferred that the lumber was piled in the street by sawmill men with whom the city had a contract for its purchase and delivery. There was also evidence from which the jury might have inferred that the lumber belonged to private persons, to be used in the erection of a dwelling-house, and with which the city had no connection whatever. The difficulty in determining the particular purpose for which and by whom the lumber was put in the street was greatly enhanced by the great length of time that had elapsed between the act and the bringing of the suit, being about twenty years. But if the city purchased lumber from outside parties, and such parties, in delivering it, wrongfully piled it in the street, such vendor of the lumber in delivering it to the city was not the agent of the city, and the city was not liable for such act. The general rule is, that a municipal corporation is not responsible for the negligence of an independent contractor with such corporation: *Leeds v. Richmond*, 102 Ind. 372; 2 *Dillon on Municipal Corporations*, 4th ed., 1082. But, as was held in the former opinion in this case, a city which suffers an obstruction or cause of danger to remain for an unreasonable length of time upon its streets or sidewalks, so that the city might be presumed to have notice of the obstruction, would be liable therefor to the same extent as if the city had itself placed the obstruction or danger there in the first instance: *Glantz v. South Bend*, 106 ⁶⁰ Ind. 305; *Bullock v. Mayor, etc.*, 99 N. Y. 654; 2 N. E. Rep. 1, and notes.

Both of the instructions 7 and 12 involve the principle of the necessity of notice to the city, express or implied, of the existence of the obstruction or danger, where the same has not been made by the city or some of its agents. As was said by this court in *Fort Wayne v. DeWitt*, 47 Ind. 397, borrowing from *Dillon on Municipal Corporations*, second edition, sections 789, 790: "The ground of the action is either positive misfeasance on the part of the corporation, its officers, or servants, or by others under its authority, in doing acts which cause the street to be out of repair, in which case no other notice to the corporation of the condition of the street is essential to its liability, or the ground of action is the neglect of the corporation to

put the streets in repair, or to remove obstructions therefrom, or to remedy the causes of danger occasioned by the wrongful acts of others, in which cases notice of the condition of the street, or what is equivalent to notice, is necessary, as will presently be stated, to give to the person injured a right of action against the corporation, unless, indeed, the matter be otherwise regulated by statute. . . . Where the duty to keep its streets in safe condition rests upon the corporation, it is liable for injuries caused by its neglect or omission to keep the streets in repair, as well as for those caused by defects occasioned by the wrongful acts of others. But, as in such case the basis of the action is negligence, notice to the corporation of the defect which caused the injury, or facts from which notice thereof may reasonably be inferred, or proof of circumstances from which it appears that the defect ought to have been known and remedied by it, is essential to liability; for in such cases the corporation, in the absence of controlling enactment, is ⁶¹ responsible only for a reasonable diligence to repair the defect or prevent accidents after the unsafe condition of the street is known, or ought to have been known, to it, or its officers having authority to act respecting it." To the same effect is *Higert v. Greencastle*, 43 Ind. 574. According to these principles, the circuit court erred in refusing to give instructions 7 and 12 asked by the appellant.

The giving and refusing of other instructions are complained of, but what we have already said covers about all the vital questions involved in such other instructions. The circuit court erred in overruling the motion for a new trial. The judgment is reversed, and the cause remanded with instructions to grant a new trial.

IN THIS CASE a petition for rehearing was filed, and a somewhat lengthy response by the court was made thereto. This response but reiterated the views of the court as expressed in the original opinion respecting the rules of law applicable to the case. In truth, the petition for a rehearing disclaimed any purpose to controvert those rules. The court, in the opinion denying the rehearing, considered the instructions numbered 7 to 12, referred to in the former opinion, for the purpose of showing that it did not misapprehend their meaning, and that the word "delivery," as used therein, did not imply an acceptance of the lumber on the part of the municipality with notice of the condition in which it was, and that it was a cause of danger in such condition.

NEGLIGENCE—INJURY TO INFANT—CONTRIBUTORY NEGLIGENCE OF PARENT.—Children of tender years are not held to the same degree of care as persons of mature age: *Price v. Atchison Water Co.*, 58 Kan. 551; 62 Am. St. Rep. 625. A child too young to exercise any care or discretion in any matter whatever is clearly incapable of contributory negligence and not amenable to

the disabling effects of that doctrine: See monographic note to *Barnes v. Shreveport City R. R. Co.*, 49 Am. St. Rep. 409. It is the duty of a parent to shield his young child from danger, and if, by his own carelessness and neglect of the duty of protection, he contributes to an injury to it, he is in pari delicto with the negligent defendant, and cannot recover for such injury: See monographic note to *Barnes v. Shreveport City R. R. Co.*, 49 Am. St. Rep. 407. But the negligence of a parent or custodian of a child is not imputable to it so as to bar its right to recover for injuries resulting from the negligence of another: *Bamberger v. Citizens' Street Ry. Co.*, 95 Tenn. 18; 49 Am. St. Rep. 909, and note.

STARE DECISIS—DOCTRINE OF.—The doctrine of stare decisis does not apply where it can be shown that the law has been misunderstood or misapplied, nor where the former decision is evidently contrary to reason. Hasty or crude decisions should be examined without fear and overruled without reluctance: *Rumsey v. New York etc. Ry. Co.*, 133 N. Y. 79; 28 Am. St. Rep. 600, and note. See extended note to *Gee v. Williamson*, 27 Am. Dec. 631-635.

MUNICIPAL CORPORATIONS—LIABILITY FOR PERMITTING OBSTRUCTIONS IN STREETS—NEGLIGENCE OF CONTRACTORS.—Where an obstruction in a street is created by a city itself, or is permitted to be erected by another, the city must take notice of such defects in the obstruction as ordinary care will discover: *Nesbitt v. Greenville*, 69 Miss. 22; 30 Am. St. Rep. 521. If the presence of a lumber pile in a street at the time of an accident is chargeable to the negligence of a city, and such negligence, together with the act of a drayman, causes an injury to a person guilty of no contributory negligence, the city is liable: *Gonzales v. Galveston*, 84 Tex. 3; 31 Am. St. Rep. 17. The decided weight of authority at the present time is to the effect that where it is the duty of a municipality to keep its streets in safe condition for travel, it must respond in damages to any person injured by the streets being left in an unsafe or dangerous condition, though they were so left through the act or neglect of an independent contractor: See monographic note to *Goddard v. Harpswell*, 30 Am. St. Rep. 412.

TOUHEY v. TOUHEY.

[151 INDIANA, 460.]

EXECUTION SALE—WHEN DOES NOT SATISFY THE JUDGMENT NOR PREVENT A RESALE.—A sale under execution to the judgment creditor, void for want of appraisalment, the issuing of a deed thereon, and the holding of the writ by the sheriff for more than two years, do not satisfy the judgment. Hence he may return the writ unsatisfied, and a venditioni exponas may issue, under which the same property may be sold, and, if the proceedings are regular, title will vest in the purchaser.

R. T. Miller, W. M. Parr, and F. J. L. Meyer, for the appellant.

Andrew Anderson, for the appellee.

⁴⁶¹ **HACKNEY, C. J.** The question for decision in this case arises upon facts specially found, and conclusions of law

stated by the trial court, in substance as follows: On October 25, 1894, the appellee obtained a decree of divorce from appellant and a judgment for two thousand dollars alimony against him, the latter then being the owner of the real estate in question. Five days later an execution issued upon said judgment, and was, according to the terms of the judgment, collectible subject to valuation and appraisement laws.

Said writ was levied upon said property, and a sale, without appraisement, was made to the appellee in May, 1895. A certificate of purchase issued to the appellee, and it recited the payment of the amount of the writ, whereas no sum was paid or receipted for by the appellee. In May, 1896, the sheriff executed to the appellee a deed for said property, and she went into possession. In December, 1896, more than two years from the issuance of said writ, the sheriff returned said execution unsatisfied, by reason of the invalidity of said sale, owing to the failure to appraise the property. Thereupon the appellee procured to be issued an execution in the nature of a venditioni exponas for the collection of said judgment, and upon said writ, appraisement, notice, and sale were made, the appellee purchasing and receiving a certificate. Upon the appellant's complaint to quiet title, and upon the facts found, the court stated as ⁴⁶² conclusions of law: 1. That the appellant is the owner of the legal title; 2. That the deed of the sheriff was void; but that 3. The lien of the judgment had not been extinguished.

It is manifest that the appellant can present but one question, that arising upon the third conclusion of law. It may be stated in this way: Did the irregularity in selling without appraisement, and in holding the writ for two years, extinguish the lien of the judgment, while leaving the title to the property undisturbed in the appellant? From any equitable view the inquiry would suggest a negative answer. It would be a remarkable state of circumstances under which a sale absolutely void would satisfy the judgment upon which it is made, there being no money paid, no receipt executed, no advantage gained, and no disadvantage occasioned the appellant.

The record contains no facts showing advantage to the appellee or disadvantage to the appellant from the irregularity; and the satisfaction insisted upon without payment of money or surrender of property, is extremely technical, and utterly devoid of equity. The principal argument in behalf of the appellant is, that the first sale was void for the want of an appraisement, and the second sale was void because the first sale satisfied the judg-

ment. The apparent, rather than real, legal support for this argument is in the holding that a levy upon property sufficient to satisfy a judgment is a presumptive satisfaction of the judgment.

As between the debtor and the creditor, and involving no interests of a third party, this presumption is only *prima facie*, "and the whole extent of the rule is, that the judgment is satisfied when the execution has been so used as to change the title of the ^{debtor's} goods, or in some way to deprive the debtor of his property. When the property is lost to the debtor in consequence of the legal measures which the creditor has pursued, the debt, . . . is gone, although the creditor may not have been paid": *United States v. Dashiell*, 3 Wall. 688; *Lindley v. Kelley*, 42 Ind. 294; *McCabe v. Goodwine*, 65 Ind. 288; *Dehority v. Paxon*, 115 Ind. 124.

Here the appellant has succeeded in his claim that the writs and attempted sales were void. Of this the appellee does not complain. The only substantial claim of the appellant here, as we have already shown, is that the invalid proceedings under the judgment shall be deemed a satisfaction of the judgment. In this claim we do not concur. The title of the appellant has not been affected, and the rights of third parties have not been disturbed. The case does not fall within the class where the presumption of satisfaction is conclusive.

The judgment is affirmed

Howard, J., absent.

JUDGMENT—SATISFACTION BY EXECUTION SALE.—The sale of land under execution and the payment of the bid, when it is sufficient to satisfy the amount due, extinguish the judgment: *Boos v. Morgan*, 180 Ind. 305; 30 Am. St. Rep. 237. A judgment is not satisfied by an execution sale without payment of the purchase money or conveyance, nor is the debtor's title divested: *Chapman v. Harwood*, 8 Blackf. 82; 44 Am. Dec. 736, and note. A void sale of land under execution is not a satisfaction of the judgment, where purchased by the judgment creditor and afterward recovered back by the judgment debtor: *Townsend v. Smith*, 20 Tex. 465; 70 Am. Dec. 400.

WILSON v. CURTIS.

[161 INDIANA, 471.]

EXECUTORS—DELEGATION OF POWER TO APPOINT.

A testator may by his will provide that his children, or a majority of them, shall appoint the executor, and their selection of a person as executor has the same effect as if he had been named as such in the will. This is the rule of the common law, and it is not abrogated by a statute declaring that if there be no person named in the will as executor, or if those named shall have failed to qualify, have renounced, or have been removed, letters of administration, with the will annexed, shall be granted to any competent residuary legatee named in such will, et cetera.

Conrad Wolf, J. C. Blackledge, and C. C. Shirley, for the appellant.

Milton Bell and William C. Purdum, for the appellees.

471 MONKS, J. Nancy Wilson died testate in Howard county, Indiana, in 1897. Her will, which was duly admitted to probate in said county, provided that her executors should buy a "tombstone," and, if necessary for the payment for the same, and her debts and funeral expenses, that he sell at private sale or otherwise, or in such manner upon such terms of credit as he may think proper, all or any part of her real estate, and to execute and deliver a deed therefor in fee simple. After the payment of the debts, her real estate was devised to her children, and it was provided that the children, or a majority of them, should appoint the executor.

All of the children referred to in the will, except appellant, met and signed a writing by which appellee, Abner R. Barber, was appointed executor of said will. Said appointment was filed in the court below, and Abner R. Barber made his written application to be appointed such executor.

Appellant, the oldest son of the testatrix, filed an application to be appointed administrator with the will annexed of said estate, and at the same time objected to the appointment of appellee Barber as executor, on the ground that he was not named as 472 executor in the will. The court overruled the objection to the appointment of said Barber, and he gave bond and was by the court duly appointed executor of said will, to all of which appellant objected and excepted.

It has been decided that a testator may in his will delegate the authority to name an executor to some third person or persons, and the appointment made by them will be the same as if made in the will: Williams on Executors, *195-*202; Woerner's

Law of Administration, sec. 239; Schouler on Executors and Administrators, sec. 41; Croswell on Executors and Administrators, 52; 1 Thornton and Blacklege on Administration and Settlement of Estates, 13, and cases cited; 1 Am. & Eng. Ency. of Law, 180, and notes; Hartnett v. Wandell, 60 N. Y. 346, 19 Am. Rep. 194; State v. Rogers, 1 Houst. 569; Mulford v. Mulford, 42 N. J. Eq. 68, 76; Bishop v. Bishop, 56 Conn. 208; Kinney v. Keplinger, 172 Ill. 449.

In Bishop v. Bishop, 56 Conn. 208, the court said: "The executor is the creation solely of the testator. And it is within the power of the latter, not only to appoint personally, but he may project his power of appointment into the future, and exercise it after death through an agent selected by him. And the agent may be pointed out by name, or by his office or other method of certain identification."

It is insisted by appellant that whatever the rule may be elsewhere, under our statutes no person can be appointed executor unless he is named in the will. Section 2375 of Burns' Revised Statutes of 1894 (Horner's Rev. Stats. 1897, sec. 2222), provides that: "Whenever any will shall be duly admitted to probate, the clerk of the circuit court in which the same shall have been probated shall issue letters testamentary thereon to the person or persons therein named as executors who are ⁴⁷³ competent by law to serve as such, and who shall appear and qualify." Section 2376 of Burns' Revised Statutes of 1894 (Horner's Rev. Stats. 1897, sec. 2223), provides that: "Every person named in the will as executor, who shall qualify and give bond, shall be named in such letters; and every person not thus named shall be deemed superseded." Section 2379 of Burns' Revised Statutes of 1894 (Horner's Rev. Stats. 1897, sec. 2226), provides that "if there be no person named in the will as executor, or if those named therein have failed to qualify, have renounced, or have been removed, letters of administration with the will annexed shall be granted by the proper clerk or court to any competent residuary legatee named in such will," et cetera.

These sections were enacted in 1881, and are substantially the same as statutes on the same subject in force in New York in 1775, when the case of Hartnett v. Wandell, 60 N. Y. 346, 19 Am. Rep. 194, was decided. In that case, it was held that the delegation of power to appoint an executor was valid at common law, and that it was valid in that state under laws substantially the same as those in force here. It was also held in Baker v.

Baker, 18 N. Y. App. Div. 189, 45 N. Y. Supp. 870, citing 1 Williams on Executors, 239, Ex parte McDonnell, 2 Bradf. 32, and Matter of Blancan, 4 Redf. 151, that a direction in a will that the public administrator shall "sell out all real estate" is an appointment of the person holding that position as executor of the will, and letters testamentary were issued accordingly.

We think that the trial court properly held that Abner R. Barber was, under the facts of the case, named as executor in the will of said testator within the meaning of the statute above cited, and that no error was committed therefore in appointing him executor.

Judgment affirmed.

EXECUTORS AND ADMINISTRATORS—DELEGATION BY WILL OF POWER TO APPOINT.—Where a testator appointed his wife executrix of his will, and requested "that such male friend as she may desire shall be appointed with her as co-executor," it was held that the delegation of power to appoint the executor was valid at common law: Hartnett v. Wandell, 60 N. Y. 346; 19 Am. Rep. 194.

CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY v. HUDDLESTON.

[151 INDIANA, 540.]

PERSONAL EXAMINATION OF A PARTY OR HIS SECRECTIONS.—Where a plaintiff in an action for personal injuries claims that they have caused a dislocation of his kidneys, producing secretions of albumen and sugar in the urine, the court should, on motion of the defendant, require the plaintiff to produce, at or in advance of the trial, as the court may order, specimens of the plaintiff's urine, that it may be examined and analyzed by proper physicians and experts.

Byron K. Elliott and William F. Elliott, for the appellant.

B. F. Marsh, E. S. Jaqua, J. S. Engle, W. G. Parry, and W. A. Brown, for the appellee.

⁵⁴⁰ HOWARD, J. This was for an action for damages brought by appellee against appellant for injuries alleged to have been received by reason of the negligence of appellant in running one of its trains of cars into a train of cars on the Grand Rapids & Indiana Railroad, at the crossing of said roads in the city of Winchester, whereby a telegraph office and building upon appellant's right of way, in which appellee was lawfully engaged at the time, was overturned, and appellee thus injured.

The accident was the same as that described in the case of

the Cleveland etc. Ry. Co. v. Gray, 148 Ind. 266. The appellee, Gray, in that case was present with the appellee in this case at the time and place where both are alleged to have been injured, and the questions arising in both cases are to a great extent identical. The complaint in this case is the same as the first paragraph of the complaint in the Gray case, except in so far as the statement of the injuries ⁵⁴¹ of appellee is concerned. The action of the court in overruling the demurrer to the complaint in the case at bar is therefore approved.

Previous to the trial of the cause, by order of the court, the examination of the appellee, as party plaintiff, was taken by the appellant. In this examination, amongst other things, the appellee testified that he was suffering from albumen and sugar in the urine as a result of the injury complained of. Thereafter, on the fifth day of February, 1896, fifteen days before the opening of the trial, the appellant filed in open court the following verified motion:

"The defendant in said cause comes now by its attorney and shows to the court that it is alleged and claimed, and, as it is informed and believes, will be alleged and claimed upon the trial of said cause, that the plaintiff's injuries consist of a dislocation of the kidney, producing the secreting of albumen and sugar in the urine. That the defendant has no means of meeting any proof that the plaintiff might adduce upon the subject of his condition in this respect. The defendant therefore asks that the plaintiff be ordered and required to produce in court, at such time, at, or in advance of, the trial, as the court may order, specimens of his urine, that it may be examined and analyzed by proper experts and physicians, with a view to determine whether or not he is suffering from the conditions above stated, and that the defendant be required to file with such specimens his sworn affidavit that the specimens produced is urine voided by him."

The appellee objected to the granting of the request thus made, whereupon the court, over the objection and exception of appellant, overruled the motion. This, we think, was error. We do not see that the making of the order as requested would ⁵⁴² have been any invasion of the personal rights of the appellee, and, if not, there can be no reason why appellant should be deprived of the use of any evidence which might result from such proposed analysis.

The ruling of the court, it seems, was based upon decisions of this and other courts denying the right of a court to subject

a party to an examination of his person for the purpose of enabling the adverse party to secure desired evidence. Such examination is held to be an invasion of the rights of the person, an indignity to which, in the absence of a positive statute, no one should be subjected against his will.

In *Kern v. Bridwell*, 119 Ind. 226, 12 Am. St. Rep. 409, which was an action by an unmarried woman for slander, where it was alleged that the defendant had spoken of the plaintiff as a whore, and that she had become pregnant and had suffered an abortion to be procured upon her, it was held that the defendant was not entitled, under a plea of justification, to an order requiring the plaintiff to submit her person to an examination by medical experts.

In *Pennsylvania Co. v. Newmeyer*, 129 Ind. 401, which was an action for damages alleged to have been received at a railroad accident, the trial court refused to require the injured party to submit to an examination of his person by surgeons to be appointed by the court for that purpose; and that ruling was approved by this court.

The court there quoted from *Union Pac. Ry. Co. v. Botsford*, 141 U. S. 250, that: "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. . . . The inviolability of the person is ⁵²⁴ as much invaded by a compulsory stripping and exposure as by a blow. To compel anyone, and especially a woman, to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault and a trespass; and no order or process commanding such an exposure or submission was ever known to the common law in the administration of justice between individuals, except in a very small number of cases, based upon special reasons, and upon ancient practice, coming down from ruder ages, now mostly obsolete in England, and never, so far as we are aware, introduced into this country": See, also, *Sioux City etc. R. R. Co. v. Finlayson*, 16 Neb. 578; 49 Am. Rep. 724, and note.

In the three cases first above cited, which are those relied upon to sustain the action of the court in overruling the motion here under consideration, it will be seen that it is the trespass upon the sacred privacy of the person that the law refuses to sanction. But urine which has passed from the body is no part of the person. It is a lifeless substance, separated forever from the in-

dividual; and it can be no more indignity to his person to subject such substance to examination and analysis than it would be to require a like examination of the cast-off clothing of the same individual.

It is said in 4 Elliott on Railroads, section 1700, that: "The clothing of one who is killed by the alleged negligence of a railroad company may, it seems, be exhibited in evidence where it tends to establish such negligence as the cause of his death, and other 'real evidence,' such as defective machinery, iron rails, and the like may be introduced and exhibited to the jury in a proper case": And see 2 Elliott's General Practice, secs. 682, 685.

⁵⁴⁴ Counsel have cited no authority directly in point to show that it is any violation of personal right to compel the production in court of a specimen of urine. Appellee himself could not have considered it any indignity to him to furnish such specimen to be used in evidence, inasmuch as he voluntarily produced a specimen for the use of his counsel, which was analyzed by physicians selected by them, and the evidence then detailed in court. Why he should have the right to use such evidence, and yet, on the plea of indignity to his person, refuse to allow the adverse party to use the same evidence, is not at all clear: See Haynes v. Trenton, 123 Mo. 326.

It would seem that the case is not essentially different from that of a like examination preparatory to life insurance, where it has never been considered that insurance companies have passed the bounds of propriety in requiring such opportunity to learn the physical condition of an applicant for insurance. It is not in any way a question as to exposure of the person or invasion of privacy. The production of the urine, accompanied by an affidavit that it was voided by appellee, does not involve any exposure of the person.

Courts of equity, as said in 2 Rice on Evidence, section 416, proceed on the principle that it is against conscience that a party having knowledge, or the means by which knowledge could be obtained, of facts material to the litigation, should obtain an advantage over himself at the sacrifice of the development of truth, and consequent working of injustice by withholding and concealing such knowledge and means. "Upon this principle," it is added, "a discovery of books, papers, and documents is ordered," and "the principle clearly ⁵⁴⁵ covers and authorizes the compulsory discovery, in a proper case, of things or substances other than books, papers, et cetera."

As, therefore, no indignity against the person of the appellee was involved, we are unable to discover any sufficient cause why he should not have been required to produce in court urine asked for by the motion. All questions as to the right of privacy and the sacredness of the person being eliminated, every reason for exclusion of the proposed evidence disappears.

Nor was there anything unfair in the manner of the request. The appellant did not ask that the urine should be given to appellant's counsel, or to its experts or physicians. The request was that the appellee "produce in court, at such time, at, or in advance of the trial, as the court may order, specimens of his urine, that it may be examined and analyzed by proper experts and physicians." That was ample protection to appellee from any danger of manufactured evidence. All would be under direction of the court. The court would determine who were "proper experts and physicians."

The request was certainly a reasonable one. It was in the interest of a fair and impartial trial. If the analysis made and testified to by appellee's experts were correct, the analysis to be made by experts appointed by the court would but confirm it. If, however, there should be found error in the analysis already made, it was but right that such error should be disclosed, to the end that justice might be done between the parties.

Other questions discussed by counsel need not, as we think, be considered, as they may not arise on another trial.

548 Judgment reversed, with instructions to grant a new trial.

Monks, J., took no part in the decision of this case.

Of the Physical Examination of Parties by Order of Court.*

The doctrine that courts have inherent power to compel parties to submit their persons to physical examination, in furtherance of the ends of justice is, as it stands in our law at present, purely the outgrowth and result of a process of reasoning from analogy. At common law, it is hard to discover more than a shadowy basis for it. Indeed, it has been maintained that such a power was unknown to the common-law courts: *Union Pacific Ry. Co. v. Botsford*, 141 U. S. 250; *Cole v. Fall Brook Coal Co.*, 87 Hun, 584; *McQuigan v. Delaware etc. R. R. Co.*, 129 N. Y. 50; 26 Am. St. Rep. 507. The first case cited is a leading one upon this subject. In the opinion therein delivered by Mr. Justice Gray, and concurred in by seven of the nine justices of the court, it was said: "The inviolability of the person is as much invaded by a compulsory stripping and ex-

*REFERENCE TO PREVIOUS NOTES.

Compelling a party to a suit to submit to personal physical examination: 3 Am. St. Rep. 554-557; 49 Am. Rep. 726-730.

posure as by a blow. To compel anyone, and especially a woman, to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault, and a trespass; and no order or process commanding such an exposure or submission was ever known to the common law in the administration of justice between individuals, except in a very small number of cases, based upon special reasons, and upon ancient practice, coming down from ruder ages, now mostly obsolete in England, and never, so far as we are aware, introduced into this country."

The cases in which a similar power was exercised at common law were those involving the infancy or identity of a party, appeals of mayhem, and in cases of atrocious battery where it was allowable for the jury to inspect the plaintiff's injury and assess damages accordingly. In determining questions of impotence as affecting the validity of a marriage, courts of divorce might order an inspection by surgeons of the person of either party, which matter will be noticed later herein. A similar inspection might also be made where a woman, convicted of capital crime, was alleged or thought to be quick with child, it being purposed to avoid the possibility of taking the life of an unborn child for the crime of its mother. In other cases where it was necessary to protect the proper succession of the property of a decedent, a like examination might be ordered to ascertain the condition of his widow, whether or not she was with child: *Union Pac. Ry. Co. v. Bolsford*, 141 U. S. 250. In further support of the doctrine under consideration, namely, the power of courts to subject parties to physical examination, analogy is drawn from the power which courts of equity have long exercised of compelling a party to produce books, papers, and documents in his possession or control and constituting evidence material to a cause, for inspection by his adversary. In compelling such discovery, courts of equity "proceeded on the principle that it was against conscience that a party to a litigation having knowledge, or the means by which knowledge could be obtained, of facts material to the litigation, should obtain an advantage to himself to the sacrifice of the development of truth, and consequent working of injustice by withholding and concealing such knowledge and means": *Walsh v. Sayre*, 52 How. Pr. 334. See monographic note to *Lester v. People*, 41 Am St. Rep. 388.

Is the Power to Order Such Examination Inherent in Courts of Law? As we proceed further with the subject we shall get a complete view of the reasoning by means of which courts justify the exercise of the power under consideration, but that such exercise is simply an extension, a new application, of principles which have long been recognized, is plain enough. Courts have disagreed as to whether the extension is legitimate or the application proper, but the division of opinion is an unequal one; the inclination of the weight of authority is clear. Research has failed to discover an instance at common law where, in a civil suit for personal injuries, the court, at the instance of the defendant, ordered a physical examination of the plaintiff by incompetent persons whose testimony was intended

to reveal the character of the injuries complained of. This failure is made much of by courts which refuse to order such an examination in similar cases, and it is especially in civil actions for personal injuries that the remaining courts grant such orders. The leading case of the first class is *Union Pac. Ry. Co. v. Botsford*, 141 U. S. 250, in which a dissenting opinion was filed by Justice Brewer, Justice Brown concurring, the reasoning of which is so cogent, forcible, and conclusive, though not a single supporting authority is cited, that, did not limited space forbid, we should quote it in full.

"The silence of common-law authorities upon the question in cases of this kind proves little or nothing," asserts the learned justice. "The number of actions to recover damages in early days, was, compared with later times, limited; and few of those difficult questions as to the nature and extent of the injuries, which now form an important part of such litigations, were then presented to the courts. If an examination was asked, doubtless it was conceded without objection, as one of those matters the right to which was beyond dispute. . . . The end of litigation is justice. Knowledge of the truth is essential thereto. . . . It seems strange that a plaintiff may, in the presence of a jury, be permitted to roll up his sleeve and disclose on his arm a wound of which he testifies; but when he testifies as to the existence of such wound, the court, though persuaded that he is perjuring himself, cannot require him to roll up his sleeve, and thus make manifest the truth, nor require him, in the like interest of truth, to step into an adjoining room and lay bare his arm to the inspection of surgeons. It is said that there is a sanctity of the person which may not be outraged. We believe that truth and justice are more sacred than any personal consideration; and if in other cases, in the interests of justice, or from considerations of mercy, the courts may, as they often do, require such personal examination, why should they not exercise the same power in cases like this to prevent wrong and injustice?"

Following such reasoning, the great majority of our courts recognize the power of trial courts, in the absence of conferring statutes, to require plaintiffs, in actions for personal injuries, to submit themselves to surgical examination with respect thereto, and the exercise of such power is held to rest within the sound discretion of the court: *Alabama etc. R. R. Co. v. Hill*, 90 Ala. 71; 24 Am. St. Rep. 764; *Richmond etc. R. R. Co. v. Childress*, 82 Ga. 721; 14 Am. St. Rep. 190; *Schroeder v. Chicago etc. R. R. Co.*, 47 Iowa, 375; *Hall v. Manson*, 99 Iowa, 698; *Sibley v. Smith*, 46 Ark. 275; 55 Am. Rep. 584; *Railway Co. v. Dobbins*, 60 Ark. 481; *Graves v. Battle Creek*, 95 Mich. 266; 35 Am. St. Rep. 561; *Strudgeon v. Sand Beach*, 107 Mich. 496; *Atchison etc. R. R. Co. v. Thul*, 29 Kan. 460; 44 Am. Rep. 659; *Miami etc. Tp. Co. v. Bally*, 37 Ohio St. 104; *Hatfield v. St. Paul etc. R. R. Co.*, 33 Minn. 130; 53 Am. Rep. 14; *White v. Milwaukee City Ry. Co.*, 61 Wis. 536; 50 Am. Rep. 154; *O'Brien v. La Crosse*, 99 Wis. 421. In some of the states the decisions exhibit a vacillating tendency, though in general those courts have swung into line with the cases just cited. In *Loyd v. Hannibal etc. R. R. Co.*, 53 Mo. 509, a proposal to call in two surgeons and have the

plaintiff examined during the progress of the trial was refused by the court as "unknown to our practice and to the law"; but in *Shepard v. Missouri Pac. Ry. Co.*, 85 Mo. 629; 55 Am. Rep. 390, the court modified its previous holding, saying: "There are respectable authorities which hold that the court may order such personal examination. There are others to the contrary. We are inclined to hold with the former, but not that a party has an absolute right to have such a personal examination. It is a matter in which the court has a discretion which will not be interfered with unless manifestly abused." This holding was affirmed in *Sidekum v. Wabash etc. Ry. Co.*, 93 Mo. 400; 3 Am. St. Rep. 549; *Owens v. Kansas City etc. R. R. Co.*, 95 Mo. 169; 6 Am. St. Rep. 39; *Fullerton v. Fordyce*, 121 Mo. 1; 42 Am. St. Rep. 516. In *Hess v. Lowry*, 122 Ind. 225; 17 Am. St. Rep. 355, the Indiana supreme court held that: "It is undoubtedly true that the court may, in its discretion, in a proper case, if application is seasonably made, require the plaintiff to submit his person to a reasonable examination by physicians and surgeons, when necessary to ascertain the nature, extent, and permanency of injuries." See, also, *Terre Haute etc. R. R. Co. v. Brunker*, 128 Ind. 542. In both of these cases the application for an order for such an examination had been denied by the lower court as not seasonably made, and the denial was affirmed on appeal. In a subsequent case, the same court denied that power to order such an examination was inherent in courts, maintaining "that the better reason is against the existence of such a power, which, so far as we know, the courts of this state have never attempted to exercise": *Pennsylvania Co. v. Newmeyer*, 129 Ind. 401. The decision in the principal case does not, in any degree, modify the ruling of *Pennsylvania Co. v. Newmeyer*, 129 Ind. 401, and the Indiana doctrine must be regarded as opposed to the weight of authority shown above.

A like difficulty in reaching a satisfactory conclusion upon this question is to be noticed in the decisions of Nebraska, Illinois, and New York. In the former state it was intimated in *Sioux City etc. R. R. Co. v. Finlayson*, 16 Neb. 578; 49 Am. Rep. 724, that a court had power, in a proper case, to order a plaintiff to submit to a physical examination to ascertain the nature and extent of his alleged injuries, but a refusal by the trial court to make such an order was held proper under the facts shown. A like intimation was made in *Stuart v. Havens*, 17 Neb. 211, and the question as to the existence of the power under consideration was similarly avoided. Later, in *Ellsworth v. Fairbury*, 41 Neb. 881, a decision of the matter was expressly avoided, though the weight of authority was admitted to be as we have stated, and the existence of the power was assumed for the purposes of the case. But in *Chaldron v. Glover*, 43 Neb. 733, the question was considered to be still an open one and its decision was again avoided, so the standing of Nebraska in the conflict of authorities is yet to be determined.

In Illinois, where the action was for damages for personal injuries, the supreme court expressed itself in these unsatisfactory sentences: "Complaint is also made that the court refused to compel appellee to submit his eyes to the examination of a physician in the

presence of the jury. There was no error in this. The court had no power to make or enforce such an order." No authorities were cited: *Parker v. Enslow*, 102 Ill. 272; 40 Am. Rep. 588. However, in *Peoria etc. Ry. Co. v. Rice*, 144 Ill. 227, it was held that the Illinois court was committed to the doctrine that the trial court had no power to make such an order, citing *Parker v. Enslow*, 102 Ill. 272; 40 Am. Rep. 588, and other cases, though in cases previous to the former case and subsequent to *Parker v. Enslow*, 102 Ill. 272, 40 Am. Rep. 588, such a construction of the holding in the latter case was not made, and the question seems to have been considered as still an open one in Illinois: *St. Louis Bridge Co. v. Miller*, 138 Ill. 465; *Chicago etc. R. R. Co. v. Holland*, 122 Ill. 461.

In *McQuigan v. Delaware etc. R. R. Co.*, 129 N. Y. 50, 26 Am. St. Rep. 507, it was held that in an action for personal injuries, the court has no jurisdiction to require plaintiff to submit to an examination of his person by surgeons appointed by the court, with a view of enabling them to testify on the trial as to the existence of his alleged injuries. The opinion there delivered was a well-considered one, and settled the conflict in earlier New York cases by approving *Roberts v. Ogdensburgh etc. R. R. Co.*, 29 Hun, 154, and disapproving *Walsh v. Sayre*, 52 How. Pr. 334; but by an amendment to section 873 of the Code of Civil Procedure of New York, passed in 1893, the common-law rule, as asserted by the court in *McQuigan v. Delaware etc. R. R. Co.*, 129 N. Y. 50, 26 Am. St. Rep. 507, was abrogated and power conferred upon the courts, in actions for personal injuries, to compel a physical examination of the plaintiff upon a proper application and showing of necessity. The constitutionality of the amendment was upheld in *Lyon v. Manhattan Ry. Co.*, 142 N. Y. 298, so it appears that at present the harmony of courts upon the subject under consideration is broken only by the dissent of Indiana, and the United States Courts, and possibly Illinois and Texas. In the latter state, the question does not seem to have been fairly presented. In *I. & G. N. Ry. Co. v. Underwood*, 64 Tex. 463, the court only went to the extent of holding that a physical examination will not be ordered when not shown to be essential to the ends of justice: and the same court, avoiding a decision as to the power of a court to order such an examination, held that at least "in no case should such an order be made when the party is willing to be examined by competent and disinterested men without such an order": *Gulf etc. Ry. Co. v. Norfleet*, 78 Tex. 321. Later, in *Gulf etc. Ry. Co. v. Pendery*, 14 Tex. Civ. App. 60, it was held upon the authority of *Union Pac. Ry. Co. v. Botsford*, 141 U. S. 250, that a court may properly refuse to order such an examination. It is a novel situation that, aside from the New York cases, the only satisfactory, outspoken, and well-considered dissent from the holding of the great weight of authority on this question is to be found in the decision of the United States supreme court in *Union Pac. Ry. Co. v. Botsford*, 141 U. S. 250, followed in Illinois *Cent. R. R. Co. v. Griffin*, 80 Fed. Rep. 278.

Without going at length into the reasoning and historical research with which the matter has been argued on both sides, it seems to us

that the reasoning of the majority of the courts is most conclusive, and their decisions the best advised. Great respect is due to the holding of the supreme court of the United States in *Union Pac. Ry. Co. v. Botsford*, 141 U. S. 250, but the force of its conclusion is much diminished by the dissenting opinion from which quotation has been made herein. The doctrine that a court has power, within its sound discretion, to order the physical examination of a plaintiff in an action based upon personal injuries, is supported by strong reasons of analogy and public policy. It is an extension of the rule requiring the production of the best evidence. It is analogous to the power of courts to compel a discovery of papers and documents constituting material evidence in causes before them. Nor does it involve the invention of new and inquisitorial methods of securing evidence, because the power of courts to compel parties to submit their persons to examination, when necessary to the ends of justice and of public welfare, is almost as old as the law itself. The argument that it involves a violation of the right to personal liberty and privacy, that in its application the sensibilities of refined and delicate women will be shocked and their dignity trespassed upon, has little force, and is based upon considerations which are purely sentimental. Much may safely be intrusted to the discretion of the courts, and in their hands these rights and sensibilities will be properly safeguarded, and will yet, as they should, be held subordinate in importance and sacredness to the interests of justice. At the basis of the disagreement of courts upon this question is a difference in their conception of the function and meaning of a trial. A trial is not "a combat in which each of the gladiators is permitted, within certain limits, to deceive and trick the antagonist and unple," but its object is "to enable the state to establish and enforce justice between party and party": *Thompson on Trials*, sec. 859. The conclusion of the weight of authority may be placed upon the higher ground that when a person appeals to the sovereign for justice, he impliedly consents to the doing of justice to the other party, and impliedly agrees in advance to make any disclosure which is necessary to be made in order that justice may be done: *Richmond etc. R. R. Co. v. Childress*, 82 Ga. 721; 14 Am. St. Rep. 190; *Graves v. Battle Creek*, 95 Mich. 266; 35 Am. St. Rep. 561. Whoever is a party to an action in a court, whether a natural person or a corporation, has a right to demand therein the administration of exact justice. This right can only be secured and fully respected by obtaining the exact and full truth touching all matters in issue in the action. If truth be hidden, injustice will be done. The right of the suitor, then, to demand the whole truth is unquestioned; it is the correlative of the right to exact justice: *Schroeder v. Chicago etc. Co.*, 47 Iowa, 375.

Exercise of Power—Review on Appeal.—The exercise by a court of its power to order a physical examination of a party rests in its discretion, which neither of the parties has a right to control: *Alabama etc. R. R. Co. v. Hill*, 93 Ala. 514; 30 Am. St. Rep. 65. The defendant, in an action for personal injuries, has no absolute right to have such an examination of the plaintiff; *Owens v. Kansas City etc. R. R.*

Co., 95 Mo. 169; 6 Am. St. Rep. 39; O'Brien v. La Crosse, 99 Wis. 421; Norton v. St. Louis etc. Ry Co., 40 Mo. App. 642; though the contrary was held where the plaintiff had alleged that his injuries were permanent: Sibley v. Smith, 46 Ark. 275; 55 Am. Rep. 584. The exercise of its discretion in such a matter by a trial court is subject to review on appeal, and an abuse of discretion is ground for a reversal of judgment: Alabama etc. R. R. Co. v. Hill, 90 Ala. 71; 24 Am. St. Rep. 764; Sibley v. Smith, 46 Ark. 275; 55 Am. Rep. 584; Hall v. Manson, 99 Iowa, 698; Shepard v. Missouri Pac. Ry. Co., 85 Mo. 629; 55 Am. Rep. 390; Sidekum v. Wabash etc. Ry. Co., 93 Mo. 400; 8 Am. St. Rep. 549; Owens v. Kansas City etc. Ry. Co., 95 Mo. 169; 6 Am. St. Rep. 39.

When an Order for Examination Should be Made.—An examination should be ordered and had under the direction and control of the court whenever it fairly appears that justice requires the disclosure, or more certain ascertainment of facts which can only be produced or fully elucidated by such examination, and that it may be made without danger to life or health, or the infliction of serious pains: Alabama etc. R. R. Co. v. Hill, 90 Ala. 71; 24 Am. St. Rep. 764. Examinations which will violate instincts of delicacy and refinement are objectionable: Cleveland etc. Ry. Co. v. Huddleston, 151 Ind. 540; ante, p. 238; and may be refused: Graves v. Battle Creek, 95 Mich. 266; 35 Am. St. Rep. 561. But matters of delicacy and modesty in such connection are left also to the discretion of the court: Richmond etc. R. R. Co. v. Childress, 82 Ga. 721; 14 Am. St. Rep. 190; Shepard v. Missouri Pac. Ry. Co., 85 Mo. 629; 55 Am. Rep. 390; and an examination should be ordered of a female plaintiff, if necessary, even though it must be of a character most objectionable to a woman of delicacy and refinement: Alabama, Great Southern R. R. Co. v. Hill, 90 Ala. 71; 24 Am. St. Rep. 764; White v. Milwaukee City Ry. Co., 61 Wis. 536; 50 Am. Rep. 154. Compare Hall v. Manson, 99 Iowa, 698. To justify an examination in any case there must be a showing of necessity: Sioux City etc. R. R. Co. v. Finlayson, 16 Neb. 578; 49 Am. Rep. 724, and extended note; Peoria etc. Ry. Co. v. Rice, 144 Ill. 227; Atchison etc. R. R. Co. v. Thul, 29 Kan. 466; 44 Am. Rep. 659; Miami etc. Tp. Co. v. Baily, 37 Ohio St. 104. An order for an examination is properly denied when the plaintiff does not allege that he is suffering from some secret malady as a result of the injuries complained of: Chicago etc. R. R. Co. v. Reith, 65 Ill. App. 461; or where it will involve the submission of the plaintiff to the administration of anaesthetics: Strudgeon v. Sand Beach, 107 Mich. 496. Although a court may have power, by analogy, to compel a plaintiff, in an action for personal injuries, to perform some physical act in the presence of the jury to illustrate the character of his injuries, no error is committed by refusing to compel him to walk across the courtroom to determine as to his lameness, where the uncontradicted proof shows that since receiving the injuries the plaintiff has walked lame: Hatfield v. St. Paul etc. R. R. Co., 33 Minn. 130; 53 Am. Rep. 14. In an action for slander in saying of a woman that she had been guilty of fornication, she will not be compelled to submit to a physical examination

where she denies having had intercourse with any man: *McArthur v. State*, 59 Ark. 431; and similarly where the purport of the slander charged was that the plaintiff was a whore, had become pregnant, and suffered an abortion to be performed upon her: *Kern v. Bidwell*, 119 Ind. 226; 12 Am. St. Rep. 409.

Application for, and Conduct of, Examination.—An application for an order for the physical examination of a party must be seasonably made, and if not so made is properly denied within the discretion of the court. The application should be made before the trial, at a time when the examination would not interfere with or suspend the trial, and is made too late when not made until the close of the plaintiff's evidence, and no reason is shown for the delay: *Savannah etc. Ry. Co. v. Wainwright*, 99 Ga. 255; *Galesburg v. Benedict*, 22 Ill. App. 111; *Hess v. Lowrey*, 122 Ind. 225; 17 Am. St. Rep. 855; *Terre Haute etc. R. R. Co. v. Brunner*, 128 Ind. 542; *Marler v. Springfield*, 65 Mo. App. 301; *Fullerton v. Fordyce*, 121 Mo. 1; 42 Am. St. Rep. 516; *Sioux City etc. R. R. Co. v. Finlayson*, 16 Neb. 578; 49 Am. Rep. 724; *Stuart v. Havens*, 17 Neb. 211; *Chadron v. Glover*, 43 Neb. 732; *Bagley v. Mason*, 69 Vt. 175; *Southern Kansas Ry. Co. v. Michaels*, 57 Kan. 474; *Smith v. Spokane*, 16 Wash. 403. In the absence of statutory authority, a judge has no jurisdiction at chambers outside of the county in which the cause is pending, to make an order requiring plaintiff, in an action for personal injuries, to submit his body to examination by physicians appointed by the court: *Ellsworth v. Fairbury*, 41 Neb. 881. The fact that a plaintiff has already submitted to an examination by his own physician, who is offered as a witness concerning the injuries complained of, is not a good ground for refusing to order a further examination, because of the possibility of bias or prejudice on the part of such physician: *Alabama etc. R. R. Co. v. Hill*, 90 Ala. 71; 24 Am. St. Rep. 764. For a similar reason, the examination should not be made by physicians selected entirely by the defendant: *Smith v. Spokane*, 16 Wash. 403. The selection of the examiners rests within the court's discretion, over which neither party may exercise control: *Alabama etc. R. R. Co. v. Hill*, 93 Ala. 514; 30 Am. St. Rep. 65; *Richmond etc. R. R. Co. v. Childress*, 82 Ga. 719; 14 Am. St. Rep. 189; but no error is committed in refusing to compel an examination by a board of physicians, to one member of which the plaintiff expresses an objection: *Missouri Pac. R. R. Co. v. Johnson*, 72 Tex. 95. A court may also refuse to order such an examination in the course of a trial where it appears that plaintiff had previously been several times examined by physicians, one of whom was sworn as a witness for the defendant: *Southern Bell Tel. Co. v. Lynch*, 95 Ga. 529.

Examination in Open Court.—It is settled beyond question that the plaintiff in a suit for personal injuries may exhibit his injuries in open court and in the presence of the jury, as evidence in his favor, except where such exhibition must involve indecent exposure of his person: *Hess v. Lowrey*, 122 Ind. 225; 17 Am. St. Rep. 855; *Brown v. Swineford*, 44 Wis. 282; 28 Am. Rep. 582. By a parity of reasoning it is held that where plaintiff has introduced his in-

juries as evidence in such a manner, the defendant may have the injury examined in open court by experts with a view of obtaining their testimony as to its character and probable permanency: *Hayes v. Trenton*, 123 Mo. 326; *Graves v. Battle Creek*, 95 Mich. 266; 35 Am. St. Rep. 561; and the same is true though the plaintiff has not so exhibited his injury: *Freeman v. Hutchinson*, 15 Ind. App. 639; *Lanark v. Dougherty*, 153 Ill. 163. Compare *Parker v. Enslow*, 102 Ill. 272; 40 Am. Rep. 588; though before an examination will be ordered it must appear that a proper sense of delicacy will not be shocked thereby: *Graves v. Battle Creek*, 95 Mich. 266; 35 Am. St. Rep. 561.

Enforcement of Order.—There is a diversity of opinion as to the methods by which courts may enforce orders for physical examination. Courts which deny the power of courts to make such orders maintain that, even if the existence of the power were admitted, courts would have no effective method of enforcing their orders: *Parker v. Enslow*, 102 Ill. 272; 40 Am. Rep. 588; though admitting that a refusal by plaintiff to make a reasonable exhibition of his injuries may excite a doubt in the mind of the jury as to the genuineness or extent of the alleged injury: *Roberts v. Ogdensburgh etc. R. R. Co.*, 29 Hun, 154. His refusal may be considered by the jury as bearing on his good faith, as in any other case of a party declining to produce the best evidence in his power: *Union Pac. Ry. Co. v. Botsford*, 141 U. S. 250; *Parker v. Enslow*, 102 Ill. 272; 40 Am. Rep. 588; *Kinney v. Springfield*, 35 Mo. App. 97. In an action for injuries which are alleged to have affected plaintiff's kidneys to the extent of causing Bright's disease his refusal to furnish defendant the means of making proper tests should go to the jury as evidence that such tests would expose the fictitious nature of his claim: *Freeport v. Isbell*, 93 Ill. 381; but in an action for slander in charging the prosecutrix with fornication, her refusal to submit to a physical examination was held to raise no presumption against her: *McArthur v. State*, 59 Ark. 431.

It is generally held that courts have effective methods of enforcing orders for examination. "Courts have very efficient remedies in their hands for the punishment of reculant witnesses or parties to suits," says the court in *Sibley v. Smith*, 46 Ark. 275; 55 Am. Rep. 584. The refusal of a plaintiff to submit to a physical examination in obedience to an order of court, is sufficient ground for the dismissal of his action; or the court may refuse to allow him to give evidence to establish the injury of which he complains: *Miami etc. Turnpike Co. v. Bally*, 37 Ohio St. 104; or treat the refusal as a suppression of testimony, and so present the matter to the jury as to make the refusal equivalent to proof of the fact which the party asking such examination, by affidavit or otherwise, would make it probable that the examination would disclose: *Shepard v. Missouri Pac. Ry. Co.*, 85 Mo. 629; 55 Am. Rep. 390. The refusal amounts to an impediment to the administration of justice, and a contempt of the court's authority. It amounts to recusancy on the part of a witness and may be punished as such: *Schroeder v. Chicago etc. R. R. Co.*, 47 Iowa, 381; *Atchison etc. R. R. Co. v.*

Thul, 29 Kan. 466; 44 Am. Rep. 659. Upon this point, illustrating further the diversity of opinion, Justice Brewer, in the dissenting opinion to *Union Pac. Ry. Co. v. Botsford*, 141 U. S. 250, says: "It is not necessary, nor is it claimed, that the court has power to fine and imprison for disobedience of such an order. Disobedience to it is not a matter of contempt. It is an order like those requiring security for costs. The court never fines or imprisons for disobedience thereof. It simply dismisses the case or stays the trial until the security is given."

In Matters of Marriage and Divorce.—As was said earlier herein, courts have from very early times exercised the power of compelling parties before them to submit to physical examination where the relief sought has been the annulment of the marriage relation because of impotency, or incapacity to perform the marital act. This power "rests upon the interest which the public as well as the parties have in the question of upholding or dissolving the marriage state, and upon the necessity of such evidence to enable the court to exercise its jurisdiction": *Union Pac. Ry. Co. v. Botsford*, 141 U. S. 250; *Le Barron v. Le Barron*, 35 Vt. 365. When it is necessary in such a case, a court may direct an examination by surgeons and matrons to ascertain the incapacity of a woman: *Devanbaugh v. Devanbaugh*, 5 Paige, 554; 28 Am. Dec. 443. See *Newell v. Newell*, 9 Paige, 25. Where it is alleged that the incapacity complained of is due to the physical malformation of the husband, both he and his wife may be compelled to submit to such an examination to ascertain the existence and source of such incapacity: *Anonymous*, 89 Ala. 291; 18 Am. St. Rep. 116. An order for such an inspection may be properly refused in consideration for the wife's age: *Shafto v. Shafto*, 28 N. J. Eq. 34. Courts may not from a sense of nicety refuse to assume jurisdiction of such matters as this, or to exercise their proper powers in the administration of justice, for the delicacy of the questions involved, extreme though it may be, is never incommensurate with their importance: *Le Barron v. Le Barron*, 35 Vt. 365. The ordering of such an examination, when the application therefor is tardily made, rests within the court's discretion, which is not revisable on appeal: *Anonymous*, 35 Ala. 226. The enforcement of such an order is doubtless practicable, but the methods to be employed do not seem to have received much consideration: See *Newell v. Newell*, 9 Paige, 25; *Anonymous*, 35 Ala. 226; *Bishop on Marriage, Divorce, and Separation*, sec. 1305.

In Criminal Cases.—In criminal cases, a physical examination of the defendant will not generally be ordered because the result would be, in most cases in which it is asked for, to make the defendant a witness against himself: *Atchison etc. R. R. Co. v. Thul*, 29 Kan. 466; 44 Am. Rep. 659. Thus, it has been held that a court has not the right, in a criminal prosecution, to compel a defendant to exhibit himself to the inspection of the jury for the purpose of enabling them to determine his status as a free negro: *State v. Jacobs*, 5 Jones, 259. Where a woman was on trial for being the mother of an illegitimate child, and of murdering it, the court held that it had no power to compel the defendant to submit to a physical ex-

amination to determine whether or not she was a virgin or had had a child: *People v. McCoy*, 45 How. Pr. 216. But a defendant was compelled to exhibit his arm to the jury to show certain tattoo marks, by the existence of which the question of his identity was to be determined: *State v. Ah Chuey*, 14 Nev. 79; 83 Am. Rep. 530. For similar purposes of identification, a prisoner has been compelled to afford means of comparing his footprints with others found near the scene of the crime: *Walker v. State*, 7 Tex. App. 245; 32 Am. Rep. 595; *State v. Graham*, 74 N. C. 646; 21 Am. Rep. 493; though such a course has been disapproved: *Day v. Georgia*, 63 Ga. 667. Compare *Stoke v. State*, 5 Baxt. 619; 30 Am. Rep. 72. In prosecutions for bastardy, the jury may consider as evidence of the paternity any resemblance which they may discern, upon inspection, between the child and the putative father: *Finnegan v. Dugan*, 14 Allen, 197; *State v. Woodruff*, 67 N. C. 89; *Gaunt v. State*, 50 N. J. L. 490. In cases of rape and cognate offenses it may well be doubted "whether the court has power to make an order compelling the inspection of the private person of a prosecutrix, in the event of her refusal to submit to such examination. If such rights exist at all, we should hold it to be a matter of judicial discretion, to be exercised only in cases of extreme necessity, and not a subject of review on appeal to this court": *Per Somerville, J., in McGuff v. State*, 88 Ala. 147; 16 Am. St. Rep. 25

KRENZER v. PITTSBURG, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY.

[151 INDIANA, 597.]

RAILWAYS—TRESPASSER UPON, WHO IS NOT.—A child playing upon a railway track in a public street is not a trespasser. Its right there is equal to that of the railway corporation, except that the latter has a prior right of passage with its cars.

CHILD—CONTRIBUTORY NEGLIGENCE OF.—A boy of seven and a half years, of ordinary intelligence, strength, and activity for that age, and who knew that engines and cars were liable to pass over a railroad track where he sat and, if they did pass, that he would be run over and injured, is guilty of negligence in going to sleep on the track, and, if injured by a train of cars being run over him, cannot recover, though the persons in charge of the train were also negligent.

RAILWAYS—NEGLIGENCE UPON TRACKS OF.—The act of falling asleep upon a railway track is such contributory negligence as will preclude a recovery in case of accident, unless the servants of the railway company, after becoming aware of the dangerous condition of the sleeper, fail to exercise due care toward him. This is true, though he is a boy only seven and a half years of age, if he is of average intelligence for that age, and knows that engines and cars run on the track, and the liability of being injured by them.

A. G. Smith, C. A. Korbly, Beckett & Doan, and Christian & Christian, for the appellant.

Samuel O. Pickens, for the appellee.

⁵⁸⁷ HOWARD J. This was an action for personal injuries, brought by appellant against appellee. The jury found for appellant in the sum of four thousand dollars, and with their verdict returned answers to certain interrogatories. On motion of appellee, the court gave judgment against appellant, upon the answers to interrogatories, notwithstanding the general verdict in his favor. The complaint was in three paragraphs. The material allegations were: That the appellee company was operating one of its locomotives upon and over one of the tracks of the Union Railway Company, known as the "Belt Railroad," within the city of Indianapolis, near the intersection of said track with the ⁵⁸⁸ Lake Erie and Western Railroad; that said track had, for twenty years or more, been used by pedestrians to pass back and forth upon, with the knowledge, acquiescence, consent and permission of the Union Railway Company and of appellee; that near said point was an open common, on either side of the Belt track, whither children were attracted in large numbers by the green grass and cool shade during the summer months, using the same for a playground, and passing upon and over said Belt track at that point with the knowledge of appellee and of said Union company; that there was no fence or other obstruction to keep children off said track, and no watchman or other person, or notice, or warning, to prevent children or other persons from going upon said track, or walking on the same; that appellee used said Belt track daily for the transportation of its cars and locomotives, and had so used the same for more than twenty years; that the appellant, a boy seven years old, being too young to appreciate the danger, or have proper discretion in the matter, and without proper sense to appreciate the danger, without the knowledge of his parents, and without fault upon his part, and without negligence of his parents, came upon said track at a point where the same is crossed by a public highway of said city, and while within said public highway, and in plain view of the appellee, there being nothing to obstruct the view of appellee's employes in charge of the locomotive, or to prevent them from seeing the appellant for a distance of three hundred feet, appellee negligently ran its locomotive against, on to, and over said appellant, crushing and mangleing his right foot and leg; that there was then in force an ordinance of the city of Indianapolis making it unlawful to run an engine at a higher rate of speed than four miles an ⁵⁸⁹ hour along any track in said

city, and requiring the bell on the locomotive to be rung when moving in or through said city; that at the time of this injury to appellant, the locomotive was moving at a very high rate of speed, fifty miles an hour, and the bell was not ringing, and no signal of danger was given; that appellee's employes in charge of the locomotive could have seen appellant upon the track in time to stop the locomotive and prevent the injury, but that they negligently failed to look and observe the track ahead of the locomotive, and negligently ran upon and over the leg of appellant.

Counsel for appellee admit that the general verdict for the appellant was a finding of all the material facts stated in the complaint. Appellee's negligence and appellant's freedom from contributory negligence must therefore be taken as established, unless the answers to the interrogatories are found to be in irreconcilable conflict with the general verdict. The answers to interrogatories show that, at the time of the accident, the appellant was seven and one-half years of age; that he was a boy of usual and ordinary intelligence, and of average physical strength and activity, for his age; that he knew that the track, at the place in question, was used to run cars and engines over, and had sufficient intelligence to know that engines and cars were liable to pass over the track, and that, if he remained on the track and an engine or car passed over it, he would be run over and injured; that just before the injury, he was out upon the track, playing jackstones; that he sat upon the rail of the track with his feet between the rails, and while so sitting fell asleep; that when the engine struck him, he was lying with one leg over the rail and his body outside; that the locality where he was hurt was at the crossing ⁵⁹⁰ of a public highway; that the time was between 7 and 8 o'clock in the evening (July 12, 1892), it being still daylight; that neither the engineer nor the fireman, nor anyone else on the engine, saw him before he was run over; that the engine was at the time running forward at the rate of ten miles per hour, and the bell was not ringing; that the engineer was looking out ahead, but the fireman was not.

Counsel for appellee, in seeking to uphold the judgment, upon the interrogatories, notwithstanding the general verdict, bases his defense of the court's action upon the contention that the appellant, at the time of his injury, was a trespasser upon appellee's right of way. We are inclined to think this contention is untenable. The accident occurred in the public highway. There the appellant had the same rights as the appellee.

His right upon the common crossing was equal to that of the appellee, with the sole exception that, when both approached the crossing, appellee had the prior right of passage with its cars. Appellant might walk or drive or play upon the highway, just as he pleased, provided only he did not obstruct the passage of others desiring to travel along the same road. The time is not yet come when American boys will be considered as trespassers merely because they go to play upon the streets or public commons. This is particularly true where, as in the present case, the population is dense, and the children have nowhere else to play, except in close rooms or scanty yards. There may be negligence in going upon the highway, whether to walk, or drive, or play, and whether the person be an adult or a child, but there is no trespass. One who goes upon the highway must guard against injury to himself, occasioned with or without the fault of others, who have an equal right to be upon the same highway. He will not, however, be a trespasser,⁵⁹¹ even if a boy, and playing jackstones on the highway: See the well considered case of Louisville etc. Ry. Co. v. Sears, 11 Ind. App. 654, 670, and cases cited. In Indianapolis v. Emmelman, 108 Ind. 530, 58 Am. Rep. 65, one of the cases cited, a child five years of age, playing in the street, fell into an unguarded pit. It was there said by Judge Mitchell: "It [the pit] was made in the bed of a shallow stream, and left alone unguarded on a July day, with knowledge that children were accustomed to play in the vicinity. The city must be held to know that children are attracted to such a place in July weather. They were not intruders": See, further, McGuire v. Spence, 91 N. Y. 303, 306; 43 Am. Rep. 668.

While, therefore, in the case at bar, the appellant and the other boys, his companions, had an undoubted right to go upon the street, and while the appellee was confessedly guilty of negligence in running its locomotive through the city at a speed forbidden by the ordinance, and without ringing the bell of the engine, as required by the ordinance, yet we are persuaded, from the answers to the interrogatories, that the appellant, notwithstanding his tender youth, was himself guilty of contributory negligence in sitting upon the rail of the track and lying down to sleep with his leg across the rail. We think he is shown to have had sufficient appreciation of the danger he thus incurred. He was seven and one-half years of age, and, as the jury find, was of ordinary intelligence and average strength and activity for that age. Moreover, they find that he had suffi-

cient intelligence to know that engines and cars were liable to pass over the rails where he sat, and that, if they did so pass along, he would be run over and injured. Had he been standing on the track when the locomotive was coming, he might have thought he could be quick enough ⁵⁹² to get off, or even to run clear across the track, before he could be caught. That might be the natural result of boyish presumption and inexperience; and, if he had been injured in such a case, we think the company, owing to its own negligence, would have been liable. But to sit upon the track to play, and to lie down there to sleep, with one leg over the rail, seems such a reckless and foolhardy act, that, as we think, a boy found to have sufficient intelligence to comprehend the danger must be held culpable for incurring it. We are consequently of opinion that the court was justified, from the answers of the jury to the interrogatories submitted to them, in holding that appellant was guilty of negligence contributing to his own injury. The judgment is affirmed.

McCabe, J., dissents.

ON PETITION FOR REHEARING.

HOWARD, J. We have given careful consideration to the learned argument of counsel in support of the petition for a rehearing. Nothing said, however, has been sufficient to convince us that the rule heretofore enforced by this court in relation to contributory negligence in injury cases should not be maintained. There is no doubt, and never has been, that, if a person is injured by the act of another, the injured person will thereby have a right of action for damages, even though he was himself not free from fault, provided only the person injuring him knew of his condition, and could, with ordinary care, have avoided the injury complained of. In the recent case of *Lake Erie etc. R. R. Co. v. Stick*, 143 Ind. 449, it was said, citing *Louisville etc. Ry. Co. v. Phillips*, 112 Ind. 59, 2 Am. St. Rep. 155: "If the employes see a man bound to the rails in time to check the train, they must use reasonable measures to check it, and not suffer it to run upon the helpless ⁵⁹³ man." This would be true, although the man had himself been wholly at fault, even so far as to have caused himself to be tied upon the track. So it is said in *Louisville etc. R. R. Co. v. East Tennessee etc. Ry. Co.*, 60 Fed. Rep. 993, cited by appellant: "If, with a knowledge of what the plaintiff has done or is about to do, the defendant can, by ordinary care, avoid the injury likely to

result therefrom, and does not, defendant's failure to avoid the injury is the last link in the chain of causes, and is, in law, the sole proximate cause. The conduct of plaintiff is not, then, a cause, but a condition of the situation with respect to which the defendant has to act. The principle is established by a long series of cases": Citing *Davies v. Mann*, 10 Mees. & W. 546, and many other cases. The statement so cited with approval in appellant's brief is quite consistent with the rule established in this state. If, "with knowledge" of the plaintiff's condition, whether that condition has been brought about by plaintiff's fault or not, defendant can, by ordinary care, prevent the threatened injury, he must do so, or become liable for the injury.

We think that counsel are perhaps right in calling in question the propriety of an attempted distinction made by a dictum in *Pennsylvania Co. v. Sinclair*, 62 Ind. 301, 30 Am. Rep. 185, between what is there called the English doctrine, illustrated by the case of *Davies v. Mann*, 10 Mees. & W. 546, and the doctrine accepted in this state. We do not perceive any difference in principle between what are called the two doctrines, however difficult it may be to apply the accepted rules of the law of negligence to particular cases. In every case, one who has himself contributed to his own injury must suffer the consequences of his own want of due care, unless it should appear that the one injuring ⁵⁹⁴ him knew of his condition in time to have avoided the injury, and could with ordinary care have avoided it. To knowingly injure another, when, with ordinary care, such injury could be avoided, is not, however, mere negligence, but rather willful wrongdoing, or, at least, such a wanton disregard of consequences as amounts to willfulness. In some cases, we readily admit, it may be hard to draw the line between simple negligence on the one side and willfulness or wantonness on the other. Carelessness may be so gross as scarcely to be distinguishable from wantonness, or from a willingness to do any act, no matter what the consequences. But, in principle, the injury suffered, if wrongful, must always be due either to a willingness to do wrong, or to a want of care to avoid such wrong. The act done is either positive or negative in its character; that is, either willful or negligent. Contributory negligence is not a sufficient answer as to willful wrongdoing, but it is as to simple negligence or want of ordinary care.

In the case before us, the injured boy, after playing upon the

railroad crossing, sat upon the rail of the track and there fell asleep, and was hurt by the passing train. It was between 7 and 8 o'clock of a summer evening, though still daylight. The engineer was at the time looking out ahead, but neither he nor anyone else on the train saw the boy. It is not claimed that these facts show any willful injury on the part of the employees of appellee, or any wanton disregard of plaintiff's rights, though it is admitted that the employees were negligent in running the train faster than allowed by ordinance, and without ringing the bell or sounding the whistle. Here, then, is a case where the injured person was himself guilty of negligence contributing to his injury, and where the persons injuring him did not see him, although the ⁵⁰⁵ engineer was looking out ahead, and did not, of course, know of his condition. Under these circumstances, even accepting the authority of the cases cited by appellant, there could be no recovery. No willful or even wanton injury is shown, and the contributory negligence of appellant is undoubted. In a note to *East Tennessee etc. R. R. Co. v. Humphreys*, 12 Lea, 200, 15 Am. & Eng. R. R. Cas. 472, the rule in cases of this kind is, as we think, well stated. It is there said: "The act of falling asleep or being drunk and incapable upon a railroad track is generally held to be such contributory negligence as will preclude recovery in case of accident," citing many cases, and adding: "It is, of course, to be understood that when the servants of the company fail to exercise due care after becoming aware of the plaintiff's dangerous position, the company is liable notwithstanding plaintiff's contributory negligence": See, further, *Lafayette etc. R. R. Co. v. Huffman*, 28 Ind. 287; 92 Am. Dec. 318; *Wright v. Brown*, 4 Ind. 95; 58 Am. Dec. 622; *Summit Coal Co. v. Shaw*, 16 Ind. App. 9; *Jeffersonville etc. R. R. Co. v. Adams*, 43 Ind. 402; *Conner v. Citizens Street R. R. Co.*, 146 Ind. 430; *Elliott on Railroads*, secs. 1251, 1257.

But it is said that as the injured party in this case was at the time but seven and one-half years of age, and, as a general verdict was returned in his favor, it follows conclusively that all the facts necessary to entitle him to judgment, including the fact as to his having sufficient capacity to comprehend and realize the danger incurred by him in sitting down to play upon the railroad track, were found for him by the jury, unless it should appear from answers to interrogatories that facts specially found were in irreconcilable conflict with such general verdict. There is no question that this is the law. It is, however, shown in the

original opinion that such irreconcilable facts as to the ⁵⁹⁶ capacity of the injured boy were found by the jury. The jury found specially that the boy was seven and one-half years old; that he was "of usual and ordinary intelligence and judgment for his age," and "of ordinary physical strength and activity for his age"; that he knew "that the track at the place where the accident happened was used to run cars and engines over"; that, just before he was hurt, he was playing jackstones upon the track, and sat "down upon the rail of the track with his feet between the rails," and that "while sitting there in that position he fell asleep and remained asleep until he was hurt"; that, when the engine struck him, he was "lying with one leg over the rail, body off north side of rail"; that "the plaintiff when he sat down upon the track had sufficient intelligence to know that the track was used to run cars over," and "that engines and cars were liable to pass over said track"; and that "at the time he sat down upon the track he had sufficient intelligence to know that if he remained on the track, and an engine or car passed over it, he would be run over and injured." The capacity of the appellant to comprehend the danger thus incurred by him, as so found by the jury, cannot be distinguished from the capacity of an adult in the same circumstances which would make such adult chargeable with contributory negligence. We think it absolutely clear that the negligent conduct of the appellant, and his full appreciation of the possible consequences of such conduct, as found by the jury, must make him, as well as any other person, chargeable with negligence contributing to his injury. There is therefore no room here for the application of the rule laid down in *Cincinnati etc. Ry. Co. v. Grames*, 136 Ind. 39, and like cases—that where it is uncertain whether the primary facts found show negligence, the jury are permitted and ⁵⁹⁷ required to find as an ultimate fact whether the plaintiff has or has not exercised such care as an ordinarily prudent person would have exercised under the circumstances. The facts here found by the jury disclose beyond question that the appellant was guilty of conduct showing him to be chargeable with negligence contributing to his own injury, and that he was at the time possessed of sufficient intelligence to know and appreciate the danger thus incurred by him.

Neither can it be that the company could be liable under the circumstances, as for willful wrongdoing, unless, indeed, those in charge of the train knew that the boy was upon the track. But here, again, the jury find expressly that the engineer was

"looking out ahead of the engine at and before the time plaintiff was run over"; and also that neither "the engineer nor fireman nor anyone on the engine saw the plaintiff before he was run over." There was, therefore, no willful or wanton injury. Indeed, none is alleged in the complaint. But, as already said, in order to charge the company with responsibility, there must have been either willfulness or wantonness on its part, or else negligence; and in the latter case the plaintiff must himself have been free from contributory negligence, which, as we have also seen, was not the case. Under any possible view, therefore, the appellant could not recover.

Petition overruled.

JUDGE McCABE DISSENTED from the opinion denying a rehearing. He claimed that the answers to the interrogatories were not necessarily irreconcilable with the general verdict, because the boy, being only seven and a half years of age, the additional facts found by the jury did not show him, as a matter of law, to have been guilty of contributory negligence. The judge admitted that the child was bound to use such care as children of that age and capacity were capable of exercising, but insisted that whether he had used that degree of care was a question for the jury: Citing *New York etc. R. R. Co. v. Perriguet*, 138 Ind. 414; *Mangum v. Brooklyn R. R. Co.*, 38 N. Y. 455; 98 Am. Dec. 66; *Detroit etc. R. R. Co. v. Van Steinberg*, 17 Mich. 99; *Stone v. Dry Dock etc. R. R. Co.*, 115 N. Y. 104; *Chicago etc. R. R. Co. v. Grablin*, 88 Neb. 90; *Huff v. Ames*, 16 Neb. 139; 49 Am. Rep. 716; *Avey v. Galveston etc. Ry. Co.*, 81 Tex. 243; 26 Am. St. Rep. 809; *Schmitz v. St. Louis etc. Ry. Co.*, 119 Mo. 256; *Central etc. R. R. Co. v. Rylee*, 87 Ga. 491; *Western etc. R. R. Co. v. Young*, 81 Ga. 397; 12 Am. St. Rep. 320; *Moynihan v. Whidden*, 143 Mass. 287; *Rosenburg v. Durfee*, 87 Cal. 545; *Springfield etc. Ry. Co. v. Welsch*, 155 Ill. 511; *Pierce v. Connors*, 20 Colo. 178; 46 Am. St. Rep. 279; *McGuire v. Chicago etc. Ry. Co.*, 87 Fed. Rep. 54; *Swift v. Staten Island R. R. Co.*, 123 N. Y. 645; *Baker v. Flint etc. R. R. Co.*, 68 Mich. 90; *Bostwick v. Minneapolis etc. Ry. Co.*, 2 N. Dak. 440; *Atwood v. Bangor etc. Ry. Co.*, 91 Me. 399; *Baltimore etc. Ry. Co. v. Cooney*, 87 Md. 261; *Adams v. Southern etc. Ry. Co.*, 84 Fed. Rep. 596; *Louisville etc. R. R. Co. v. Morley*, 86 Fed. Rep. 240; *Satinsky v. Mutual Brewing Co.*, 187 Pa. St. 57; *Ohio etc. Ry. Co. v. Collarn*, 73 Ind. 261; 38 Am. Rep. 134; *Woolery v. Louisville etc. R. R. Co.*, 107 Ind. 381; 57 Am. Rep. 114; *Smith v. Wabash R. R. Co.*, 141 Ind. 92; *Cleveland etc. Ry. Co. v. Harrington*, 131 Ind. 426; *Shoner v. Pennsylvania Co.*, 180 Ind. 170; *W. C. De Pauw Co. v. Stubblefield*, 132 Ind. 182; *Faris v. Hoberg*, 134 Ind. 273; 39 Am. St. Rep. 261; *Cincinnati etc. Ry. Co. v. Grames*, 136 Ind. 89; *Cleveland etc. Ry. Co. v. Moneyhun*, 146 Ind. 147.

The judge also claimed that if it was negligence for the plaintiff to go to sleep on the track, this was not the proximate cause of his injury, but only a condition or remote cause thereof; that the

finding of the jury was that the driver of the engine was in plain view of the plaintiff in time to avoid injuring him by the exercise of ordinary care in stopping the engine. The judge, therefore, was of the opinion that the case should be governed by the same rule as if the engineer had actually known of the presence of the plaintiff on the track and his condition of peril, and, seeing the child, had failed to take any precautions for his safety and to avoid injuring him. In justification of this part of the opinion, the judge said: "But it is said the answers to the interrogatories show that the engineer did not discover the perilous situation of the sleeping boy on the track until the engine ran into him, and inflicted the injury, and hence it is claimed the rule I have been discussing has no application to the case. It is true that those answers show that neither the engineer nor fireman saw the plaintiff before he was run over and injured by their engine. But the findings of the jury also show that it was daylight and in a populous city, approaching a crossing, where children were liable to be, and that the sleeping child was in plain view from the engine for a distance of three hundred feet before it reached him, and could have been seen by the engineer and fireman if they had looked. It has long been established in this court that a railroad track is an indication of danger, and where one attempts to go upon or across the same, he must listen for signals, notice signs put up as warnings, and look attentively up and down the track, in order to his freedom from negligence: *Mann v. Belt R. R. etc. Co.*, 128 Ind. 188; *Hathaway v. Toledo etc. Ry. Co.*, 46 Ind. 25; *Cincinnati etc. R. R. Co. v. Butler*, 103 Ind. 31; *Smith v. Wabash R. R. Co.*, 141 Ind. 92; *Pittsburg etc. Ry. Co. v. Frazee*, 150 Ind. 576; 65 Am. St. Rep. 377. It is established in this court that such person is presumed in law to have seen what he could have seen if he had looked attentively, and have heard what he could have heard if he had listened attentively. The reason of this presumption is that it was the traveler's solemn duty to look attentively when approaching such a crossing, and listen attentively for a coming train: *Pittsburg etc. Ry. Co. v. Frazee*, 150 Ind. 576; 65 Am. St. Rep. 377; *Cones v. Cincinnati etc. Ry. Co.*, 114 Ind. 328. It was no less the solemn duty of the engineer to look attentively as he ran his engine through a populous city, approaching a highway crossing, where children were liable to be. The only difference between the negligence of the defendant and the negligence of the plaintiff is, one is contributory, while the other is original and independent. They are exactly alike in their essential elements, the same being a failure to exercise ordinary care under all the circumstances. The law imposes the same solemn duty on plaintiff and defendant to exercise due care—the one to avoid injury to himself, and the other to avoid inflicting such injury. Therefore, there is no reason why the one should be presumed in law to have seen or heard what he might have seen or heard had he looked or listened that does not equally apply to the other, where the circumstances are such as to make it his solemn duty to look or listen. So the defendant is under the same solemn obligation to look and listen, where the circumstances require it, as

the plaintiff is, in order to escape responsibility for negligence. Therefore, I think it quite clear that the law presumes that the engineer did see the sleeping child on the track in time to avoid running over it, because he might have seen it had he looked: Indianapolis etc. Ry. Co. v. Pitzer, 109 Ind. 179; 58 Am. Rep. 387; and hence his negligence in running over it was the proximate cause of the injury to the boy, and his negligence in going and falling asleep on the track, if negligence it was, was not a proximate cause of such injury, but was a remote cause or a mere condition of such injury."

RAILROAD COMPANIES—STREET RAILWAYS—INJURY TO CHILD ON TRACK.—A cable railway operating dangerous machinery at a rapid speed on and along the public streets of a city is in law bound to know that men, women, and children have an equal right to use the highway, and will be upon it, and its servants must be on the lookout and take all reasonable measures to avoid injuries to persons who may be on the streets: Winters v. Kansas City etc. Ry. Co., 99 Mo. 509; 17 Am. St. Rep. 591. The mere fact that a young child is on the track, where it has no right to be, does not relieve a street railway company from liability for its own negligence in injuring the child: Johnson v. Reading City etc. Ry., 160 Pa. St. 647; 40 Am. St. Rep. 752; Galveston City R. R. Co. v. Hewitt, 67 Tex. 473; 60 Am. Rep. 32. The law fixes no arbitrary age when an infant is deemed capable of exercising judgment and discretion. From the nature of the case it is impossible to fix an exact period when a child becomes *sui juris*. It depends upon many things, such as natural capacity, physical conditions, training, habits of life, and surroundings; hence it becomes a matter for determination in the particular case in hand. See monographic note to Barnes v. Shreveport City R. R. Co., 49 Am. St. Rep. 410, discussing the question at length.

CASES
IN THE
SUPREME COURT
OF
IOWA.

TISDALE v. MAJOR.

[108 IOWA, 1.]

ATTACHMENT OF REAL ESTATE—DAMAGES.—An attaching creditor is not liable for the depreciation in value of real estate levied upon which occurs while the attachment is in force, provided there is no change of possession.

PLEADING—ULTIMATE FACTS.—A paragraph in a pleading in the nature of a statement of evidence not relevant to any issue in the case, and not of ultimate and material facts, is properly stricken out on motion.

ATTACHMENT—WRONGFUL—DAMAGES FOR MENTAL SUFFERING.—Mental suffering resulting from the wrongful and malicious suing out and levying of a writ of attachment does not afford ground for the recovery of compensatory damages.

McElroy & Heindel, for the appellant.

McNett & Tisdale, for the appellee.

² **ROBINSON, J.** The writ of attachment was issued on the alleged grounds that the defendants were about to dispose of their property with intent to defraud their creditors, and that they had disposed of their property, in whole or in part, with intent to defraud their creditors. The writ was levied upon certain real estate in the city of Ottumwa. The defendants appeared to the action, and filed an answer, in which they admitted that they were indebted to the plaintiff on the note and accounts in suit to the amount claimed, but alleged that the attachment was wrongfully and maliciously sued out, and that on the day it was levied they made to C. W. Major an assignment of all their property not exempt from execution for the benefit

of their creditors. On the same day the assignee filed a petition of intervention, in which he admitted the indebtedness of the defendants as alleged by the plaintiff, and sought to recover on the attachment bond, by virtue of the assignment by the defendants to him, for damages alleged to have been sustained by the defendants, in consequence of the alleged wrongful and malicious suing out and levying of the writ of attachment. A motion to ³ strike out portions of the petition of intervention was sustained in part, the intervenor thereafter filed an "amended and supplemental petition," and a motion to strike out portions of that petition was sustained. No evidence was offered on the trial in behalf of the defendants and the intervenor, and the questions presented by the appeal for our consideration grow out of the sustaining of the motions.

1. One of the paragraphs of the petition of intervention which was stricken out purports to state a part of the damages alleged to have been sustained by the defendants, and is as follows: "In the depreciation in the market value of said attached property, caused by the issuance and levy of said writ of attachment in the sum of two thousand dollars." It is stated in the petition that the property levied upon was a mill used in manufacturing doors, sash, blinds, counters, bookcases, and other articles, and that it was equipped with a large quantity of valuable machinery, which was a part of the mill and of the property upon which the attachment was levied. It does not appear that possession of any part of the property levied upon was taken under the writ, nor that the right of defendants and their assignee to use it was interfered with in any manner. The question to be determined is, whether an attaching creditor is liable for the depreciation in value of real estate levied upon, which occurs while the attachment is in force. The mere issuing and levying of a writ of attachment upon real estate cannot ordinarily cause it to depreciate in value. The appellant suggests that some portion of the machinery might become worthless, or out of date, and in that case it could not be exchanged for new and improved machinery. Nothing of that character is suggested by the portion of the petition stricken out, nor would proof of damage by reason of inability to make improvements, or by loss of a sale, be material under it. It is the general rule that the depreciation of real property upon which a writ of attachment has been levied, which occurs while the levy remains in force, if there be no change of possession, is not the immediate result of the ⁴ attachment, and recovery therefor cannot

be had of the attaching creditor: *Heath v. Lent*, 1 Cal. 410; *Travick v. Martin-Brown Co.*, 79 Tex. 460; *Brandon v. Allen*, 28 La. Ann. 60; *Muldoon v. Rickey*, 103 Pa. St. 110; 49 Am. Rep. 117; *Drake on Attachments*, sec. 179; *Wade on Attachments*, sec. 301; 2 *Sutherland on Damages*, sec. 512. The only cases cited by the appellant as holding a contrary doctrine is that of *Lowenstein v. Monroe*, 55 Iowa, 82, but that involved a levy upon personal property, which is subject to a different rule.

2. One of the paragraphs of the petition of intervention stricken out described the purposes for which the property levied upon was used, and that it was the only mill, machinery, and equipment of the kind located in Ottumwa, and it was doing a substantial business. The paragraph was in the nature of a statement of evidence not relevant to any issue in the case, and not of ultimate and material facts, and it was properly stricken out.

3. The amended and supplemental petition contained a paragraph of which the following is a copy: "That the suing out of said attachment on said false grounds caused great shame, degradation, humiliation, wounded pride, and mental suffering to the defendants, and each of them, to their actual damage in the sum of three thousand dollars." That was stricken out on motion, and of that ruling the appellant complains. The question thus presented is, whether there can be a recovery as of actual damages for mental anguish, including the feelings of shame, degradation, humiliation, and wounded pride. In *Stevenson v. Belknap*, 6 Iowa, 97, 71 Am. Dec. 392, a recovery by a father for his anxiety and wounded feelings because of the seduction of his daughter was held to be authorized. In *Muldowney v. Illinois Cent. Ry. Co.*, 36 Iowa, 462, a recovery was permitted for mental anguish suffered by a person who was injured in a railway accident. In *McKinley v. Chicago etc. R. R. Co.*, 44 Iowa, 314, 24 Am. Rep. 748, it was held that "mental anguish arising from the nature and character of an ⁵ assault is an element of compensatory damages." In *Parkhurst v. Masteller*, 57 Iowa, 474, it was held that a person might recover compensation for mental suffering caused by a malicious prosecution. In *Shepard v. Chicago etc. Ry. Co.*, 77 Iowa, 54, it was held that compensatory damages might be recovered for the mental suffering of a passenger, caused by her being wrongfully compelled, with insult and abuse, to leave a train; and the same rule was applied in *Curtis v. Sioux City etc. Ry. Co.*, 87 Iowa, 622. It will be observed that each of these cases involved an injury to

the person, or a violation of personal rights, as distinguished from injury to tangible property, or to the rights of such property. In *Mentzer v. Western Union Tel. Co.*, 93 Iowa, 752, 57 Am. St. Rep. 294, the right of the sender of a telegram to recover for mental suffering which resulted from negligence in the delivery of the telegram was involved, and many authorities upon the right of recovery for mental anguish were reviewed. It was there said that, to authorize such a recovery, "there must be some direct and proximate connection between the wrong done and the injury to the feelings, to justify a recovery for mental anguish." Also: "Every breach of contract is likely to cause some pain, but some of these contracts relate to property and pecuniary matters, and in such case the law furnishes what has always been held to be an adequate remedy for pecuniary loss sustained." In the case of *Campbell v. Chamberlain*, 10 Iowa, 337, in which recovery was sought on an attachment bond, it was held that injuries to credit and character were too remote to be considered in such an action, and that rule was approved in *Lowenstein v. Monroe*, 55 Iowa, 82: See, also, 1 *Sutherland on Damages*, 2d ed., sec. 55; 2 *Sutherland on Damages*, 2d ed., sec. 512. Although none of the cases last cited are precisely in point, yet they tend strongly to support the conclusion we reach that mental suffering resulting from the wrongful and malicious suing out and levying of a writ of attachment does not afford ground for the recovery of compensatory damages. We think that the district court was right in striking out the paragraph of the amended and supplemental petition which we have been considering. A careful examination of the entire record fails to disclose any error prejudicial to the defendant, and the judgment of the district court is affirmed.

Damages for Wrongful or Malicious Attachment.*

Reconvention for damages while an attachment suit remains pending is an exceptional remedy, but is allowed in some jurisdictions. Such remedy is in the nature of a cross-bill pleaded by the attachment defendant in his answer, in which he assumes the position of plaintiff in reconvention and alleges a claim for whatever damages he has suffered by reason of the wrongful attachment. Although the damages are dependent upon the decision in the attachment suit, and cannot be known to exist at all until such judgment has been rendered, yet it is claimed that justice is more readily administered and business expedited by trying both issues together, to the end that the court, when vacating the attachment, may award

*REFERENCE TO MONOGRAPHIC NOTE.

Actions for wrongful attachment and defenses thereto: 81 Am. Dec. 467-480.

damages to the reconvenor at the same time. Under such counterclaim both actual and exemplary damages may be passed upon on the trial of the attachment suit. Losses and expenses incurred in defending such suit, those sustained by being deprived of the use of the property attached, or by injury thereto and depreciation in the value thereof, are grounds for compensatory or actual damages upon the dissolution of the attachment when the attaching creditor is actuated by good motives, and for exemplary damages or smart money when his motives are vexatious and malicious.

This doctrine of reconvention is recognized and applied in the following cases: *Hencke v. Johnson*, 62 Iowa, 555; *Campbell v. Chamberlain*, 10 Iowa, 337; *Lowenstein v. Monroe*, 55 Iowa, 82; *Cole v. Smith*, 83 Iowa, 579; *Hardeman v. Morgan*, 48 Tex. 103; *Barker v. Abbott*, 2 Tex. Civ. App. 147; *Turner v. Lytle*, 59 Md. 199; *Raymond v. Green*, 12 Neb. 215; 41 Am. Rep. 763; *Plunkett v. Sauer*, 101 Pa. St. 356.

The general rule, however, is that no action to recover damages for a wrongful or a malicious attachment can be maintained until the final determination of the attachment suit; and the plaintiff, in order to recover, must show that such suit was decided in his favor or that the attachment has been dismissed, dissolved, or abandoned: *Sloan v. McCracken*, 7 Lea, 626; *Hansford v. Perrin*, 6 B. Mon. 595; *Kamer v. Thomson-Houston Electric Light Co.*, 95 N. C. 277; *Nolle v. Thompson*, 3 Met. (Ky.) 121; *Kennedy v. Meacham*, 18 Fed. Rep. 312; *Dunning v. Humphrey*, 24 Wend. 31. The reason given for this rule is, that the facts constituting a counterclaim must arise out of the same transaction that is the subject of the complaint, and must exist at the time of the commencement of the action: *Kamer v. Thomson-Houston Electric Light Co.*, 95 N. C. 277; *Nolle v. Thompson*, 3 Met. (Ky.) 121. Upon the failure of the attachment plaintiff to recover, the defendant therein is entitled to recover not only the costs of the defense in that suit, but also damages for the seizure and detention of the property: *Dunning v. Humphrey*, 24 Wend. 31; *Kennedy v. Meacham*, 18 Fed. Rep. 812.

If an attachment is dissolved, this is conclusive of the right of the attachment defendant to recover actual damages, although the attachment was taken out without malice and under legal advice: *McDaniel v. Gardner*, 34 La. Ann. 340; *Kennedy v. Meacham*, 18 Fed. Rep. 312. And the voluntary abandonment of an attachment renders the attaching creditor and his surety liable in actual damages for the wrongful suing out of the writ: *Steinhardt v. Leman*, 41 La. Ann. 835.

It has been held that an action to recover damages for the mere wrongfully causing an attachment to issue must be governed by the rules, so far as applicable, that apply to an ordinary action for malicious prosecution: *Pixley v. Reed*, 28 Minn. 80. And where this rule prevails the action cannot be maintained without proof of malice and want of probable cause, and, in the absence of any such proof, a nonsuit is properly awarded: *Willcox v. McKenzie*, 75 Ga. 73; *Collins v. Shannon*, 67 Wis. 441; *McKellar v. Couch*, 34 Ala.

836; *Benson v. McCoy*, 36 Ala. 710; *Williams v. Hunter*, 8 Hawks, 545; 14 Am. Dec. 597; *King v. Montgomery*, 50 Cal. 115; *White v. Dingley*, 4 Mass. 433; *Lindsay v. Larned*, 17 Mass. 190; *Burkhardt v. Jennings*, 2 W. Va. 242.

The better rule is, that in order to recover for a wrongful levy the plaintiff need only show a discharge of the writ and want of probable cause, by proof of the conduct of his affairs, and the good faith of his transactions: *Seattle Crockery Co. v. Haley*, 6 Wash. 302; 36 Am. St. Rep. 156; *Kirkham v. Coe*, 1 Jones, 423; *Sprague v. Parsons*, 13 Daly, 553. Within the meaning of this rule justifiable probable cause for suing out an attachment may be defined to be a belief by the attaching creditor in the existence of the facts essential to the prosecution of his attachment, founded upon such circumstances as, supposing him to be a man of ordinary caution, prudence, and judgment, are sufficient to induce such belief: *Burkhardt v. Jennings*, 2 W. Va. 242. Want of probable cause in such cases, when clearly proven, is *prima facie* evidence of malice: *Collins v. Shannon*, 67 Wis. 441; *Durr v. Jackson*, 59 Ala. 203. If the attachment levied was void or irregular, it is not necessary to aver or prove malice or want of probable cause: *Sprague v. Parsons*, 14 Abb. N. C. 320; *Wehle v. Butler*, 61 N. Y. 245. And in Kansas it is held that in a petition to recover damages for the wrongful issue of an attachment it is unnecessary to aver a want of probable cause, for the suing out of the writ, or a determination of the action in which the attachment was issued: *McLaughlin v. Davis*, 14 Kan. 168. In such action the defendant may show in defense, either that he had good cause to believe the grounds stated for the writ to be true, or that they were in fact true. If true in fact they constitute a good defense, though, at the time of taking out the writ, he did not have sufficient knowledge to constitute reasonable ground for believing them true: *Vorse v. Phillips*, 37 Iowa, 428.

In Iowa it is held that one injured by the wrongful suing out of an attachment has no other remedy for his injury than an action on the attachment bond, unless the case is such that an action of trespass would lie: *Veiths v. Hagge*, 8 Iowa, 163; *Abbott v. Whipple*, 4 G. Greene, 320. The general and better rule is, that a party aggrieved by the wrongful suing out of an attachment is not required to bring his action upon the attachment bond, but may have his action on the case for the injury: *Smith v. Story*, 4 Humph. 168; *Half v. Curtis*, 68 Tex. 640; *Hill v. Rushing*, 4 Ala. 212.

Measure of Damages for Merely Wrongful Attachment.—A person whose property has been wrongfully or illegally attached is entitled to recover the actual damages proved to have resulted therefrom: *Dickinson v. Maynard*, 20 La. Ann. 66; 96 Am. Dec. 379; *Reed v. Samuels*, 22 Tex. 114; 73 Am. Dec. 253. The defendant in an attachment wrongfully sued out, though there was no actual seizure of his property, if the levy was such as to place the property in the custody of the law, is entitled to recover such actual damages as

resulted to him from virtually being dispossessed of his property during the time the levy was continued in force: *Rice v. Miller*, 70 Tex. 613; 8 Am. St. Rep. 630. If an attachment is merely wrongful and not vexatious or malicious, the attachment defendant can recover only actual damages, and by this is meant such damages as will compensate him for the injury received: *Bloch v. Creditors*, 43 La. Ann. 1334; *Nordhaus v. Peterson*, 54 Iowa, 68; *Harger v. Spofford*, 46 Iowa, 11; *Myers v. Farrell*, 47 Miss. 281; *Plumb v. Woodmansee*, 34 Iowa, 116; *Goodbar v. Lindsley*, 51 Ark. 380; 14 Am. St. Rep. 54; *Kirksey v. Jones*, 7 Ala. 622; *State v. Thomas*, 19 Mo. 613; 61 Am. Dec. 580; *Tynburg v. Cohen*, 76 Tex. 409.

The measure of damages for the mere wrongful suing out of an attachment upon a stock of goods is the cost of replacing the goods at the place where they were levied upon: *Selz v. Belden*, 48 Iowa, 451. The owner of property seized under attachment wrongfully sued out is entitled to recover as actual damages the value of the use of the property while it is withheld from his control: *Hurd v. Barnhart*, 53 Cal. 97, and his right to such recovery is not affected by the fact that the property had been replevied and remained under the control of his codefendant, who had no right to it: *Munierlyn v. Alexander*, 38 Tex. 125.

If an attachment is discharged, only such damages as are strictly compensatory can be assessed against the plaintiff in that proceeding, and the personal expenses of the defendant in the attachment, incurred, not in resisting the attachment, but in prosecuting his suit for the injury it has caused, cannot be included in the amount of damages to be assessed: *Goodbar v. Lindsley*, 51 Ark. 380; 14 Am. St. Rep. 54.

Actual damages recoverable for the wrongful seizure of personal property embrace the necessary expenses incurred in regaining possession, together with reasonable hire for the property during the time it was withheld from the owner, and part of such expense is the loss of time by such owner in giving necessary personal attention to the business: *Jones v. Lamon*, 92 Ga. 529. If the plaintiff in attachment has taken possession of and used a store-room in which the goods seized are situated at the time of the levy, evidence of the defendant's leasehold interest in the premises, and of the amount of rent paid thereunder, is competent as an element of damage: *Allen v. Kirk*, 81 Iowa, 658. If property is wrongfully seized and sold, the owner thereof can recover its value at the time of the seizure, with interest; *Casey v. Chayton*, 5 Tex. App. 385. If goods are thus seized and sold, and the proceeds of the sale are applied in satisfaction of a judgment obtained by another creditor against the judgment debtor, the measure of his damages for the wrongful attachment is not the value of the property at the time of the seizure, but the difference between that value and the amount realized from the sale: *Empire Mill Co. v. Lovell*, 77 Iowa, 100; 14 Am. St. Rep. 272. If goods are seized and sold under a wrongful attachment, which is subsequently dissolved, their value at the time of the seizure, with interest to the date of trial, less the sum for which they were sold, is the measure of damage: *Bass*

v. Lee, 55 Ark. 329; Reidhar v. Berger, 8 B. Mon. 160. And from this amount there should be deducted any portion of the proceeds of the attached property which has been returned to the owner: Straub v. Wooten, 45 Ark. 112; Norman v. Fife, 61 Ark. 33; and also the amount adjudged in favor of plaintiff, and if the damages assessed are greater than the judgment rendered in favor of plaintiff, a judgment for the residue should be given in favor of defendant: Norman v. Fife, 61 Ark. 33.

If, by the instigation and direction of a party in whose favor, a void attachment has been issued, an officer seizes and carries away the goods of another, the first party may be held liable for all the consequences of the loss, although the officer has in his hands like void process in favor of others also concerned in the trespass. And in such case, when the goods of a retail dealer are wrongfully taken and carried away, he is entitled to recover, as part of his damages, the fair retail value of the goods taken: Wehle v. Butler, 61 N. Y. 245. If a sale of the goods levied upon has been negotiated prior to the attachment, and the completion of the contract has been prevented by the levy, the measure of damages is the price of sale agreed upon and not the market value of the goods: Curry v. Catlin, 12 Wash. 322. If an attachment is wrongfully levied upon the property of a third person, the measure of damage would be interest, or the value of the property, or the value of its hire during the time that the owner is deprived of it, unless it appears that injury or deterioration has resulted: Witascheck v. Glass, 46 Mo. App. 209; Jones v. Lamon, 92 Ga. 529.

If the defendant owns none of the property attached, he cannot, after defeating a recovery on the indebtedness issue, maintain an action for expenses incurred in defending the suit on the attachment issue: Tebo v. Betancourt, 73 Miss. 868; 55 Am. St. Rep. 573; Heath v. Lent, 1 Cal. 410; Pinson v. Kirsh, 46 Tex. 29.

If corporate stock, fluctuating in value, is wrongfully attached, the holder is not entitled to damages for the difference in value of the stock at the time of the levy and at the time of the trial, if the service of the writ did not cause the decline in the value of the stock: Girard v. Moore, 86 Tex. 675.

Elements of Damage—Miscellaneous.—A levy on a small portion of a stock of goods, if the attachment defendant continues business, cannot be considered as the proximate cause of damages from loss of trade, and does not justify a recovery of damages: Tynberg v. Cohen, 76 Tex. 409. In an action to recover property wrongfully taken, and damages for its detention, if it appears that the property was mortgaged, the plaintiff is entitled to recover damages for the detention up to the date of foreclosure only, and not up to the time of trial: Gaar v. Lyons, 99 Ky. 673. The owner of property is not entitled to recover the value thereof if he has not been dispossessed, and, if it is not shown that he has been subjected to costs, he is entitled to nominal damages only: Groat v. Gillespie, 25 Wend. 383. Nor can he recover for the use and occupation of property of which he has not been dispossessed: Imperial Rolling Mill Co. v. First Nat. Bank, 5 Tex. Civ. App. 686. If property

wrongfully attached is taken from the possession of plaintiff's mortgagees, who are selling it under a mortgage, and an independent suit is brought by the attaching creditor, under which, instead of the attachment, the property is sold by consent, nominal damages only can be recovered: *Schwartz v. Davis*, 90 Iowa, 324.

Loss, resulting from a forced sale of property under an assignment, is not a natural or proximate consequence of a wrongful attachment by a creditor, previous to the assignment by the debtor, and it cannot be recovered: *Donnell v. Jones*, 13 Ala. 490; 48 Am. Dec. 59. If a fund is already in the custody of the law when it is wrongfully attached, the taxes accruing thereon pending the litigation, and paid out by the fund are not elements of damage recoverable for the wrongful attachment: *Stringfield v. Hirsch*, 94 Tenn. 425; 45 Am. St. Rep. 733.

The prevention of the sale of property by a wrongful attachment thereof entitles the owner to recover a loss caused by a decline in the market value while the property was detained under the attachment: *Chesmore v. Barker*, 101 Iowa, 577. If the property attached is perishable, the extent to which it is damaged by the attachment is an element of damage which may be recovered: *Jamison v. Weaver*, 81 Iowa, 212. If the property wrongfully attached is used only for the purposes of sale, the owner thereof is not entitled to recover as damages, interest on the value of the property from the time of the seizure, unless he shows a loss, merely from failure to have the property on hand: *Fullerton Lumber Co. v. Spencer*, 81 Iowa, 549. The measure of damages for the wrongful seizure of a vessel is the expenses incurred and profits lost as the direct consequence of the wrongful seizure and detention: *British etc. Navigation Co. v. Sibley*, 27 La. Ann. 191. If a crop is unlawfully attached and detained for rent, the tenant is entitled to recover for the injury sustained by such detention and any deterioration of value arising from the attachment: *Patton v. Garrett*, 37 Ark. 605. If, under a wrongful attachment, cattle are taken from the range where they are accustomed to being kept, and placed on another range, where feed and water are poor, the owner is entitled to recover for the failure of the stock to make an expected gain in weight, although they do not lose in their original weight during the time they were thus detained under the attachment: *Hoge v. Norton*, 22 Kan. 275. If a racehorse is wrongfully detained under an attachment, the owner may recover damages for his depreciation in value by reason of improper treatment, but he cannot recover as damages entrance fees and fines paid after the horse was attached, for his entry in certain future races in which he was unable to start by reason of the attachment: *Riley v. Littlefield*, 84 Mich. 22. Injury to land from a wrongful attachment is not presumed, but must be proved, and damages are not given for the mere issuing of a wrongful attachment against land. The reason for this is, that there is no disturbance of the possession, use, or enjoyment of the premises: *Trawick v. Martin-Brown Co.*, 79 Tex. 461; *Barker v. Abbott*, 2 Tex. Civ. App. 147. Only nominal damages can ever be recovered for the wrongful attachment of land

when no injury is done. If, however, the defendant in attachment has an opportunity to sell the land which is defeated by the levy of the attachment, and the property depreciates in value after that time, he may recover for such depreciation while the levy was in force: *Wetzel v. Tillman*, 3 Tex. Civ. App. 559. The levy of an attachment on a mortgaged homestead, when the mortgage is due, cannot be held the proximate cause of the foreclosure of the mortgage, and though the levy of the attachment prevented the raising of money to pay the mortgage debt, and a foreclosure followed, the homestead owner cannot maintain an action to recover for a wrongful attachment, if there has been no loss and the homestead at the sale has brought its full value: *State v. Springer*, 45 Mo. App. 252. The inability of the attachment debtor to sell or mortgage his land levied upon is not the proximate consequence of the attachment, and damages are not recoverable therefor in an action for a wrongful attachment: *Elder v. Kutner*, 97 Cal. 490.

Loss of Credit or Profits.—Although the authorities are in conflict, the general rule is, that in actions to recover for a merely wrongful attachment where only actual damages can be allowed, injury to credit and loss of prospective profits in business are not an element of damages, and cannot be recovered, because too remote: *Holliday v. Cohen*, 34 Ark. 707; *Pettit v. Mercer*, 8 B. Mon. 51; *State v. Thomas*, 19 Mo. 613; 61 Am. Dec. 580; *Trawick v. Martin-Brown Co.*, 79 Tex. 461; *Kaufman v. Armstrong*, 74 Tex. 65; *Meyers v. Farrell*, 47 Miss. 281; *Seattle Crockery Co. v. Haley*, 6 Wash. 302; 36 Am. St. Rep. 156; *Mitchell v. Harcourt*, 62 Iowa, 349; *Casper v. Kilppen*, 61 Minn. 353; 52 Am. St. Rep. 604; *Birch v. Conrow*, 161 Pa. St. 118. The loss of profits resulting from injury to business after resumption and until the commencement of the action to recover for a wrongful attachment, and the loss of credit caused by a wrongful seizure and retention of the goods under the writ of attachment, are too remote and speculative to be considered in ascertaining damages, resulting from seizure: *Crymble v. Mulvaney*, 21 Colo. 203. If it appears that, prior to the attachment, the financial embarrassment of the defendant therein was such as to necessitate the discontinuance of business unless he could obtain relief from some source, and such source is not shown, he cannot recover damages for breaking up his business and loss of credit therein caused by the attachment: *MacFarland v. Lehman*, 38 La. Ann. 351. A merchant who has mortgaged and delivered possession of his stock of goods to a trustee to be sold for the benefit of his creditors, and has voluntarily gone out of business, cannot recover damages against an attaching creditor for loss of credit and standing as a merchant: *Scott Grocer Co. v. Kelly*, 14 Tex. Civ. App. 136.

Mental Suffering, sickness, injury to character, or humiliation, as well as injury to credit, or loss of business, are elements too remote and speculative to be considered in assessing damages sustained by the wrongful suing out of an attachment: *Campbell v. Chamberlain*, 10 Iowa, 337; *Trawick v. Martin-Brown Co.*, 79 Tex. 460; *Jensen v. Hallam*, 51 Neb. 492; *Zinn v. Rice*, 161 Mass. 571. There are a few cases which hold that loss of credit or business resulting

from a wrongful attachment are recoverable as an element of actual damages. Thus in *Kennedy v. Meacham*, 18 Fed. Rep. 312, it was held that if the defendant in an attachment suit is a merchant, and the peculiar circumstances of the case render his credit sensitive to injury by the attachment, the jury may consider such circumstances in compensating him in damages for a wrongful attachment. Again, in *Marx v. Leinkauff*, 93 Ala. 453, it was held that loss of credit and business of a merchant, resulting from the wrongful suing out of an attachment, is the natural consequence of the act, and is recoverable as damages if specially averred and claimed in the complaint, but his credit with particular persons, and his loss thereof are not a proper element of damage. If, from the issue made by the pleadings, it is admitted that an attachment was wrongfully sued out and levied on a debtor's stock of goods, although they were not removed from the store, such debtor, after the dissolution of the attachment, is entitled to damages for injury to his business and credit: *Meyer v. Fagan*, 34 Neb. 184. Loss of business as to goods seized, caused by the seizure, may be a factor in the computation, if shown as a matter of fact and not as an opinion or estimate of witnesses: *Marqueze v. Sinthelmer*, 59 Miss. 431; *Alexander v. Jacoby*, 23 Ohio St. 358.

Attorney Fees.—Whether or not counsel fees incurred in defending the suit when a wrongful attachment has been levied should be allowed as an element of actual damages is a question upon which there is a lack of harmony in the adjudications. In some jurisdictions the right to collect attorney's fees as an element of the damages is always recognized. Thus where one by whom an attachment has been sued out abandons the case under circumstances showing that in instituting it he was not acting in good faith, the defendant may recover of him fees of counsel paid to defend the attachment: *Littlejohn v. Wilcox*, 2 La. Ann. 620; but the counsel fees of an attachment defendant which can be recovered when the case is tried on its merits embrace only those incurred in procuring a dissolution of the attachment: *Adam v. Gomila*, 37 La. Ann. 479; *Fush v. Egan*, 48 La. Ann. 60; *State v. Heckart*, 62 Mo. App. 426; *Dickenson v. Maynard*, 20 La. Ann. 66; 96 Am. Dec. 379; *State v. McKeon*, 25 Mo. App. 667; *Porter v. Knight*, 63 Iowa, 365. However, in an action upon an attachment bond for the wrongful suing out of an attachment, the court may allow attorney fees for services rendered by attorneys for the defendant in the attachment in the entire defense of the action, when such defense tends merely to show the wrongful issuance of the attachment: *Union Mill Co. v. Prenzler*, 100 Iowa, 540. A recovery in damages of the full amount of the attachment bond does not preclude the taxation of an attorney fee as a part of the costs: *Union Mercantile Co. v. Chandler*, 90 Iowa, 650; In Iowa, attorney's fees incurred in defending against the attachment suit cannot be recovered without an allegation of a general claim for damages, or a special statement of the particular item: *Vorse v. Phillips*, 37 Iowa, 428. One who interpleads in an attachment wrongfully sued out may recover all costs and damages that may accrue to him by reason of the attachment, including reason-

able attorney's fees: *State v. Kerns*, 70 Mo. App. 663. And an owner whose property has been seized as that of another, and who is compelled to go into court to protect his rights, is entitled to be reimbursed by the seizing creditor a reasonable amount for counsel fees: *Gilkerson-Sloss etc. Co. v. Yale*, 47 La. Ann. 690. In other jurisdictions, however, attorney's fees incurred in defending the attachment suit cannot be allowed as part of the damages which may be recovered: *Hughes v. Brooks*, 36 Tex. 379; *Kennedy v. Meacham*, 18 Fed. Rep. 312; *Patton v. Garrett*, 37 Ark. 605; *Plumb v. Woodmansee*, 34 Iowa, 116. In an action to recover damages for the wrongful levy of an attachment on property that is exempt, evidence as to the value of attorneys' fees paid in asserting the exemption is inadmissible, unless such damages are specially claimed in the complaint: *Boggan v. Bennett*, 102 Ala. 400. Attorney fees may be recovered for defending the wrongful attachment suit provided they are specially pleaded as an element of damage: *Crofford v. Vassar*, 95 Ala. 548. Attorneys' fees incurred in defending a wrongful attachment are not an element of damages that can be recovered on the attachment bond: *Stringfield v. Hirsch*, 94 Tenn. 425; 45 Am. St. Rep. 733. A defendant who is not the owner of any of the property attached cannot, after defeating a recovery on the indebtedness issue, maintain an action to recover attorneys' fees and expenses incurred in defending the suit on the attachment issue: *Tebo v. Betancourt*, 73 Miss. 868; 55 Am. St. Rep. 573; *Adams v. Gillam*, 53 Kan. 131. If the defendant in attachment employed no counsel until after judgment by default against him, and then only to make an unsuccessful motion for a new trial, he cannot recover such counsel fees in an action on the attachment bond: *Trammell v. Ramage*, 97 Ala. 686; *Baldwin v. Walker*, 94 Ala. 515. Attorneys' fees to prosecute the claim of defendant in attachment for damages are not a proximate and natural consequence of the suing out and levy of the attachment, and are not an element of damage which may be considered, and evidence in relation thereto is not admissible in an action to recover for wrongfully suing out the writ: *Yarborough v. Weaver*, 6 Tex. Civ. App. 215. If an attachment is sued out, maliciously and without probable cause, attorneys' fees are recoverable as part of the defendant's damages: *Hughes v. Brooks*, 36 Tex. 379.

Expenses, if unnecessarily incurred by the attachment defendant in defending against a wrongful attachment, cannot be recovered as an element of damages, but such outlays as are distinctly attributable to the wrongful attachment and made necessary by it may be recovered. Under the rule that the defendant in attachment may recover for any direct loss, damage, or expense produced or occasioned, traveling expenses incurred in attending to the attachment suit may be recovered: *State v. Shobe*, 23 Mo. App. 474; *Hayden v. Sample*, 10 Mo. 215; *Kennedy v. Meacham*, 18 Fed. Rep. 312; but damages for expenses are not recoverable, except such as the defendant would be liable to pay: *State v. Kevill*, 17 Mo. App. 144. The personal expenses of the attachment defendant, incurred in prosecuting his suit for the injury caused by the attachment, but

not in resisting it, cannot be included in the amount of damages to be assessed against the plaintiff: *Goodbar v. Lindsley*, 51 Ark. 380. 14 Am. St. Rep. 54. If the plaintiff in a wrongful attachment has had the attached property restored to the owner by order of court on motion, as soon as he has discovered his error, the expenses of the attachment defendant incurred in attending the hearing of such motion cannot be recovered in the absence of any showing of fraud, malice, or oppression: *Adams v. Gillam*, 53 Kan. 131; *Tebo v. Betancourt*, 73 Miss. 868; 55 Am. St. Rep. 573.

Principal and Agent.—If an attachment sued out by an agent is merely wrongful, and the act is ratified by his principal with knowledge, the latter is undoubtedly liable for actual damages the same as though he were acting by himself alone. And if the attachment is sued out by an agent acting maliciously, and without probable cause, as well as wrongfully, and the act is ratified by the principal with full knowledge of the facts, the recovery is not limited to actual damage, but exemplary damages may also be recovered against such principal: *Baldwin v. Walker*, 94 Ala. 514. To make the principal liable in exemplary damages because of the malice of his agent, the evidence must always show that he had knowledge of, and participated in, the malice, or afterward ratified, adopted, or approved the malicious acts: *Willis v. McNeill*, 57 Tex. 405; *Baldwin v. Walker*, 91 Ala. 428; *Tynburg v. Cohen*, 67 Tex. 220. And in the absence of proof of such participation in or ratification or adoption of such malicious act by the principal, the court is not warranted in submitting to the jury the issue as to his liability for exemplary damages on that ground: *Thompson v. Bell*, 11 Tex. Civ. App. 1. If an agent, who makes the affidavit and bond in attachment, acts maliciously in doing it, he is liable, but his malice cannot be imputed by presumption to his principal, though his error in judgment in suing out the writ would be: *Wallace v. Finberg*, 46 Tex. 35. In an action to recover under such circumstances, the complaint must allege that the process was vexatiously sued out by the plaintiff in attachment, even though it issued upon the affidavit of the agent, and it is bad if it merely asserts that the attachment was vexatiously sued out by the obligors in the bond: *McCullouch v. Walton*, 11 Ala. 492. If an agent having ascertained facts which on the advice of counsel constitute good grounds for the attachment, so informs his nonresident principal, who thereupon procures sureties to sign the attachment bond, he cannot be subjected to exemplary damages for any malice or vexatious conduct on the part of the agent of which he is ignorant: *Baldwin v. Walker*, 91 Ala. 428. However, the failure of a debtor to pay his debt does not authorize the suing out of an attachment, and when upon this ground a principal directs his agent to sue out, and cause to be levied, an attachment without reference to whether the grounds recognized by law as sufficient to authorize it exist, the agent's act must be deemed the act of the principal, and his negligence, rashness, or carelessness in making an untrue affidavit for an attachment, such as clearly shows a conscious indifference to the rights of the defendant, must be deemed malicious, and as the

act of the principal: *Blum v. Stein*, 68 Tex. 608. And liability for a malicious attachment accrues if the person whose direct act caused the writ to be issued was actuated by malicious motives, although the principal for whom he acted as agent knew nothing of the transaction, unless it is shown that the agent had no authority to attach under any circumstances, and that his act in attaching was affirmatively repudiated as soon as knowledge of it was received: *Seattle Crockery Co. v. Haley*, 6 Wash. 302; 36 Am. St. Rep. 156.

Mitigation of Damages.—If the plaintiff in attachment submits the facts fairly to his attorney, and is advised to bring suit, which he does in good faith, he is protected in all events from punitive or exemplary damages by such advice, and may show it in mitigation of actual damages, although such counsel is mistaken in his judgment: *Kennedy v. Meacham*, 18 Fed. Rep. 312; *Trammell v. Ramage*, 97 Ala. 666; but to make the advice of counsel a defense, or admissible in mitigation of damages, it must not only appear that the person who sued out the attachment informed counsel of all the facts in his possession, but also that he used due diligence to ascertain the facts: *Baldwin v. Walker*, 94 Ala. 514. In order to relieve the plaintiff in attachment from liability for exemplary damages in wrongfully and maliciously suing out the writ, he must not only show that he made a fair statement of all of the facts within his knowledge to his attorney in good faith before taking out the writ, but also that he honestly believed that he had a good ground for the attachment: *Union Mill Co. v. Prenzler*, 100 Iowa, 540; *Sloan v. Langert*, 6 Wash. 26. In an action to recover for the wrongful suing out of an attachment, the fact that the attached property brought its fair value, and that the proceeds of the sale were applied to the payment of the debt of the defendant in the attachment, cannot be pleaded in mitigation of damages: *Hundley v. Chadwick*, 109 Ala. 575; but if property is wrongfully taken under an illegal attachment, it may be shown in a suit, brought after the attachment is set aside, to recover the damages caused thereby, that the same property was subsequently seized under valid process issued in favor of another creditor of the owner and applied to the payment of his debt: *Wehle v. Spelman*, 25 Hun, 99; *Beyeradorf v. Sump*, 39 Minn. 495; 12 Am. St. Rep. 678; and in a suit to recover damages caused by the sacrifice of property by a sale under an attachment wrongfully sued out, the fact that other ground for attachment than that mentioned in the writ existed may be pleaded in mitigation of damages, but not as a defense to the action: *Woods v. Huffman*, 64 Tex. 98. It has been held that insolvency constitutes no ground for an attachment, and it cannot be shown in excuse or mitigation of the act of procuring an attachment: *Kaufman v. Armstrong*, 74 Tex. 65. And, on the other hand, it has been held that in an action to recover damages for the malicious suing out of an attachment, evidence that the attachment defendant, at the time of suing out the writ, was greatly involved in debt, is admissible, as tending to show that the plaintiff was not actuated by malice, and to reduce the damages: *Mitchell v. Harcourt*, 62 Iowa,

342. It is no justification that the one suing out the attachment has good reason to believe the facts to be as he states them in his affidavit, and if the causes alleged do not exist he is answerable to the attachment defendant for all the injury he sustains by the suing out of the attachment: *Alexander v. Hutchinson*, 9 Ala. 825. Consent to the dismissal of an attachment brought against him does not preclude the attachment defendant from bringing a subsequent suit to recover damages for the wrongful attachment: *Spaulding v. Wallett*, 10 La. Ann. 105. Evidence to show that, had the levy not been made, the debtor would probably, within a short time, have sold the property at a reduced rate, is not admissible in reduction of damages for the wrongful attachment: *Estes v. Chesney*, 54 Ark. 463. If, within a certain time after the levy of a wrongful attachment, a trustee in insolvency is appointed upon the estate of the attachment defendant's vendor, and the plaintiff in attachment, upon a demand by such trustee and in conformity to an order of court, surrenders the attached property to him, the fact of such surrender cannot be successfully urged in reduction of damages, if it does not appear that the sale to such vendee was made under such conditions as to render it voidable by the trustee: *Greenthall v. Lincoln*, 68 Conn. 384. In an action by the mortgagee against a creditor of the mortgagor for a wrongful seizure of mortgaged property under a void attachment, the defendant may prove in mitigation of damages that at the time of the seizure under the attachment there was rent in arrear due upon the premises occupied by the mortgagor, in which the goods attached were; that after the seizure, and before the removal of the goods, there was filed with the officer making the levy, by the landlord, a notice and affidavit of such rent in arrear, and that in pursuance of such notice and of an order of court the officer paid to the landlord, out of the proceeds of the sale of the attached goods, the amount of such rent in arrear: *Wanamaker v. Bowes*, 36 Md. 42.

Exemplary Damages.—If an attachment, in addition to being wrongful merely, is sued out maliciously or vexatiously, and without probable cause, for the purpose of harassing and oppressing the attachment defendant, rather than to preserve legal rights, he is entitled to recover exemplary or vindictive damages in addition to his actual damages: *Kirksey v. Jones*, 7 Ala. 622; *Seay v. Greenwood*, 21 Ala. 491; *Foster v. Sweeney*, 14 Serg. & R. 386; *Frank v. Curtis*, 58 Mo. App. 349; *Campbell v. Chamberlain*, 10 Iowa, 337. If an attachment is obtained by one who has no just claims against the owner whose property is seized, and for the purpose of thereby gaining an illegal advantage in the collection of his pretended debt, the act is not only wrongful, but malicious, and if the property seized is not, on the dismissal of the suit, returned to the owner, but is impaired in value or lost to him, he may recover exemplary damages: *Farrar v. Talley*, 68 Tex. 349. If the writ of attachment is maliciously sued out and levied, exemplary damages may be recovered on the attachment bond: *Seattle Crockery Co. v. Haley*, 6 Wash. 302; 36 Am. St. Rep. 156. But the party aggrieved by the malicious suing out of an attachment is not required to bring his

action upon the attachment bond, but may have his action on the case for the injury: *Smith v. Story*, 4 *Humph.* 168. To justify a recovery of exemplary damages, the attachment causing the injury must be levied with an evil intent, and with the purpose of injuring the defendant therein, or with such a wanton and reckless disregard of his rights as shows a wrongful motive: *Crymble v. Mulvaney*, 21 *Colo.* 208. Exemplary damages cannot be recovered unless the writ was sued out maliciously and without probable cause: *Melvin v. Clancy*, 8 *Tex. Civ. App.* 252. In a suit on the attachment bond against the surety the plaintiff is not entitled to recover exemplary damages, unless the principal is shown to have acted with malice or a wrongful abuse of the process: *Renkert v. Elliott*, 11 *Lea*, 235. Both malice and want of probable cause must be alleged and proved, in an action to recover vindictive or exemplary damages for an unfounded and malicious attachment, in order to entitle the plaintiff to recover: *Dickinson v. Maynard*, 20 *La. Ann.* 66; 96 *Am. Dec.* 379; *Townsend v. Fontenot*, 42 *La. Ann.* 890; *Chaffe v. Mackenzie*, 43 *La. Ann.* 1062. Malice and want of probable cause lie at the foundation of the action for malicious attachment and constitute its fundamental elements. Both must concur, and a petition that does not allege the want of probable cause is fatally defective. In the absence of such allegation, the presumption is, that the attachment plaintiff had reasonable cause to bring his suit: *Witascheck v. Glass*, 46 *Mo. App.* 209; *Crofford v. Vassar*, 95 *Ala.* 548; *City Nat. Bank v. Jeffries*, 73 *Ala.* 183; *McLane v. McTigue*, 89 *Ala.* 411. To sustain an action for damages for the malicious issuance of an attachment, brought against the plaintiff in the attachment suit, it must be alleged and shown that the writ was issued maliciously and without probable cause. But a complaint in such action which alleges that the affidavit for the attachment was wholly false in every particular, and that the plaintiff in attachment knew it to be so when he made it, is sufficient as against a general objection at the trial to the admission of any evidence under it: *Beyersdorf v. Sump*, 39 *Minn.* 495; 12 *Am. St. Rep.* 678. It has been held that malice and want of probable cause must both be apparent to authorize a recovery of exemplary damages in attachment proceedings, that want of probable cause cannot be inferred from proof of malice, and that, however malicious the act may be, if the evidence shows that there was a probable cause to believe that facts existed which authorized an attachment, no vindictive or exemplary damages can be recovered: *Biering v. First Nat. Bank*, 69 *Tex.* 599. In *Bozeman v. Shaw*, 37 *Ark.* 161, it was held that to maintain an action to recover damages for a malicious attachment it is not necessary to prove that the defendant, in suing out the attachment, acted dishonestly or with actual malice, and if there is no probable cause to believe that the facts alleged in the affidavit for the attachment are true, the jury may presume malice. In an action to recover for the vexatious suing out of an attachment, it is not necessary to prove personal ill-will, or revenge, and if a party without probable cause resorts to an attachment, this, together with the unlawful act of suing out the writ, is a vex-

ations, malicious abuse of process for which vindictive damages may be awarded: *Durr v. Jackson*, 59 Ala. 203. Probable cause which will prevent the recovery of exemplary damages is a sound belief in the existence of such facts as a ground for the attachment, as would justify such belief in a reasonably prudent man under like circumstances: *Kirbs v. Provine*, 78 Tex. 353. Vindictive damages for maliciously suing out an attachment cannot be recorded if the attachment was not vexatious to the defendant therein who sues to recover, and the attaching creditor is actuated by malice only against some third person not a party to the process: *Wood v. Barker*, 37 Ala. 60; 76 Am. Dec. 346.

If the writ of attachment was sued out and levied in good faith, the plaintiff cannot be held liable in exemplary damages, consequently, evidence that the plaintiff in the writ acted in good faith, and that there was probable cause for his action, is sufficient to defeat a claim for exemplary damages: *Yarborough v. Weaver*, 6 Tex. Civ. App. 215; *Kirbs v. Provine*, 78 Tex. 353; *Palmer v. Hightower*, 47 La. Ann. 17; *Batchelder v. Frank*, 49 Vt. 90. And in an action to recover for a wrongful attachment, exemplary damages are never recoverable if the attachment plaintiff believed, in good faith, that the property attached was subject to the payment of his debt, and there is no element of oppression: *Ellis v. Bonner*, 80 Tex. 198; 26 Am. St. Rep. 731. If the attachment plaintiff knew of the contemplated removal of the attachment defendant for several months before the writ of attachment in question was sued out, and continued to sell him goods upon account, and yet made oath in his affidavit for attachment that such contemplated removal was not known to him at the time that the indebtedness was contracted, he is plainly chargeable with malice, and cannot shield himself from liability for exemplary damages on the ground that he sued out the attachment in good faith: *Hurlbut v. Hardenbrook*, 85 Iowa, 606.

If an attachment is maliciously sued out, the defendant therein cannot recover exemplary damages therefor, unless he proves that he has suffered some actual damage therefrom: *Goodbar v. Lindsay*, 51 Ark. 380; 14 Am. St. Rep. 54; *Hilfrich v. Meyer*, 11 Wash. 186; *Meyers v. Wright*, 44 Iowa, 38; *Girard v. Moore*, 86 Tex. 675; *Jones v. Mathews*, 75 Tex. 1; *Flanagan v. Womack*, 54 Tex. 45. And the mere suing out of an attachment, though with malice and without probable cause, does not authorize a recovery of exemplary damages when there has been no actual seizure under the writ and no actual damages caused thereby: *Biering v. First Nat. Bank*, 69 Tex. 599.

Loss of credit, or business, or profits, or injury to feelings caused by the issuance and levy of a writ of attachment maliciously and vexatiously sued out may be recovered as elements of exemplary damages in an action to recover for such malicious attachment: *Biering v. First Nat. Bank*, 69 Tex. 599; *Kirbs v. Provine*, 78 Tex. 353; *Trawick v. Martin Brown Co.*, 79 Tex. 461; *Kaufman v. Armstrong*, 74 Tex. 65; *State v. Thomas*, 19 Mo. 613; 61 Am. Dec. 580; *Zinn v. Rice*, 161 Mass. 571.

Exemplary damages for malicious attachments are allowed as a matter of punishment, and, when a proper case is made, the jury is permitted, in assessing their amount, to take into consideration damages too remote to be considered strictly compensatory: *Mayer v. Duke*, 72 Tex. 445; *Trawick v. Martin-Brown Co.*, 79 Tex. 461-464. And an award by the jury of exemplary damages, in an action for the wrongful and malicious suing out of an attachment, cannot be disturbed, on appeal, as excessive, except in extreme cases: *Union Mill Co. v. Prenzler*, 100 Iowa, 540. In a case where exemplary damages should be awarded, while the amount is largely in the discretion of the jury in the first instance, it is also a matter within the discretion of the trial judge afterward, and if, on motion for a new trial, based on an excessive verdict for such damages, the court is satisfied that the verdict was the result of passion or prejudice, it should not hesitate to set such verdict aside: *Tynburg v. Cohen*, 76 Tex. 409. In Arkansas, the rule prevails that the damages which may be recovered for a malicious attachment must be restricted to the injury done by the writ without regard to what it may have, by its example, induced another creditor to do. Hence the defendant cannot recover exemplary damages for a malicious attachment because it occasions some of his judgment creditors to issue execution on their judgments, and to seize and sell his property thereunder: *Goodbar v. Lindsley*, 51 Ark. 380; 14 Am. St. Rep. 54. And it was also held in the same case that expenses incurred by the attachment defendant in prosecuting his action to recover for a malicious attachment cannot be recovered therein. This, however, is in keeping with the general rule everywhere that expenses incurred by the attachment defendant in prosecuting his suit for a malicious attachment must be borne by himself, the same as such expenses are borne by others who become actors in the courts to attempt to right their wrongs, real or fancied: *Goodbar v. Lindsley*, 51 Ark. 380; 14 Am. St. Rep. 54. Exemplary damages may be recovered for the seizure of exempt property under attachment with knowledge of the exemption and in culpable disregard of the debtor's rights: *Cronfeldt v. Arrol*, 50 Minn. 327; 36 Am. St. Rep. 648. If, pending a suit for wrongful and malicious attachment, the plaintiff therein dies, his administrator may be substituted in his stead and may recover any exemplary damages which might have been recovered by the decedent himself: *Union Mill Co. v. Prenzler*, 100 Iowa, 540.

FIELD v. THORNELL.

[106 Iowa, 7.]

CONTEMPT—RECESS OF COURT—CONSTRUCTION OF STATUTE.—A statute providing punishment for "contemptuous or insolent behavior toward a court while engaged in the discharge of a judicial duty" does not limit such behavior to the time the court is actually in session and to acts committed in its presence. It includes such behavior during the intermission of the court while a trial is in progress. Such judicial duty is not performed until the particular case is finally disposed of.

CONTEMPT—MOTION FOR DISCHARGE—WAIVER OF OBJECTIONS.—If, in contempt proceedings, the defendant moves for a discharge upon the conclusion of the evidence for the prosecution, and the court declines to decide the motion at that time, whereupon the defendant introduces evidence without insisting upon a ruling or saving an exception, he is deemed to have waived the right to make any objection and to have acquiesced in the conduct of the trial.

CONTEMPT.—A NEWSPAPER ARTICLE headed, "A Put-up Job," which does not contain a fair account of the trial, but rather a statement of the editor's opinion, in effect or by innuendo, that one witness for the state was a jail bird, another silly and suitable for the insane asylum, that four of them were in a deal to convict the defendant, and that, whatever the jury might do, there was no doubt in the mind of every intelligent man familiar with the facts that it should acquit him, if placed in the hands of two of the jurors during the progress of the trial, but during an intermission of the court, and read aloud by one of the jurors in the jury-room during the deliberation of the jury, is a contempt of court and punishable as such.

CONTEMPT OF COURT—NEWSPAPER ARTICLE.—The publication of an article in a newspaper commenting on proceedings in court then pending and undetermined, or upon the court, the witnesses, or the jury in relation thereto, made at a time and under circumstances calculated to affect the course of justice in such proceedings, and obviously intended for that purpose, may be punished as a contempt, even though the court was not in session when the publication was made.

CONTEMPT—LIBERTY OF THE PRESS.—Under a plea of liberty of the press a newspaper has no right to assail litigants during the progress of the trial, intimidate witnesses, dictate verdicts or judgments, or spread before juries its opinion of the merits of cases on trial. The liberty of the press stops when a further exercise would invade the rights of others.

Appeal by petition for a writ of certiorari from a judgment finding the petitioner guilty of contempt of court.

P. P. Kelly and O. R. Patrick, for the petitioner.

* LADD, J. The case of the state against William De Ford, accused of the crime of incest, was on trial in the district court of Mills county. Nearly all the evidence had been introduced, and the court had adjourned until the following ⁹ morning. Two of the jurors, William Van Doren and James Galbraith,

went to the petitioner's place of business; and he handed each of them a copy of the Mills County Tribune, a newspaper of general circulation in that community, and of which he was publisher. Galbraith was a subscriber, but Van Doren was not. This paper contained an article headed "A Put-up Job," concerning the trial, in which the arrest of the defendant, the apparent conclusiveness of the evidence, and the public indignation are referred to. It then proceeds: "But it wasn't long before there came a reaction. Curious facts and unaccountable incidents came to mind that began to throw a shadow of doubt on the whole transaction, and very many good people became convinced that the whole thing was a farce and a put-up job. As this wore on, this conviction became stronger; and, when the case came up for trial, the majority of the sensible, thinking people of the locality where the reputed crime occurred took very little stock in the story as told by the parties chiefly interested." The names of the jurors are then given, the talk of the county attorney belittled, and that of the attorney for the defense pronounced "one of the most notable speeches we ever heard in the courtroom." One witness is said to be conceded a jail-bird by the county attorney, and to belong to the penitentiary. It continues: "After the opening statements to the jury, the first witness for the state was called, it being the fellow Hobbes. His testimony was about what might be expected, coming as it did from one of the four men in the deal. Mrs. Harmer was then put on the stand, and told, of course, the story that she had been expected to tell. She told just what her husband wanted her to tell, and admitted (?) that everything had happened just as her husband said it did. Poor, silly thing! Everybody felt sorry for her, and there were not a few that felt she ought to be in the insane asylum instead of on the witness stand. At the conclusion of the woman's testimony the case was adjourned until yesterday, when it was again resumed. 'Doc' Lemonds, Alec McCrary, ¹⁰ and Frank Harmer were put on the stand when the trial was resumed, and told their little story fairly well; but, as might be expected, on cross-examination they contradicted and tangled themselves up in bad shape. The defense began its testimony yesterday afternoon, and the evidence is being heard to-day. It is expected that the case will go to the jury to-night or in the morning. Of course, there is no telling what the jury's verdict will be, as juries are an uncertain quantity sometimes; but there is no doubt in our mind what it ought to be, nor do we think there is any doubt in the mind of

every intelligent man who has familiarized himself with the facts in the case." The petitioner had been in attendance at court during the trial, knew the jurors, and was much interested in the case. He wrote the article naming them on the day he delivered the papers. His explanation is that he published the article as a matter of news, and did not think at the time of the case, or that Galbraith and Van Doren were jurors. The article was read by these jurors, and Galbraith gave his paper to another juror, and Van Doren read a part of the article aloud in the juryroom when the jurors were deliberating on their verdict.

1. The petitioner first insists that the particular offense of which he was adjudged guilty is not included in the terms of the statute. We think it comes within the purview of subdivision 1 of section 4460 of the code, which provides for the punishment of "contemptuous or insolent behavior toward such court while engaged in the discharge of a judicial duty which may tend to impair the respect due to its authority." Coke once said: "We shall never know the true reason of the interpretation of the statutes if we know not the law before the making of them." The power to punish for contempt is recognized as inherent in all courts, and essential to the preservation of order in judicial proceedings, and to the due administration of justice. The exercise of such power may be traced as far back in antiquity as the trial by jury; and it has been well said that the experience of ages has demonstrated its compatibility with civil liberty and the purest ends of justice. "It is a trust given to the courts,¹¹ not for themselves, but for the people, whose laws they enforce and whose authority they exercise": *Watson v. Williams*, 36 Miss. 331. Unless the court may protect itself in the fulfillment of its important and responsible duties for the public good, it becomes impotent and contemptible. To deprive it of that power would be equivalent to ending its useful existence. If it may not repel and punish those who impede, obstruct, or embarrass the administration of law, then no litigant may rely with any assurance upon the ability of the court to insure him a fair and impartial trial. Of what value is the right of trial by jury or of cross-examination of witnesses, if the result be controlled by inimical influences, against which there is no opportunity to contend? The language of the statute does not require us to adopt a construction which will cripple the administration of justice, and deprive parties and the state of the hearing of causes unmolested by extrinsic influences, whether within or without the actual presence of the court. That maliciously at-

tempting to influence a juror in reaching his verdict, or in any way attempting to prevent the decent and orderly administration of justice, as charged in this case, is contemptuous behavior toward the court, tending to impair the respect due to its authority, is not questioned, nor could it be, in the light of the authorities. But it is asserted that the words "while engaged in the discharge of a judicial duty" limit such behavior to the time the court is actually in session, and to acts committed in its presence. If so, then during the intermission of court, while the trial is in progress, the jurors may be approached by friend or foe of the litigant parties, witnesses, and officers denounced or intimidated, and the judge threatened or insulted with impunity. We shall not inquire whether the legislature may thus deprive the judiciary of powers necessary to enable it to perform the duties conferred by the constitution, because such an intention will not be imputed to that body. If the statute may be said to be subject to two constructions, that in harmony with the dictates of sound public policy will always be preferred to one ¹² inimical to the public good. The court throughout a trial is "engaged in the discharge of a judicial duty." The necessities of nature require temporary suspension of the proceedings, for all must eat and sleep. But the judicial duty is not performed until the particular case is disposed of. The purpose of the statute is, that during the pendency of specific legal proceedings the court shall be permitted to administer the law according to approved rules and precedents, without molestation or interference.

2. Upon the conclusion of the evidence in behalf of the state, the petitioner moved that he be discharged. The court remarked: "I shall not decide this motion offhand. If you want to introduce any evidence, why do so, because this motion involves the case." Without insisting upon a ruling or saving an exception, the petitioner proceeded with the introduction of his evidence. With the record in this condition, he is not in a situation to complain, and will be deemed to have acquiesced in the manner of conducting the trial.

3. The article is not a fair account of the trial, but rather, as admitted, a statements of the petitioner's convictions. Neither the proceedings of the court nor the evidence is given, but comments thereon charging, in effect or by innuendo, that one witness for the state was a jail-bird; another, silly and suitable for the insane asylum; that four of them were in a deal to convict the defendant; and that, whatever the jury might do, there was no doubt in the mind of every intelligent man, familiar with the

facts, that it should acquit him. This was while the case was on trial, and, as the paper was published and distributed at the county seat, the petitioner must be presumed to know that the article would be likely to fall into the hands of the witnesses and jurors in attendance. The question arises, then, whether the court may, by contempt proceedings, protect witnesses from denunciation and intimidation by the public press, and the jurors from the influence created thereby, and suggestions of their proper course during the ¹³ progress of a trial. It was remarked by Lord Hardwick, in *Champion v. Evening Post*, 2 Atk. 471, that "there cannot be anything of greater consequence than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters." Mr. Cooley, in his work on Torts, page 424, says: "It has also been held in many cases that the publication of an article in a newspaper commenting on proceedings in court then pending and undetermined, or upon the court in its relation thereto, made at a time and under circumstances calculated to affect the course of justice in such proceedings, and obviously intended for that purpose, may be punished as a contempt, even though the court was not in session when the publication was made." In *In re Sturoc*, 48 N. H. 428, 97 Am. Dec. 626, the accused published an article referring to the prosecution and "smelling committees" in going beyond the limits of their towns, and inquiring: "How does it look to you taxpayers of New Hampshire, that your hard-won earnings should be squandered by bigots or demagogues in this way? Yet such must inevitably be the effect if certain outrageous proceedings lately instituted in the town of Sunapee are to be tolerated and sustained." The article was published in the village where the court was in session, and during the term at which the case was likely to be called for trial. The court says: "It is not, however, open to doubt that the article has an obvious tendency to bring the prosecution and the promoters of it into odium and contempt. The whole tone of the article assumes that the prosecution was illegal, oppressive, and unjust; and, in particular passages, it denounces the prosecution in opprobrious and abusive terms. It must have been intended to persuade those who read it that the prosecution ought not to be maintained. If jurors, who might read the article, should adopt such views of the cause, they would be improper persons to try it, and the direct effect would be to obstruct and corrupt the administration of the law. The character of the article and the time and circumstances of the publication oblige

us to find that as this was the natural, so it must have been the intended, effect of the ¹⁴ publication. The natural consequences of his act being to corrupt the administration of the law, the defendant cannot discharge himself by alleging that he meant no harm, and did not suppose that he was doing anything illegal." In *Littler v. Thomson*, 2 Beav. 129, a published article representing the proceedings as vexatious and the witnesses as guilty of perjury was adjudged contemptuous. The general doctrine is stated in 2 Bishop's Criminal Law, section 259, to be that any publication, whether by parties or strangers, relating to a cause in court, which tends to prejudice the public as to its merits, and to corrupt or embarrass the administration of justice, may be visited as a contempt; and this includes reflections on the tribunal or its proceedings, or on the parties, the jurors, the witnesses, or the counsel.

We have discovered no authority denying the power of a court to punish as contempt an act which tends to impede, embarrass, or obstruct it in the discharge of its duties. The necessity for this power is that the law may be fairly and impartially administered, uninterrupted by any influence affecting the safety or tending to direct the conclusion of the judge or jurors, or preventing or interfering with the officers of the court, or intimidating or coercing witnesses in giving their testimony. Can it be that a court has no power to protect counsel from publications calculated to intimidate and prevent them from a proper defense of suitors? Is it possible that jurors, while in the discharge of their duties, may be held up before the public as without intelligence, and not reliable when forced to sit upon the trial of causes? May witnesses who are required to attend trials by compulsory process be denounced as jail-birds, conspirators, and fit subjects for the lunatic asylum during the progress, because, forsooth, they may not testify in accordance with the whim or judgment of some editor? If so, then attorneys, jurors, and witnesses in attending court must not pay heed to the fearless discharge of their duties, if they would avoid excoriation of the newspapers, but conform their conduct and testimony ¹⁵ to the intimations which may be thrown out in advance. Such is not law. The courts must be left free during the progress of trials to investigate, untrammelled by such influences. Newspapers cannot be permitted to invade the sanctity of the courts of justice, assail litigants, intimidate witnesses, and dictate the verdicts of jurors or the judgments of the court. The trial of De Ford was pending when the article in question was published.

The petitioner had every reason to believe it would fall into the hands of the witnesses and jurors. Its natural tendency was to intimidate the witnesses in attendance on court, and to influence the jury in reaching their verdict. The judgment imposed was fully warranted by the evidence and the law: *State v. Judge Civil Dist. Ct.*, 45 La. Ann. 1250; 40 Am. St. Rep. 282. It must be added, however, that the courts have no power or desire to control the press in its legitimate sphere. Its freedom is jealously guarded by the law, and made secure in the constitution. It enjoys the utmost latitude in reviewing the action of the courts, and may, after the particular litigation is ended, assail, with just criticism, opinion, rulings, and judgments with the weapons of reason, ridicule, or sarcasm. "But the liberty of the press must not be confounded with mere license. Liberty of the press stops where a further exercise would invade the rights of others. This provision of the constitution does not authorize a usurpation of the functions of the courts. Under a plea of the liberty of the press, a newspaper has no right to assail litigants during the progress of a trial, intimidate witnesses, dictate verdicts or judgments, or spread before juries its opinion of the merits of cases which are on trial": *In re Shortridge*, 99 Cal. 526; 37 Am. St. Rep. 78. It is seldom, however, that an honorable journalist so far forgets his self-respect as to trespass upon the rights of the judiciary, or seek to control or improperly influence its conclusions. Courts are constantly passing on questions affecting the life and liberty of the citizen, as well as the rights of property; and the freedom of the judiciary to investigate and decide is quite as important to the well-being of society as the freedom of the press. Let the ¹⁶ courts perform their duties unmolested, but their final judgments, as well as the manner of reaching them, are thereafter open to the world for such criticism or condemnation as taste or necessity may require. As supporting the views expressed, see *People v. Wilson*, 64 Ill. 195; 16 Am. Rep. 528; *Fishback v. State*, 131 Ind. 304; *Myers v. State*, 46 Ohio St. 473; 15 Am. St. Rep. 638; *Ex parte Barry*, 85 Cal. 603; 20 Am. St. Rep. 248; *State v. Doty*, 90 Am. Dec. 671; *State v. Judge of Civil Dist. Ct.*, 45 La. Ann. 1250; 40 Am. St. Rep. 282; *State v. Galloway*, 98 Am. Dec. 404, and note; *Cooper v. People*, 13 Colo. 337, 373; *State v. Kaiser*, 20 Or. 50; 8 L. R. Ann. 584, and note; *State v. Morrill*, 16 Ark. 384.

Dismissed.

CONTEMPT—NEWSPAPER PUBLICATION.—Any publication relating to a cause pending in court tending to prejudice the pub-

lie as to its merits, and to corrupt or embarrass the administration of justice, or reflecting on the tribunal, or on the parties, jurors, witnesses, or counsel, may be punished as a contempt. But a newspaper publication is a contempt of court only when it has reference to a matter then pending in court, and is of a character tending to the injury of pending and subsequent proceedings upon such matter: *Percival v. State*, 45 Neb. 741; 50 Am. St. Rep. 568, and monographic note. When a newspaper or other publication, being read by jurors and attendants on the courts has a tendency to interfere with the proper and unbiased administration of the law in pending causes, it may be adjudged in contempt of court and punished accordingly: *State v. Judge of Civil Dist. Court*, 45 La. Ann. 1250; 40 Am. St. Rep. 232. The liberty of the press to fairly criticize the official conduct of a judge, and the decisions or proceedings of courts, and to expose any wrongful, corrupt, or improper act of a judicial officer, will be carefully preserved and protected by the courts; but if a newspaper publishes, prints, and circulates unjust censures, or false charges, concerning such matters, he will be held strictly accountable and punished for contempt: *Ex parte Barry*, 85 Cal. 603; 20 Am. St. Rep. 248, and note.

STATE v. HUGHES.

[106 Iowa, 125.]

SEDUCTION—PROMISE OF MARRIAGE IN EVENT OF PREGNANCY.—To induce an unmarried woman of previous chaste character to yield her virtue by promise of marriage in event she becomes pregnant may be seduction. Whether a woman of chaste character would so yield, and whether, if she does, it is voluntary, and to gratify her desires, rather than because of such conditional promise, may be considered in connection with all the facts and circumstances shown upon the trial.

SEDUCTION—PROMISE OF MARRIAGE IN EVENT OF PREGNANCY.—If a man twenty-two years of age, while paying his addresses to an unsophisticated country girl seventeen years of age, succeeds in having sexual intercourse with her under his promise to marry her in event of her becoming pregnant, such transaction may constitute seduction, as it cannot be said, as matter of law, that she is unchaste in yielding on the strength of such promise, or that she submits as a result of passion, rather than of the promise.

SEDUCTION—EVIDENCE that a defendant, in a prosecution for seduction, though engaged to marry another, was paying his addresses to the prosecutrix as a suitor, and stated that he "was going to show her a hot time," and, about the time of the alleged seduction, also stated that he was going to her home for sexual intercourse, is admissible in corroboration of the prosecutrix, and as rebuttal when the alleged seduction has been denied.

SEDUCTION—EVIDENCE—COMPETENCY OF WITNESS. On a prosecution for seduction, the testimony of the mother of the prosecutrix that she discovered her daughter's pregnancy about four weeks after the alleged seduction, is admissible, if objection is made to the admissibility of the evidence only and not to the competency of the witness.

SEDUCTION—EXCESSIVE JUDGMENT.—If a seducer pays addresses to the prosecutrix for the deliberate purpose of accomplishing her ruin, a sentence of two and one-half years for such seduction is not excessive.

Benjamin & Preston and L. T. Genung, for the appellant.

M. Kemley, attorney general, and J. A. Miller, for the state.

¹²⁶ LADD, J. That some man had sexual intercourse with the prosecutrix about March 30, 1896, is put beyond dispute by the birth of a fully-developed child, December 18th of the same year. As to whether the defendant is that man, the evidence is in conflict, she affirming and he denying. Her previous chastity is not questioned, nor is the fact that she was then unmarried. But the defendant insists the evidence utterly fails to show that intercourse, if had, was procured through artifice, flattery or deception. That he paid his attentions to the prosecutrix, by taking her to church several times, to a literary society, a theater, and a dancing party, during February and March, 1896, is admitted; and she testified that he hugged and kissed her ¹²⁷ repeatedly, told her she was pretty and sweet, and, on the night in question addressed her as his "pretty sweetness." On the way home from the dancing party, according to her testimony, after some caressing, he took liberties with her person, and told her what he wanted, and that he was going to have it. She responded that he was not. He then said he would not harm her, and would be careful, and remarked: "You don't need to be afraid of me knocking you up. If I was ornery enough to do the like, and get a woman in a fix, I would marry her. I know my sweet little girl won't refuse me." He also promised her that he would not get her in a family way. He then helped her from the buggy to the robe laid on the ground by the roadside, and the act complained of occurred. All of this he denies. The evidence tends to show that the prosecutrix submitted to the embraces of the defendant, if at all, by reason of his promises that he would not get her in a family way, and that if he did, he would marry her. While the statement, if made, was not direct, it was meant to be so understood by her, and she so accepted it. His assurances that no harm would be done evidently related to physical injury, and were not representations as to the character of the act. But it cannot be said that she relied upon these promises entirely freed from the flattery and arts he had been previously and was then practicing. Indeed, it was held in *Wilson v. State*, 73 Ala. 527, that the prosecutrix

will not be permitted to testify that she yielded in consequence of a promise of marriage, or of any act or declaration of the defendant, because that is a matter of inference to be drawn by the jury from the facts and circumstances proven or presumed. While such is not the rule in this state, it is yet true that the jury may and should consider all the influences exerted by the defendant in overcoming the objections of the prosecutrix. Here she says the promises caused her to yield, but she does not state that these were the only influences operating on her will. What she doubtless meant was, that but for these promises she would ¹²⁸ not have submitted. As said in *State v. Higdon*, 32 Iowa, 262: "The exact amount or what kind of seductive arts is necessary to establish the offense charged cannot be defined. Every case must depend upon its own peculiar circumstances, together with the condition in life, advantages, age, and intelligence of the parties. All these circumstances, it must be presumed, were observed and duly considered by the jury and court below. From her demeanor they could tell whether her story went beyond or fell short of the real facts." It was held in *State v. Knutson*, 91 Iowa, 549, that to induce intercourse by a promise to marry the prosecutrix if anything went wrong might constitute seduction, the court remarking: "It is said that the promise of defendant, which caused her to yield to him the last time, was conditional, and wholly insufficient to induce a chaste woman to submit to sexual intercourse. It appears that several promises were made, and their effect upon the prosecutrix was for the jury to determine." In *State v. Hemm*, 82 Iowa, 609, an instruction to the effect that procuring intercourse "by representing that there was nothing wrong in the act, and that no one would find it out," constituted seduction, is approved, and it is there said: "By the act of intercourse in this case, the prosecutrix became a mother, and his representations were false. If she yielded because of his representations, it was a case of deception or fraud, for he was the means of her public exposure. His representations were no less than a promise that it would not be known, which he rendered false: See *State v. Prizer*, 49 Iowa, 534; 31 Am. Rep. 155. But it is said that a woman with chaste character would not yield because of such representations. That was a question for the jury. The law does not determine that she would not." The reasoning of these cases leads to the inevitable conclusion that to induce an unmarried woman of previous chastity to yield her virtue by a promise of marriage in event she becomes pregnant may be seduction. Whether a

woman of chaste character would so yield, and whether, if she so does, it is voluntary, and to gratify her desires, rather ¹²⁹ than because of such conditional promise, may well be considered in connection with all the facts and circumstances shown upon the trial. But it cannot be said as a matter of law that an unsophisticated country girl of seventeen years, when addressed by a young man of five or six years her senior, with possibly a greater knowledge of the world, as in this case, and under the circumstances disclosed, would necessarily be of previous unchastity in yielding on the strength of such a promise, or that she submitted as a result of passion, rather than the false promises of the defendant. The question is not determined in *State v. Reilly*, 104 Iowa, 13. Where a promise of marriage must be the inducing cause, as in New York and Oregon, intercourse procured by conditional agreement to marry in event of conception is adjudged not to be within the statute: *People v. Van Alstyne*, 144 N. Y. 361; *State v. Adams*, 25 Or. 172; 42 Am. St. Rep. 790. As applied to our statute, the reasoning of these authorities is not controlling, but important in passing on the facts of each particular case.

2. Proof of acquaintance and of opportunity is not alone sufficient corroboration of the prosecuting witness: *State v. Painter*, 50 Iowa, 317; *State v. Smith*, 54 Iowa, 743; *State v. Araah*, 55 Iowa, 258. The evidence in this case, however, tends to show that the defendant was waiting on the prosecutrix as a suitor. If this were not true, how, then, shall the fact that he was with her, attending church or entertainments, taking long drives, seven or eight times in as many weeks, be explained? There are some circumstances indicating the deliberate purpose on his part of accomplishing her ruin. He was engaged at the time and was married to another within two weeks after the alleged seduction. Besides, one witness testified that the defendant told him prior to the offense that he was going to go with the prosecutrix, and was going "to show her a hot time." To another witness, on the Sunday after that event, he stated that he was going to the home of the prosecutrix for sexual intercourse. ¹³⁰ If the jurors believed he was waiting on Cyrene only ostensibly as a suitor, and relied on the testimony of the other witnesses referred to, then they might well find that evidence other than that of the injured party tended to connect the defendant with the commission of the offense.

3. It is said that the evidence of defendant's statement that he was going to the house of prosecutrix for sexual intercourse

was not admissible. This occurred within a week after the alleged seduction. The defendant had not seen the prosecutrix in the meantime. The only fair inference to be drawn from the statement was that such a relation existed between them. He had denied on examination any illicit connection with the girl, and this tended directly to rebut such evidence. Moreover, it tended to corroborate, as before stated, the story of the prosecutrix: See *State v. Hill*, 91 Mo. 423. Even if the evidence was not strictly in rebuttal, this was without any prejudice to the defendant.

4. The mother of the prosecuting witness, over the objection of the defendant, testified that she discovered her daughter's condition two weeks after the defendant's wedding, which occurred thirteen days after the alleged seduction. The court had allowed Cyrene to state that she informed her mother of her condition at that time, but afterward withdrew such evidence from the jury. The defendant insists that this information could alone be derived from the statements made by the daughter. If so, then the court, in withdrawing the evidence of the daughter from the jury, cured the alleged error. But the existence of pregnancy was a fact proper to be proven on such a trial, and no objection was made to the competency of the witness. The evidence was competent; the witness may have been incompetent. But the objection of incompetency went to the evidence only, and not to the witness: *White v. Smith*, 54 Iowa, 233; *Ball v. Keokuk etc. Ry. Co.*, 74 Iowa, 132.

¹³¹ 5. The claim that the evidence established the crime of rape rather than seduction, and the exception to the eleventh paragraph of the court's charge to the jury, are without merit, and require no consideration. The defendant was sentenced to serve a term of two years and six months in the penitentiary. As said, there are circumstances tending to show that he paid his attentions to the prosecutrix for the deliberate purpose of accomplishing her ruin. In view of this state of the record, we cannot say the judgment is excessive.

Affirmed.

SEDUCTION--PROMISE OF MARRIAGE IN EVENT OF PREGNANCY.—The gist of the offense of seduction is the promise of defendant to marry the prosecutrix and the yielding by her of her virtue in consequence of such promise: *McCullar v. State*, 36 Tex. Cr. Rep. 213; 61 Am. St. Rep. 847, and note. Compare *Bracken v. State*, 111 Ala. 68; 56 Am. St. Rep. 23. Seduction accomplished under promise of marriage, to be performed only on condition that pregnancy results from the intercourse, is not seduction within a statute punishing seduction "under promise of marriage." Within

the meaning of such statute, seduction must be accomplished by means of an absolute promise of marriage, or one which becomes absolute the moment the woman yields: *State v. Adams*, 25 Or. 172; 42 Am. St. Rep. 790. But as to this there are cases, with which the principal case is in accord, holding that consent to intercourse obtained even upon such a conditional promise may amount to seduction: See monographic note to *State v. Carron*, 87 Am. Dec. 408.

MANATT v. SCOTT.

[106 Iowa, 203.]

APPELLATE PRACTICE—OBJECTIONS TO RECORD.—

The evidence, rulings, and exceptions taken in the trial court cannot be stricken from the record on appeal, if the bill of exceptions contains directions to the clerk of the court to copy the shorthand reporter's report of the trial in full as extended, certified, and signed by such reporter, merely on the ground that such clerk was not directed to copy the original notes.

APPELLATE PRACTICE.—INSTRUCTIONS ARE SUFFICIENTLY IDENTIFIED in the bill of exceptions by referring to them as filed in the case by their numbers, and as duly indorsed by the presiding trial judge.

APPELLATE PRACTICE.—ASSIGNMENTS of error are sufficiently specific and definite when they point out the number of the exception relied upon as it appears in the abstract on appeal, and also point out the page of such abstract where such exception may be found.

WILLS—CONTEST—EVIDENCE.—When a will is attacked, on the ground of want of capacity in the testator arising from old age, infirmity, and senile dementia, the testimony of one who has been the friend of the testator, as to a sudden dislike taken by the latter for such friend, is admissible as tending to show senile dementia.

WILLS—CAPACITY—DECLARATIONS AS EVIDENCE.—If the validity of a will is contested on the ground of incapacity and undue influence, declarations made by the testator before the execution of the will, as to what the devisees and the proponents of the will told him detrimental to the contestants, are admissible as bearing on the capacity of the testator and undue influence exerted over him.

WILLS—UNDUE INFLUENCE—EVIDENCE.—If the validity of a will is contested on the ground of incapacity and undue influence, an inventory and final account of the aged testatrix, as executrix of her husband's estate, executed by her, but prepared by the proponent and devisee of the will, which fails to refer to property of great value included in such estate, is admissible to show that she was not aware of the extent of her property, and that the proponent concealed property from her and from the court, and exerted an undue influence over her.

WILLS—WANT OF CAPACITY—NONEXPERT EVIDENCE.—If a will is contested on the ground of want of mental capacity in the testator, a request to a nonexpert witness to state any difference in the testator's actions and appearance, indicating mental strength or weakness, at the time he last saw him, as compared with the time when he first saw him, does not call for an opinion without detailing the facts to the jury, and is admissible.

WITNESSES—EXPERT EVIDENCE.—A hypothetical question propounded to an expert witness, if founded on facts which the evidence tends to establish, is admissible, and it is not essential that such facts should have been proven to actually exist.

PRACTICE.—EXCLUSION OF EVIDENCE as to who were present at the execution of certain receipts by a testator whose will is contested, is harmless error, if the execution of such receipts is undisputed.

WILLS—EVIDENCE—HARMLESS ERROR.—If, in an action contesting the validity of a will on the ground of want of mental capacity and senile dementia, the proponent introduces evidence of the commencement of a suit by the contestants against the testator in order to explain his feelings against them, the admission in evidence of the circumstances of such suit is harmless error.

WILLS—WANT OF MENTAL CAPACITY—EVIDENCE.—In an action contesting the validity of a will on the ground of want of mental capacity in the testator, his sworn answer to a suit against him, alleging that he was very weak at the time of the execution of the contract in suit, unable to read or write, or to transact business intelligently, is admissible in evidence as bearing upon the condition of his mind at the time of making his will.

WILLS. — TESTAMENTARY INCAPACITY DOES NOT NECESSARILY REQUIRE that the testator shall actually be insane or of unsound mind. Weakness of intellect, whether arising from extreme old age, from disease, or great bodily infirmities or suffering, or from all of these combined, may render the testator incapable of making a valid will, providing such weakness really incapacitates him from knowing or appreciating the nature, effect or consequences of the act he is engaged in performing.

WILLS — TESTAMENTARY INCAPACITY. — Although a sound and disposing mind in the testator is necessary to the execution of a valid will, yet eccentricity, peculiarity, oddity, or the like, or weakness of mind ordinarily attendant upon old age, do not of themselves necessarily establish lack of testamentary capacity.

WILLS—MENTAL CAPACITY—EVIDENCE.—INEQUITIES of a will may be taken into consideration in determining the mental capacity of the testator, or whether undue influence has been exercised, but apparent inequality and inequity in the provisions of a will do not alone warrant the presumption of mental incapacity or undue influence, and should be considered only as circumstances in connection with other facts bearing on the condition of the testator's mind.

WILLS—EVIDENCE.—INEQUALITIES or inequities in a will not appearing on its face may be shown by evidence establishing the relationship and financial condition of the testator's heirs.

WILLS—MENTAL INCAPACITY—UNDUE INFLUENCE—EVIDENCE.—A will which bestows property on the wealthy and overlooks the claims to bounty of those who are poor, in like relationship to the testator, does not commend itself as reasonable or natural, and it is a circumstance suggesting a disordered mind or the effect of undue influence.

TRIAL.—INTERROGATORIES submitted to the jury calling for material facts to be determined, although some of those called for are not ultimate, is not prejudicial error.

WILLS—MENTAL CAPACITY—UNDUE INFLUENCE—QUESTION FOR JURY, WHEN.—If, in an action contesting the validity of a will for want of mental capacity in the testator, and

undue influence exerted upon him, the evidence on these issues is conflicting, they should be submitted to the jury for determination, and its decision is final.

Haines & Lyman, and W. R. Lewis, for the appellants.

J. T. Scott and H. S. Winslow, for the appellees.

²⁰⁵ LADD, J. William Scott and Eliza, his wife, settled in Poweshiek county in 1849, and resided there until death. William died in 1886, and Eliza ten years later. They had ²⁰⁶ but two children, one of whom, William, died, unmarried, soon after the father. The other son, Robert, died in 1885, leaving him surviving his widow and five children, viz., William F., Robert D., Ina Belle, Mary, and Elizabeth Ann Scott. Mary Scott intermarried with L. Reynolds, and, upon her death, left surviving her husband and two children, Robert L. and Scott S. Reynolds. Elizabeth Ann intermarried with Ed. McGinley, and, upon her death, left surviving her husband and two children, Edward Earl and William McGinley. These grandchildren and great-grandchildren of Eliza Scott are the contestants to the probating of her will. It may be added that in 1870 William Scott conveyed to his son Robert three hundred and twenty acres of land, and, by his will, left the remainder of his estate to his wife and son William. This consisted of three hundred and eighty-four acres of land and a large amount of personal property, which fell to Eliza under the will and as heir of the son. In 1892 she formally executed a will, bequeathing to her brothers, James, Thomas, and Irvin Manatt and her sister Susannah Gwin all her household goods, beds, bedding, and clothing, "to be divided equally between them, share and share alike," and devising the remainder of her property, real and personal, to the three brothers named. The will also contains this provision: "Second. I given and bequeath to my grandchildren, Robert L. Scott, Reynolds Scott, Eliza Ann Reynolds, Wm. T. Scott, Robert D. Scott, and Belle Scott, fifty dollars each, share and share alike." The objections interposed to the admission of this paper to probate are that the deceased, by reason of old age and mental infirmities, had not sufficient capacity to make a will; that she did not comprehend and understand the extent of her property, or those who had claims upon her bounty; that the will was procured by fraud and undue influence exercised by the proponents; and, further, that the fraud and undue influence consisted of poisoning the mind of testatrix, and inducing her to believe that her legal heirs were her enemies, and were plotting

to do her bodily harm. ²⁰⁷ The jury found, by their general verdict, and in answer to the special interrogatories, for the contestants. There are sixty-eight assignments of error, and we can be expected to consider in detail those only which seem of the most importance.

1. The motion of the appellees to strike all the evidence, rulings, and exceptions from the abstract is overruled. The practice of incorporating the shorthand notes in the skeleton bill of exceptions has been fully approved by this court: *Hampton v. Moorhead*, 62 Iowa, 91; *Waller v. Waller*, 76 Iowa, 513; *Hill v. Halloway*, 52 Iowa, 678; *Gardner v. Burlington etc. Ry. Co.*, 68 Iowa, 590; *McCarthy v. Watrous*, 69 Iowa, 264. These are presumed to have been filed in the case, as it was the duty of the reporter to file them. The bill recites that they were filed, and that all the evidence, motions, objections, and exceptions, "having been extended . . . and transcribed into longhand, and certified and filed in due time after such trial by such shorthand reporter, are as follows, to wit: (Clerk will here copy shorthand reporter's report of the trial in full, as extended, certified and signed by Blue, shorthand reporter)." The objection seems to be that the clerk was not directed to copy the original notes. For what conceivable purpose would such a copy be made? None. Whatever the direction, he is expected to copy the transcript made by the reporter. It is said that he might be unable to identify it as that of the particular trial. If it is filed in that case, properly entitled and duly certified, the identification is ample. The appellants seem to lose sight in their arguments of the fact that the reporter is an officer of the court, and will not be presumed to foist an unauthorized transcript on the record. The skeleton bill of exceptions is necessarily imperfect, and its expediency lies in saving the record until time or necessity requires its completion. A translation of the notes may not be required, and, in any event, need not be made, in a suit at law, until necessary for the preparation of the abstract: *Kassing v. Ordway*, 100 ²⁰⁸ Iowa, 612; *Slone v. Berlin*, 88 Iowa, 205. The presumption that the reporter and clerk performed their duties will prevail, in the absence of any showing to the contrary, and the record prepared as directed treated as genuine.

2. The point that the instructions are not identified in the bill is not well taken. This was done by referring to them as filed in this case by their numbers, and as duly indorsed by the presiding judge. When so referred to, the clerk will find no difficulty in making the selection.

3. The appellees insist that assignments of error are not as specific as is required. The first fifty-two errors relate to the introduction of evidence. The twenty-sixth assignment is a fair illustration of all, and is as follows: "The court erred in overruling the proponents' objection to the question propounded to the witness W. W. Woods, as shown in the thirtieth exception at the bottom of page 47 and top of page 48 of the abstract, and also erred in overruling the proponents' objection to the further question propounded to the same witness, as shown on page 48 of the abstract, and in permitting the witness to answer the same." It will be noticed the particular ruling is mentioned, as well as the witness, and the page of the abstract; and it may be added that at the bottom of that page the exception bears a corresponding number. The method pursued is certainly a very convenient one, and enables the court and counsel, without loss of time, to find, not only the ruling, but the connection in which it is made. It clearly and specifically indicates the very error complained of, and, in so doing, complies with the statute: Code, sec. 4136. In *Wood v. Whitton*, 66 Iowa, 297, the errors were not specifically mentioned or pointed out as found in any particular part of the record, and it is there said: "An assignment should plainly state the error complained of, and not refer the opposite counsel and court to parts of the record wherein the objection is said to appear." This language must be construed in connection with the alleged error in that case, and ²⁹⁹ which could only be discovered by the examination of the entire record. It has also been held that resort will not be had to the argument in order to determine the error assigned: *Calkins v. Chicago etc. Ry. Co.*, 92 Iowa, 715; *Smola v. McCaffrey*, 83 Iowa, 760. In *Keokuk Stove Works v. Hammond*, 94 Iowa, 694, stating errors generally in ruling on the admissibility of the testimony of the witness named is held not sufficiently specific. In *Hamilton Buggy Co. v. Iowa Buggy Co.*, 88 Iowa, 367, it is said: "Each and all of these assignments relate to the admission of evidence against the objection of the intervenor, and each assignment sufficiently points out the error, naming the witness, and specifying the evidence and rulings objected to. To require more would entail an unnecessary burden upon the appellants. While the law contemplates that such assignment shall clearly point out the error complained of, it is not necessary to encumber the record by setting out the whole examination in which the error is claimed to have occurred: *Unon Bldg. Assn. v. Rockford Ina. Co.*, 83 Iowa, 649; 32 Am. St. Rep. 323." What is said in

this case aptly applies to that at bar, and we not only hold the assignment sufficient, but approve the method of definitely pointing out the error and the part of the record where it may be found.

4. William Manatt was asked this question: "You may state whether or not there was any cessation of friendliness on your part toward Mrs. Scott at that time, or was the ill-will all on her part"—and over objection answered: "All on her part. The ill-will was all on her part." The time referred to was when she left the farm, in 1886. It is conceded that the feeling of the witness might be shown, but it is said that the ill-will of the decedent ought not to be inquired into. It may be mentioned that the contestants claimed Mrs. Scott was suffering from senile dementia, and, according to the evidence of physicians, this disease is of slow development, and one of the symptoms is a sudden aversion or dislike conceived against those with whom the person afflicted has been on friendly terms. We ²¹⁰ think it was admissible as bearing upon the condition of Mrs. Scott's mind. She had been on friendly terms with this brother for years; and as soon as taken from the farm by James and Thomas Manatt conceived a dislike for him. It was part of the history of the case, and one of the circumstances to be considered with others in determining whether she had testamentary capacity.

John Manatt testified that prior to the execution of the will, Mrs. Scott had said to him that her daughter in law and children gave her husband a dose, and helped him out of the world; that if she went to their homes, they would treat her likewise; and that Thomas and James Manatt had so informed her. The proponents moved to strike out the statement that Thomas and James had told her, as incompetent, hearsay, immaterial, and as declarations made by the devisees under the will. This motion was overruled, and it is urged that the statement made by the deceased testatrix of declarations by devisees cannot be received in evidence against other devisees. The order of introduction of evidence was within the discretion of the court. While the statement that she based her belief on information derived from James and Thomas could not be received as proving that they in fact made such a report, it did have a tendency to show that her mind was controlled by undue influence. Had competent evidence been produced that James and Thomas had in fact so advised her, the importance of this evidence would be manifest. That is, not only the exertion of the influence,

but its direct effect upon the mind would have been established: *In re Hess' Will*, 48 Minn. 504; 31 Am. St. Rep. 665, and extended note. Such evidence was, however, not adduced, and the court told the jury that her statement could not be considered as tending to show James and Thomas in fact so informed her. This instruction obviates the exception urged. The authorities relied upon by appellants are not in point. They simply relate to declarations made by a devisee before or after the ²¹¹ execution of a will: *In re Ames*, 51 Iowa, 596; *Dye v. Young*, 55 Iowa, 433; *Parsons v. Parsons*, 66 Iowa, 754; *In re Goldthorp's Estate*, 94 Iowa, 336; 58 Am. St. Rep. 400. That declarations made by the testatrix are admissible as bearing on capacity and undue influence, is well settled: *Waterman v. Whitney*, 11 N. Y. 157; 62 Am. Dec. 71; *Bates v. Bates*, 27 Iowa, 112; 1 Am. Rep. 260; *Stephenson v. Stephenson*, 62 Iowa, 165; *In re Goldthorp's Estate*, 94 Iowa, 336; 58 Am. St. Rep. 400; *Lane v. Moore*, 151 Mass. 87; 21 Am. St. Rep. 430; *Schouler on Wills*, secs. 193, 243. As said in *Bever v. Spangler*, 93 Iowa, 603: "Mental disturbance may be detected by declarations as surely as by conduct; hence the declarations of persons charged with insanity are admissible in a chain of logical connection, to show the mental condition existing when the will was executed." The evidence tended to show Mrs. Scott was then laboring under a delusion which of itself was a symptom of mental unsoundness.

5. The appellants complain of the ruling of the court in admitting in evidence the inventory and final report of Mrs. Scott, as executrix of her husband's estate, filed in 1886 and 1887. These were signed and sworn to by her, but prepared by or under the supervision of James Manatt. William Scott left nearly six thousand dollars in cash, which was placed in the bank by James and Thomas Manatt. Soon after his death, a large amount of personal property was disposed of, and the proceeds handled by the same parties. Neither the report nor the inventory contained any reference to these amounts, and the omission tends to show that she did not know the extent of her property at that time; and, further, that James Manatt, knowing thereof, concealed these from the court in reports prepared by him or under his supervision. It may be said that this is remote in time, but the testatrix was then an aged woman, and the testimony tended to show that from that time on her property and business were managed and controlled by these proponents. We think it was also admissible as bearing upon her

knowledge of her business and property. It is said that she may have given ²¹² away considerable amounts of money. This would not relieve her from making a truthful report and inventory. Besides, if this had been done, the knowledge of proponents of her affairs was such that they could readily have shown it.

6. About three years after making the will, Mrs. Scott remarked to Eliza Breneman that, "if it had not been for that blackleg and them [referring to Dr. Reynolds, her daughter in law, and children] her husband would have been living this day." We have seen that declarations made by the deceased were admissible. But it is said that this was long after the execution of the will. The evidence tended to show, however, that the disease, if it existed, was of long standing and progressive; and, if so, the time was not too remote: *Bever v. Spangler*, 93 Iowa, 603.

7. It is asserted that nonexperts were allowed to give their opinion as to the sanity of the decedent without first detailing the facts to the jury. This criticism is not well founded. It is often difficult to draw the line between what is a fact and an opinion: *Yahn v. Ottumwa*, 60 Iowa, 429. A question to Woods will illustrate the exception taken. He was asked to state "any difference there was in Mrs. Scott's actions or appearance, indicating mental strength or weakness, at the time you last saw her, compared with the first time that you saw her." Now, anything about the decedent indicating her strength or feebleness would be a fact, and this question calls, not for his opinion, but for the facts, as to her actions and appearance: *Severin v. Zack*, 55 Iowa, 28. In *Parsons v. Parsons*, 66 Iowa, 754, it is said: "We think evidence that a person acted strangely or in a childish manner are facts, and may be testified to by any one." In *In re Goldthorp's Estate*, 94 Iowa, 343, 58 Am. St. Rep. 400, it is said: "The witness might testify from what he saw that decedent was weak physically, and, in principle, we see no difference between such inquiry, whether it relates to the physical or mental organization, so long as it calls for facts ascertainable ²¹³ by observation alone." A careful examination of the evidence leads us to the conclusion that no nonexpert was permitted to give his opinion without first detailing to the jury the facts upon which it was based.

8. A hypothetical question was propounded to Dr. Vest, and it is urged that the facts stated have no support in the evidence. If there was no evidence tending to sustain some of the material facts included, then the exception is well founded: *In re*

Amea, 51 Iowa, 596. But it is not essential that the facts be proven to exist. It is sufficient if the evidence tends to establish them: Meeker v. Meeker, 74 Iowa, 357; 7 Am. St. Rep. 489; Bever v. Spangler, 93 Iowa, 603. Upon examination of the record, we find every fact stated to have support in the evidence. For instance, it is said in the hypothetical question that the deceased was unable to read and write understandingly, and was wholly uneducated. It is admitted that she could not write, and several witnesses testify that in reading she was required to spell out the simplest words. Some years before this, she is shown to have filed a sworn answer in a suit, alleging total want of education and inability to read. Again, the fact of her aversion to those who were near and dear to her is referred to, and exception is taken to this description. Her affection for her daughter in law and grandchildren at one time is fully established. But a detailed consideration of this evidence will serve no useful purpose. It is asserted that the time is not limited to the date of making the will. The age fixed indicated a period covering that time, and inquiry in a case like this may extend over several years, either before or after execution of the will.

9. One Dorrance testified that he wrote certain receipts, and signed them as witness to the mark of Eliza Scott, and also her name, and that he believed that he had authority for doing so. One of the receipts is as follows:

214 "Brooklyn, Iowa, Jan. 18, 1889.

"Received of Thomas Manatt all moneys, papers, and property that he has had in his hand for my acct., in full to date.

her

"ELIZA X SCOTT.

mark

"Witness: O. F. Dorrance."

The other, similar to this, was drawn to James Manatt. James testified to the execution of the receipt to Thomas, and Thomas to that to James. The record disclosed no objection to the evidence of these brothers. The court afterward made this entry: "The motion of the contestant heretofore made to strike out from the record the evidence of James and Thomas Manatt relating to whether the persons were there at the time of signing the receipt [the exhibits 11 and 12] is sustained, and the proponents except, and the jury is so instructed." The abstract does not contain the motion referred to. As the execution of the receipts was proved and undisputed, it was not important to

know who were present when they were signed. If the ruling was erroneous, it was without the slightest prejudice.

10. The proponents introduced evidence showing the beginning of a suit in partition by the grandchildren against Mrs. Scott, and also pleadings therein. This was undoubtedly for the purpose of explaining any feeling testatrix may have had against them. The contestants were permitted to show all the circumstances connected with the beginning of this action, and that it was dismissed as soon as the facts were learned. Some letters between the attorneys and one of the contestants were received in evidence. All this simply indicated the employment of an attorney in the usual way, a contract to pay him a part of the land recovered, and a dismissal of the suit. While it has no bearing whatever upon the issue the jury were required to determine, no prejudice could possibly have resulted.

²¹⁵ 11. Exception was taken because of the proof introduced showing the settlement of Robert Scott's estate, and the partition of two hundred and forty acres of land left the widow and heirs after the payment of his debts. This, we think, was admissible, as bearing upon the question whether the will of Eliza was reasonable and natural. The proponents had introduced the will of William Scott, reciting that he had made ample provision for Robert during life, and also a deed to him of three hundred and twenty acres of land, executed in 1870. As Robert died before his father, this evidence showed how much he had at that time, and also the financial condition of the natural heirs of Eliza. And, if it was material to show the conveyance of the land, it was certainly important to understand its value: *Sim v. Russell*, 90 Iowa, 656.

12. A sworn answer of Mrs. Scott to a suit brought on a contract for the purchase of a monument was introduced in evidence over the objection of the appellants. In it she alleged that she was very weak, unable to read or write, or to transact business intelligently. This was filed when she was sixty-nine years of age, and we think it was admissible as an act of the deceased, and as bearing upon the condition of her mind. Indeed, the appellants insist that it shows her to have been a woman of remarkable memory. From this we understand them to object to the effect to be given to this answer, rather than its admission in evidence.

13. Complaint is made of the fourth instruction, in which the court tells the jury that "testamentary incapacity does not necessarily require that a person shall actually be insane or of

an unsound mind. Weakness of intellect, whether it arises from extreme old age, from disease, or great bodily infirmities or suffering, or from all these combined, may render the testator incapable of making a valid will, providing such weakness really disqualifies her from knowing or appreciating the nature, effects, ²¹⁶ or consequences of the act she is engaged in. Eccentricity, peculiarities, oddities, or the like, or weakness of mind ordinarily attendant upon old age, do not of themselves necessarily establish a lack of testamentary capacity." In the previous paragraph the jurors were told that a sound mind was necessary to the execution of a valid will, and what was necessary to constitute a sound mind clearly defined, substantially as approved in *Bates v. Bates*, 27 Iowa, 110, 1 Am. Rep. 260, *In re Convey*, 52 Iowa, 197, and *Meeker v. Meeker*, 74 Iowa, 357; 7 Am. St. Rep. 489. We take it, the court intended to say that the mind need not necessarily be diseased, but weakness might incapacitate it; and that the instruction was so understood by the jury.

14. The jurors were also told that Eliza Scott had the right to dispose of her property as she desired, and, in the sixteenth instruction, that, in passing upon the issues, the provisions of the will might be considered, "whether just or unjust, whether reasonable and natural, or unreasonable and unnatural, as may be disclosed by the evidence." That the inequities of a will may be taken into consideration in determining the mental capacity of the testator, or whether undue influence has been exercised, is too well settled to require an extended examination of the authorities: *Sim v. Russell*, 90 Iowa, 656; *Schouler on Wills*, secs. 78, 188; *Knox v. Knox*, 95 Ala. 495; 36 Am. St. Rep. 235; *Crandall's Appeal*, 63 Conn. 365; 38 Am. St. Rep. 375, and note; *Hammond v. Dike*, 42 Minn. 273; 18 Am. St. Rep. 503; *Davis v. Calvert*, 5 Gill & J. 269; 25 Am. Dec. 282; *Peck v. Cary*, 27 N. Y. 9; 84 Am. Dec. 220. But apparent inequality or inequity in the provisions of a will will not alone warrant the presumption of mental incapacity or undue influence. These may be only considered as circumstances in connection with other facts bearing on the condition of the testator's mind: *Turnure v. Turnure*, 35 N. J. Eq. 437; *In re Hess' Will*, 48 Minn. 504; 31 Am. St. Rep. 665, and note; *Maddox v. Maddox*, 114 Mo. 35; 35 Am. St. Rep. 734; ²¹⁷ *Knox v. Knox*, 95 Ala. 495; 36 Am. St. Rep. 235. In a technical sense, a will cannot be said to be just or unjust, because the testator is under no obligation to leave his property to any particular person or institution, but the terms have been generally employed in this connection. What is

meant by unjust, unreasonable, or unnatural provisions of a will is that they are not as a person in like situation and similar relationship would ordinarily and usually make them. We think the instruction not subject to misinterpretation.

15. But inequality or inequity in the provisions of a will may not appear on its face, and, to show this, evidence is sometimes essential to establish relationship and conditions in life. Thus in *Sim v. Russell*, 90 Iowa, 656, it was held proper to show the financial condition of the son. The contestants were permitted to prove that a half-sister of Mrs. Scott, living just across the street, was so poor as to be an object of charity. It already appeared that proponents were well to do, and that Mrs. Gwin was of limited means. As the decedent preferred some of her brothers to her natural heirs, it was material, in looking into the equities of the will, to know that, in remembering proponents, she forgot several other brothers and this sister, in abject poverty. A will which bestows property on the wealthy, and overlooks the claims to bounty of those who are poor in like relationship, does not commend itself as reasonable or natural. It is a circumstance suggesting a disordered mind or the working of sinister influences. While it may not have a very strong bearing in this case, it was for the jury to take into consideration in connection with the other evidence introduced.

16. The appellants insist that interrogatories not calling for ultimate facts were submitted to the jury. But every interrogatory asked for a fact material to be determined; and, while some of them may not have been ultimate, propounding the questions to the jury worked no prejudice: *British American Assur. Co. v. Neil*, 76 Iowa, 646. It is also said that the issue of undue influence ought not to have been submitted to the jury. This may be conceded. But ²¹⁸ there was a conflict in the evidence bearing upon the issue raised as to the mental capacity of Mrs. Scott to execute the will; and, whatever our views may be with reference to the full weight of the evidence, the determination by the jury is final. The jury especially found, in answer to the fifth interrogatory, that she did not have mental capacity to dispose of her property according to her desires. We shall not review the evidence in detail. It is enough to say that it tended to show the testatrix did not know the extent of her property, nor those who had claims upon her bounty; that she was possessed of a delusion that her daughter in law and her grandchildren and Dr. Reynolds were plotting to do her injury; and that her physical condition indicated that she was suffering from senile

dementia. The sixty-eight errors assigned are argued. We have touched upon those the parties seem to consider of most importance. The other assignments appear to us to be without merit.

The judgment is affirmed.

WILLS—CONTEST—WANT OF CAPACITY—EVIDENCE.—A witness who describes actions, looks, and language of the testator inconsistent with a rational state of mind is competent to state his opinion respecting the sanity of the testator: *Rivard v. Rivard*, 109 Mich. 98; 63 Am. St. Rep. 506. If a witness has had such a long and intimate acquaintance with a testator as to enable him to form a correct judgment as to the testator's mental condition, he may give his opinion that the testator was of sound mind, provided he also states the facts upon which such opinion is based: Note to *Kimberly's Appeal*, 57 Am. St. Rep. 111.

WILLS—DECLARATIONS OF TESTATOR AS EVIDENCE OF UNDUE INFLUENCE.—In a contest of a will, declarations made by the testator, both before and after the execution of the will, as to his feeling toward the contestant, his reasons for not recognizing him in his will, the legatee's influence over him and the disposition to be made of his property, are admissible to show undue influence: *Estate of Goldthorp*, 94 Iowa, 336; 58 Am. St. Rep. 400. See monographic note to *In re Hess' Will*, 31 Am. St. Rep. 686. To rebut the idea of fraud or of undue influence, or to show that the will is the result of the deliberate mind of the testator, his previous declarations consistent with the will are admissible in evidence. *Kaufman v. Caughman*, 49 S. C. 159; 61 Am. St. Rep. 808.

WITNESSES—EXPERTS—HYPOTHETICAL QUESTIONS.—When the testimony of an expert is proper, counsel may assume the existence of any state of facts which the evidence tends to justify, and base their questions upon such assumption: Note to *Klegel v. Altken*, 59 Am. St. Rep. 905.

WILLS—TESTAMENTARY INCAPACITY—HOW SHOWN.—The age of a testatrix does not authorize the jury to draw any unfavorable inferences against the validity of her will: *Henry v. Hall*, 106 Ala. 84; 54 Am. St. Rep. 22. A testator having sufficient mental capacity may make an unreasonable, unjust, and injudicious will: *Berberet v. Berberet*, 131 Mo. 399; 52 Am. St. Rep. 634; *Kaufman v. Caughman*, 49 S. C. 159; 61 Am. St. Rep. 808; but the jury may be instructed that they may consider the terms of a will in connection with other evidence in determining whether it was the fruit of monomania or insane delusion: *Rivard v. Rivard*, 109 Mich. 98; 63 Am. St. Rep. 506. See *Cash v. Lust*, 142 Mo. 630; 64 Am. St. Rep. 576; and great age, while it does not alone constitute testamentary disqualification, may raise a doubt of testamentary capacity: *Hall v. Perry*, 87 Me. 569; 47 Am. St. Rep. 352, and note.

CARNES v. IOWA STATE TRAVELING MEN'S ASSN.

[106 Iowa, 281.]

INSURANCE—ACCIDENT—AMENDMENT OF CONSTITUTION OF ASSOCIATION—EFFECT ON MEMBER.—The liability of an accident insurance association toward its members is fixed by its constitution and by-laws as they exist at the time when the certificate of membership was issued and not by those in force at the time the member dies, when such constitution does not authorize amendments therein nor in the by-laws, binding the member to any change in the contract without his assent.

INSURANCE—ACCIDENT.—Under insurance against death "from an accidental cause," a recovery may be had if the insured died from taking more morphine than he intended, but if his death is caused by his taking morphine, knowing how much he is taking, but not that the amount taken would cause death, no recovery can be had.

INSURANCE — ACCIDENT — SUICIDE — PRESUMPTION. In an action to recover insurance against death from an accidental cause, the presumption is against suicide.

INSURANCE—ACCIDENT—WHAT IS.—An accident, within the meaning of insurance against death from an accidental cause, is an event happening without any human agency, or, if happening through human agency, an event which, under the circumstances, is unusual, and not expected, to the person to whom it happens.

INSURANCE—ACCIDENT—BURDEN OF PROOF.—In an action to recover insurance against death from an accidental cause, the burden of proof is upon the plaintiff to show that death resulted from such cause, and until this is established no case is made out, but if plaintiff has introduced evidence showing death to have been the result of an accident, the burden of proof is then on the insurer to establish a defense that the insured was within some exceptions of the policy.

Cummings, Hewitt & Wright, for the appellant.

Baily & Ballreich, for the appellee.

282 LADD, J. When the certificate of membership was issued to Oliver D. Carnes the constitution of the association provided for indemnity whenever the death of a member occurred "from an accidental cause, except while said member shall be under the influence of intoxicating liquors or narcotics." As afterward amended, the articles of incorporation and by-laws, with the same exception, limited such indemnity to injuries "effected through or by external, violent, and accidental means." We may determine, then, at the outset, whether the liability of the association is fixed by the constitution and by-laws at the time the certificate was issued or those in force when Carnes died. The certificate entitled him to "all the benefits accruing from such membership, under the provisions of the constitu-

tion and by-laws of the association. Now, the by-laws relate entirely to the manner of transacting the business, and the constitution contained all the provisions with respect to the terms and conditions of insurance. The power to amend the by-laws was limited to matters not provided for in the constitution, and that could be revised or amended only on a two-thirds vote of the members. Nothing in it authorized the association to amend, and thereby bind a member to any change in the contract without his assent, nor do the amended articles purport to change existing contracts or to authorize any such change by the adoption of by-laws. In the absence of such provisions, the articles and by-laws as amended cannot be treated as retroactive in their operation. Mere silence as to the effect of revision and amendment of the constitution and by-laws will not warrant the inference that any change wrought will limit ²⁸³ or extend the obligation theretofore created by the issuance of certificates of membership. Statutes are construed so as to give them a prospective operation, unless the intention that they operate retrospectively is clear and undoubted, and it is not perceived why the same canon of construction should not be applied to the rules adopted by a mutual insurance association for the transaction of its business and the government of its members: *Hobbs v. Iowa Mut. Ben. Assn.*, 82 Iowa, 107; 31 Am. St. Rep. 466; *Sieverts v. National etc. Assn.*, 95 Iowa, 710; *Benton v. Brotherhood of R. R. Brakemen*, 146 Ill. 570. Of the contention that, by changing from a voluntary to an incorporated association, the former ceased to exist, and recovery must be had, if at all, under the articles and by-laws of the latter, it is enough to say that such an issue is neither raised in the pleadings nor established by the proof.

2. As no evidence indicated Carnes to have been under the influence of intoxicating liquors or narcotics, the important inquiry was whether his death occurred from an accidental cause. The testimony is not in conflict. On the sixteenth day of March, 1896, being Monday, he was suffering from neuralgia in the face, and remained at home during the afternoon and the following day. He obtained morphine from some source, and during this time took it for the relief of the pain. He went out for whisky Tuesday, but is not known to have obtained any. The physician found him that day lying on a cot, with clothes on, complaining of pain and soreness in his face and the back of his neck, and was informed by Carnes that he had taken, during Monday night, two quarter-grain tablets of morphine. The doc-

tor prescribed tablets with no morphine in them, and whisky, which was administered in the form of a hot punch. He undressed and went to bed downstairs, his clothes remaining in the room. His wife left him at about 10 o'clock P. M., and found him unconscious at 6:30 the following morning. In the meantime he had taken none of the whisky or tablets prescribed, and no morphine was found in the room or about ²⁸⁴ his clothes. He continued in a comatose condition for about four hours, when he died. That his death was caused by morphine taken between the time his wife left his bedside on Tuesday evening and when she found him dying the next morning is conceded. How much morphine he took is not known, but it was enough to cause death, and the physicians differ somewhat as to the amount necessary to do this. There are three possible ways to account for Carnes' death: 1. He may have taken the morphine with the purpose of committing suicide; 2. He may have taken more than he intended—that is, several quarter-grain tablets instead of one or more; and 3. He may have intended to take the amount he did, and misjudged the effect it would produce. There is nothing in the evidence or surrounding circumstances pointing to suicide, and, as everyone is supposed to be endowed with the instinct of self-preservation, he will be presumed not to have voluntarily ended his life: *Travelers' Ins. Co. v. McConkey*, 127 U. S. 661; *Cronkhite v. Travelers' Ins. Co.*, 75 Wis. 116; 17 Am. St. Rep. 184; *Mallory v. Travelers' Ins. Co.*, 47 N. Y. 52; 7 Am. Rep. 410; *Freeman v. Travelers' Ins. Co.*, 144 Mass. 572; *Mut. Life Ins. Co. v. Wiswell*, 56 Kan. 765. See 1 Am. & Eng. Ency. of Law, 331. He must, then, have either taken more morphine than he intended, or taken what he intended and misjudged its effects. If he took more than he intended—that is, intended to take one or two quarter grains, and, by mistake or inadvertence, took much more—this was accidental, and, if death was so caused, the beneficiary is entitled to recover. But suppose he took just the amount of morphine he intended, and misjudged the effect it would produce; may death so occasioned be said to result from an accidental cause? Webster defines "accidental" as "happening by chance or unexpectedly; taking place not according to the usual course of things"—and an "accident," as "an event that takes place without one's foresight ²⁸⁵ or expectation; an undesigned, sudden, and unexpected event; chance; contingency. Such unforeseen, extraordinary, extraneous interference as is out of the range of ordinary calculation." It is defined in *Paul v. Travelers' Ins. Co.*, 112 N. Y. 472, 8 Am.

St. Rep. 758, as the "happening of an event without the aid and design of a person, and which is unforeseen": See valuable notes to this case in 8 Am. St. Rep. 763. In *McGlinchey v. Fidelity etc. Co.*, 80 Me. 251, 6 Am. St. Rep. 190, it is said: "The definition of 'accident' generally assented to is an event happening without any human agency, or, if happening through human agency, an event which, under the circumstances, is unusual, and not expected, to the person to whom it happens." Bouvier thus defines "accident": "An event which, under the circumstances, is unusual and unexpected by the person to whom it happens. The happening of an event without the concurrence of the will of the person by whose agency it was caused; or the happening of an event without any human agency." The courts have frequently defined accident, and an examination of the authorities indicates but little difference of opinion: See *Lovelace v. Travelers' etc. Assn.*, 126 Mo. 104; 47 Am. St. Rep. 638; *Supreme Council v. Garrigus*, 104 Ind. 133; 54 Am. Rep. 298; 1 Am. & Eng. Ency. of Law, 291. It will be observed that this policy insures against death from an accidental cause, and not an accidental death. It is possible that under the definitions referred to the death of Carnes was accidental, but if he took the amount of morphine intended, and a result not anticipated occurred, then the cause of his death was not accidental, for he intended to do the very thing he did. The morphine was, under the circumstances, taken by design. The result only was unforeseen—unintended. This distinction was recognized by Judge Dyer in *Barry v. United States Mut. Acc. Assn.*, 23 Fed. Rep. 712, who, in charging the jury, said: "The term 'accident' is here used in its ordinary, popular sense, and in that sense it means happening by chance—unexpectedly; taking place not according to the usual course of things, or not as ²²⁸ expected. In other words, if a result is such as follows from ordinary means voluntarily employed, in a not unusual or unexpected way, then, I suppose, it cannot be called a result affected by accidental means. But if, in the act which precedes the injury, something unforeseen, unexpected, unusual occurs, which produces the injury, then the injury has resulted from accident or through accidental means": See *United States Mut. Acc. Assn. v. Barry*, 131 U. S. 100. In 3 *Joyce on Insurance*, section 2863, quoting from *Clidero v. Insurance Co.*, 29 Scot. L. R. 303, it is said that "a person may do a certain act, the result of which act may produce unforeseen consequences, and may produce what is commonly called 'accidental' death, but the

means are exactly what the man intended to use, and did use, and was prepared to use. The means were not accidental, but the result might be accidental": See, also, *American Acc. Co. v. Carson*, 99 Ky. 441; 59 Am. St. Rep. 473. Now, it is impossible to say, from the evidence, whether Carnes took more morphine tablets than he intended to take, or whether he took just what he did intend, and misjudged their effects. Death might have been occasioned in either way, and one is as likely as the other. Under such circumstances, can it be left to the jury to guess which? The burden of proof was upon the plaintiff to show that death resulted from an accidental cause, and, the evidence leaving this unestablished, she failed to make out a case. It is said, however, that death will be presumed to have resulted from accident, and that the burden of proof is upon the defendant to show the contrary. But an examination of the case does not sustain this contention. They go no further than to hold that, where the insured has introduced evidence tending to show an injury to be the result of an accident, the burden of proof is on the insurer to establish as a defense that the insured was within some exceptions of the policy: See *Hess v. Preferred etc. Assn.*, 112 Mich. 196; *Badenfeld v. Massachusetts etc. Assn.*, 154 Mass. 77; *Mutual Life Ins. Co. v. Wiswell*, 56 Kan. 765. ²³⁷ The plaintiff wholly failed to prove the cause to have been accidental, and this will not be presumed. It was necessary to do this in order to bring the case within the terms of the policy.

Reversed.

INSURANCE—MUTUAL BENEFIT SOCIETIES—CHANGE IN BY-LAWS.—The charter of a beneficial association is as much a part of the contract of insurance made by it as if written therein: *Supreme Lodge v. Stein*, 75 Miss. 107; 65 Am. St. Rep. 589. Where the original agreement contains no provision that the member shall be bound by all articles and by-laws that may be adopted by the association, it cannot, by the adoption of new articles of incorporation, create a new condition of forfeiture of the certificate without his consent: See monographic note to *Lake v. Minnesota etc. Assn.*, 52 Am. St. Rep. 556, 557.

INSURANCE—ACCIDENT—TAKING POISON.—A death caused by accidentally taking poison is regarded as caused by external and violent means: *Note to Healey v. Mutual Acc. Assn.*, 23 Am. St. Rep. 641. See note to *Metropolitan etc. Assn. v. Froiland*, 52 Am. St. Rep. 863, 864. The words "taking poison," as employed in a clause of an accident insurance policy, exempting the company from liability for death by "taking poison," mean the voluntary, intentional taking of poison, and do not include cases of accidental poisoning: *Travelers' Ins. Co. v. Dunlap*, 160 Ill. 642; 52 Am. St. Rep. 355.

INSURANCE—SUICIDE—PRESUMPTION.—Self-destruction is never presumed; and if recovery upon a policy of life insurance is resisted on the ground that the assured committed suicide, the de-

fendant must satisfy the jury, by a preponderance of competent evidence, that the injuries which caused death were intentional on the part of the assured: *Walcott v. Metropolitan Life Ins. Co.*, 64 Vt. 221; 33 Am. St. Rep. 923, and note.

INSURANCE—ACCIDENT—DEATH BY—WHAT IS.—Death by accident means death from any unexpected event which proceeds from an unknown and unforeseen cause, happening without the design of the person acted upon: *Lovelace v. Travelers' Protective Assn.*, 126 Mo. 104; 47 Am. St. Rep. 638, and note; *Paul v. Travelers' Ins. Co.*, 112 N. Y. 472; 8 Am. St. Rep. 768, and extended note.

CONWAY v. NICHOLS.

[106 Iowa, 358.]

HOMESTEADS—ABANDONMENT.—If the owner of a homestead removes therefrom with the intention and expectation of selling it, and making his home in another place, this must be deemed an abandonment of the homestead, although he intends to return to it if he fails to sell it.

HOMESTEADS—ABANDONMENT—LIEN OF JUDGMENT—PRESUMPTION—BURDEN OF PROOF.—If the owner of a homestead removes therefrom and takes up his residence and votes in a new place before he sells and conveys the homestead, a presumption of abandonment thereof before the sale arises, and in an action by his grantee to quiet his title as against the apparent lien of a judgment against his grantor, the burden of proof is upon the former to overcome such presumption of abandonment.

Delano & Meredith, for the appellant.

Curtis & Follett, H. M. Boorman, and G. M. Lyon, for the appellees.

350 DEEMER, C. J. The real estate in question was used and occupied by Davis as a homestead until March 1, 1891. On this last-named date, he leased the premises for the period of one year, and moved into the city of Atlantic. Appellees' judgments were obtained in the years 1889 and 1890. In October of the year 1891 Davis entered into a contract for the sale of the land to one Conrad, which was consummated in March of the year 1892. Thereafter Conrad sold the land to appellant, and she brought this suit to quiet her title thereto. It is conceded that the land was originally the homestead of Davis, and the only question in the case is whether or not he abandoned it before the sale to Conrad. The evidence shows that he rented the farm because his son was sick, and unable to look after the place upon which he (the son) was then living; and that after Davis' removal to Atlantic he assisted this son in the management and care of his (the son's) farm. He left a wagon upon the leased

premises and did not sell it, or his farming implements and stock, until after the sale to Conrad. He saved grain grown upon his son's land with which to seed his own land the following spring, and did not dispose of it until after he made the contract for the sale of his farm; and he also arranged for timothy seed to sow upon his land in the spring of 1892. His contract with Conrad was made October 20, 1891, and Conrad at that time turned over a team of mules, a wagon, and harness to apply upon the purchase price. Davis registered as a voter in the city of Atlantic on the thirty-first day of October, 1891, and voted in said city at the following November election, and also voted in the same place at the next spring election. Shortly after renting his farm he moved all his stock to the farm occupied by his son. As Davis removed from the ³⁶⁰ homestead in March, 1891, and thereafter made his home in Atlantic, and voted in that place at the November election, the presumption arises that he intended to abandon his homestead, and the burden is on plaintiff to show that, notwithstanding this apparent abandonment, he (Davis) left his farm temporarily, and with the definite and settled purpose of returning thereto and continuing it as his home: *Newman v. Franklin*, 69 Iowa, 244; *Maguire v. Hanson*, 105 Iowa, 215. Davis says: "I wanted to sell the place, and if I did not sell it, then I intended to go back there. . . . My intention all the time was to go back if I did not sell. I expected to sell it, but would go back if I did not sell it." "At the time of the sale to Conrad my family was living in town, and this was my home. I regarded this as my residence and home then. . . . When I registered in October, 1891, I intended to go back on the place if I did not sell it, but I did not then claim my home on the farm, as I was out of my township then." The evidence further shows that Davis began his efforts to dispose of the farm within a few weeks after he moved to Atlantic, and finally made the contract with Conrad. It seems to us that these facts bring the case within the rule announced in *Kimball v. Wilson*, 59 Iowa, 638, wherein it is held that a removal from the homestead with the intention to return if the owner could not make a living at some other business, which contingency he intended to avoid, constitutes an abandonment. In that case the debtor said he intended to go back to the farm if he "could not make a living here" in the practice of his profession as a lawyer. In this case Davis says: "My intention was to go back if I did not sell. I expected to sell, but would go back if I did not sell." In each case there was an intention to abandon, qualified by a contingency. And

the contingency was one which the debtor intended to avoid: See, also, *Cotton v. Hamil*, 58 Iowa, 594; *Maguire v. Hanson*, 105 Iowa, 215. We think Davis' removal constituted an abandonment of the homestead, and that the lien of appellant's judgments attached before the sale to Conrad.

Affirmed.

HOMESTEAD—ABANDONMENT.—To establish abandonment of a homestead the evidence must show not only that the party removed from the homestead, but that he did so with the intention of not returning, or that after such removal he formed the intention of remaining away: *Edwards v. Reid*, 39 Neb. 645; 42 Am. St. Rep. 607, and note. Abandonment of the homestead is effected, and the right to exemption is lost when the grantor conveys the premises and places the grantee in possession of the homestead: *McDonald v. Crandall*, 43 Ill. 231; 92 Am. Dec. 112. See monographic note to *Taylor v. Hargous*, 60 Am. Dec. 607. When judgment is obtained against a debtor while in occupancy of homestead, proof of intent to abandon the homestead should be clearer and more satisfactory than when the lien relied on was obtained after the homestead has ceased to be actually occupied as such: *Boot v. Brewster*, 75 Iowa, 631; 9 Am. St. Rep. 515.

HENDERSHOT v. WESTERN UNION TELEGRAPH Co.

[106 Iowa, 529.]

TELEGRAPH COMPANIES—NEGLIGENT DELAY IN DELIVERING MESSAGE.—A delay of five hours on the part of a telegraph company in delivering a message, the urgency of which is known to it, is negligence, when it attempts to find the addressee down town, and at his office, but fails to leave notice there or to visit his residence within the free delivery limits, where he might have been found.

TELEGRAPH COMPANIES—NEGLIGENT DELAY IN DELIVERING MESSAGE—PROXIMATE CAUSE.—Negligent delay of five hours in the delivery of a telegraph message reading "Bravo is sick; come and fetch Miller at once," when the telegraph company knows that Bravo is a valuable horse, and that Miller is a veterinary surgeon, is the proximate cause of the death of the horse, when it is shown that had the veterinary surgeon reached the horse five hours earlier his chances of recovery would have been greater, and that in all reasonable probability he would have been saved.

TELEGRAPH COMPANIES—DELAY IN DELIVERING MESSAGE — DAMAGES — REMOTENESS.—Damages claimed against a telegraph company for the death of a horse, due to the company's delay in delivering a message, are within the contemplation of the contract, and not too remote, when the company knew from the nature of the message that promptness was required.

TELEGRAPH COMPANIES—DAMAGES FOR DELAY IN DELIVERING MESSAGE—NOTICE.—A telegraph message reading, "Bravo is sick; come and fetch Miller at once," it being known

to the telegraph company that Bravo was a valuable horse, and that Miller was a veterinary surgeon, is notice to the company of the damages that may result from delay in delivering the message, especially when it was a "hurry message" and the company was asked to send it promptly.

TELEGRAPH COMPANIES—DELAY IN DELIVERING MESSAGE—CONTRIBUTORY NEGLIGENCE.—In an action to recover damages for the death of a horse, caused by the delay of a telegraph company in delivering a message requesting the attendance of a veterinary surgeon, the sole issue is whether such death was attributable to delay in treatment, caused by the failure to deliver the message, regardless of negligence in the treatment of the horse after the dispatch was delivered.

PRIVILEGED COMMUNICATIONS.—Statements made by the owner of a horse to a veterinary surgeon called to treat the animal are not privileged communications, and are admissible in evidence when they may have an important bearing upon the cause of the death of the horse which is in issue, and in such case their exclusion is prejudicial error.

G. H. Fearsons and McNett & Tisdale, for the appellant.

W. W. Cory, and Jacques & Jacques, for the appellee.

530 GIVEN, J. 1. The following facts are undisputed, and a statement thereof will sufficiently show the issues: Plaintiff, for a long time a well-known resident and practicing attorney of Ottumwa, Iowa, was the owner of a valuable stallion and speed horse, called "Bravo," which he had in charge of one E. Daggett, for care and training, at the track and training stable at Hedrick, Iowa, about twelve miles distant from Ottumwa. On June 28, 1893, ⁵³¹ at about 7 A. M., Daggett discovered that the horse was ailing, and at 7:30 o'clock A. M., delivered to the defendant's agent at Hedrick for transmission, with the request that it be promptly forwarded, a dispatch, as follows: "6-28, 1893. To C. Hendershot, Ottumwa, Iowa: Bravo is sick; come and fetch Miller at once. [Signed] E. Daggett." The message was received by defendant's agent at Ottumwa between 8 and 8:30 the same morning, and was delivered to the plaintiff between 1 and 2 o'clock that afternoon. There being then no railway train by which Hedrick could be sooner reached, the plaintiff and Dr. Miller, a skillful and competent veterinary surgeon, proceeded by train to Hedrick, where they arrived between 3 and 4:30 o'clock that evening, when Dr. Miller found that the horse had pneumonia, or lung fever, and proceeded to treat it for that disease. The horse continued sick until the seventh day thereafter, when it died. There is dispute as to whether the defendant was negligent in not sooner delivering the dispatch to the plaintiff, whether the delay was the proximate cause of the death of the horse, whether plaintiff was negligent in the care of the horse,

and as to its value. The facts as to these disputed questions will be noticed further on.

2. Appellant moved for a verdict at the close of the plaintiff's evidence, and again at the close of all the evidence, upon the grounds that the evidence failed to make out a case for the plaintiff, for that the damages claimed are too remote, for that it fails to show that the death of the horse was the proximate result of any act or omission of defendant, and for that there is not sufficient proof of negligence on the part of the defendant; also, that the evidence shows that plaintiff was guilty of contributory negligence. Appellant also included these grounds in its motion for a new trial, and, these several motions being overruled, the rulings are assigned as error. The state of the evidence was not so materially changed, following the first motion, as to require a separate consideration of these rulings. They may be considered under the general inquiry as to the sufficiency of the evidence.

3. We first inquire as to the sufficiency of the evidence to sustain the charge of negligence in failing to deliver the dispatch. The jury returned twenty-four special findings, of which the following is the substance of those relating to the alleged negligence. These findings, we think, are warranted by the evidence. The jury found that the message was delivered at Hedrick for transmission at 7:30 o'clock A. M.; that it was received at Ottumwa at 8 o'clock, and delivered to the plaintiff at 1:30 P. M.; that the messenger went to plaintiff's office twice—the first time at about 8:15 A. M.; that he left no notice of the message under the door; and that there was a negligent delay of five hours in delivering the message. They also found that the plaintiff's residence was within a radius of one mile from defendant's Ottumwa office. One mile was the radius of free delivery. The defendant's agent at Ottumwa who received the dispatch says he knew Dr. Miller, and implied from the message that some one was sick and that a physician was wanted. While this message was not sent as an emergency message, there was surely reason to understand from its language that promptness should be exercised in its delivery. The messenger made several efforts to find Mr. Hendershott down town, but did not go to his residence, which the jury found was within the radius of free delivery. Plaintiff remained at his residence until after dinner that day, but, as his residence was within the limits of free delivery, the message should have been taken there—especially so in view of what its words disclosed. There is a conflict in the

evidence as to whether the residence was within a radius of one mile, but, if it was not, it was at most but a few feet beyond; and, in view of the character of the message, promptness and good faith required that it should have been taken to the residence, even though it was a few feet beyond the limits of free delivery. We think, however, the finding of the jury as to the distance is warranted. We are in no doubt that the plaintiff's evidence in chief and the entire evidence were such as to warrant the court in submitting the issue of negligence to the jury, and to warrant the ⁵³² jury in finding that the defendant was negligent in not sooner delivering the message to plaintiff.

4. Appellant contends that "the negligent delay, if any there was, in the delivery of the message, and the consequent failure of the veterinary surgeon to reach the horse as soon as he otherwise would, by the space of five hours, as found by the jury, was not the proximate cause of the death of the horse," and the law applied to the facts did not warrant the court in submitting to the jury the question whether the delay in the delivery of the message was the proximate cause of the death of the horse. To determine these contentions, we must first ascertain the rule as to the degree of evidence which plaintiff must present to entitle him to recover. The court instructed that, to recover, the plaintiff must establish that the defendant was negligent in not sooner delivering the message, that plaintiff was not guilty of negligence contributing to the death of the horse, and "that the death of the horse was directly and proximately caused by the delay in delivering the dispatch, or that but for such delay the horse would not, in all reasonable probability, have died." The instructions throughout direct the jury that the burden was on the plaintiff to prove that, "in all reasonable probability," the death of the horse was caused by reason of Dr. Miller's not reaching it as soon as he would had the message been delivered when it should have been, and that it did not rest upon the defendant to prove that the horse would have died even if Dr. Miller had reached it as much sooner as the delivery of the dispatch was delayed. In *Kerr v. Keokuk Waterworks Co.*, 95 Iowa, 514, this court quoted with approval from *Gores v. Graff*, 77 Wis. 174 (an action against a surgeon for negligence which caused the death of his patient), as follows: "There can be no recovery, unless it is reasonably probably that Olson [the patient] would have lived had Dr. Graff treated him properly, and the existence of such reason-

able probability must be proved; that is, facts and circumstances must be proved sufficiently to bring conviction to a reasonable mind, without resorting to mere conjecture or ⁵³⁴ uncertainty, and inconclusive inference or bare possibilities that the surgeon's neglect of duty was the proximate cause of the death of his patient." In *Taylor v. Western Union Tel. Co.*, 95 Iowa, 744, wherein the question was whether the death of a horse had been caused by exposure, it is said: "The evidence as to the death of the animal from exposure on that night is not as definite and certain as if the death had been caused by accident or violent means, such as collision of trains, or the like, but we think it was a fair question for the jury." In the nature of things, reasonable probability as to the cause of the death of the horse is the most that can be proven in a case like this; and, if the evidence discloses facts which show such reasonable probability as convinces the jurors as to the cause of death, they may surely act upon it, though, as they were told, they must not indulge in conjecture, speculation, or guesswork. Absolute certainty is not required to entitle a party to recover, but only a preponderance of the evidence. Holding the plaintiff to the burden of proving that in all reasonable probability the cause of the death of the horse was the failure to deliver the message in due time, we inquire as to the sufficiency of the evidence to warrant the court in submitting the issue to the jury, and in overruling the motion for new trial.

5. There is much evidence as to the nature of the disease, the best time for its treatment, and the condition of the horse from day to day during its sickness. This evidence is so minute and lengthy that we will not do more than refer to it in a general way. Dr. Miller states condition of the horse at the time he saw it (June 28th) to be as follows: "The horse had pneumonia, commonly called 'lung fever.' He was breathing rapidly. His pulse was increased, his temperature raised. His nostrils were somewhat dilated. His mucous membranes were heightened in color, and he looked depressed—held his head lower than usual. He was breathing about 18 per minute. Normal would be about 10 or 12 times a minute. His pulse was 64 to the minute; normal, 40, ⁵³⁵ though it varies with the change of temperature some. Temperature, 103½; normal, 100. The color of his nose is usually a pale red, while it became a brighter red. His breathing was shorter, quicker than natural, and more labored. His lungs were in a congested condition—the right one—while the left one was in also a congested condition, ex-

cept the lower part of it, which had passed into what we call the 'second stage'—consolidated stage. I would have to consider that the horse had passed into the second stage of the disease. When I got there I considered the horse to be in rather a critical condition." He further stated the fact that both lungs being involved added very greatly to the danger of the disease, and that there is much more mortality when both lungs are involved; that, if he had reached the horse five or six hours earlier, the chances of recovery would have been greater; that the best time to commence treatment is in the earlier stages of the disease; and, that when taken in its incipient stages, the per cent of loss is one in ten to thirteen. The evidence of other experts and of standard authors tends to show that in all reasonable probability the life of the horse would have been saved had it been treated four or five hours sooner than it was. There is also evidence showing that the horse was first observed to be ailing about 7 o'clock in the morning, and continued to grow worse up to the time that Dr. Miller came, and that during the four hours he remained it did not seem to change for either better or worse. The jury found specially that the horse remained in the same condition up to July 3d, when it became worse. We will not discuss this evidence further, but content ourselves with saying that it discloses facts which tend to show that in all reasonable probability the life of the horse would have been saved had Dr. Miller reached and treated it four hours sooner than he did. Appellant cites a number of cases in which it was held that there was no evidence or not sufficient evidence upon which to submit the question of probable cause to the jury: *Kerr v. Keokuk Waterworks Co.*, 95 Iowa, 514, is cited. In that case there was not a fact testified to showing that the death ⁵³⁶ resulted from the trip to the waterworks. There was nothing upon which to find for the plaintiffs, but conjecture and inconclusive inferences; but in this we have evidence of facts tending to show that treatment four or five hours earlier would, in all reasonable probability, have saved the horse. The same want of evidence is true of *Trapnell v. Red Oak Junction*, 76 Iowa, 745, also cited. In that case there was no evidence of facts which tended to prove that the diseased condition of plaintiff's breast was caused by the fall, and, on the contrary, the physicians testified, without conflict, that the disease was hereditary. There was no evidence in that case tending to connect the disease with the fall, and such connection was left merely to conjecture.

Telegraph Co. v. Swoveland, 14 Ind. App. 341, is also cited. In that opinion many cases are referred to. That action was to recover for defendant's negligent failure to put the plaintiff in communication with a veterinary surgeon whom he desired to consult and call to see a sick horse, and in consequence of which it was alleged the horse died. It was held that the value of the horse could not be considered as an element of damages, the question whether the horse would have been saved had the messenger taken the call at once being entirely a matter of speculation. The only evidence in that case was the opinion of the veterinary surgeon, who did not arrive until after the horse had died, which opinion was based upon supposed conditions. The court, after citing cases wherein there was a like failure of evidence to connect the effect with the cause, concluded as follows: "We do not wish to be understood as holding that cases may not arise in which, under similar circumstances, it would be proper to submit the question as to whether the death of the animal may be traced to the negligence of the company, but we do not think there is any proper evidence in this case upon which the jury could base a verdict for damages by reason of the death of the horse." The cases cited in that opinion and referred to by appellant were lacking in evidence tending to connect the alleged fact as a proximate cause of the negligence charged. ⁵³⁷ Brown v. Western Union Tel. Co., 6 Utah, 219, was an action to recover damages for failure to deliver a message saying: "Send doctor on first train. Katy has broken her finger." Because of a failure to deliver the dispatch a doctor was not sent, and on the next day plaintiff took Katy to a doctor by whom the finger was amputated. The contention was whether amputation was rendered necessary by the delay, and there being evidence to the effect that the broken part had become dead, and the circulation strangled so that the parts would not unite, the court held that it was a question for the jury. While we are of the opinion that courts should carefully guard against verdicts based upon mere conjecture, we think that under the evidence in this case there was no error in overruling the appellant's motions for a verdict, nor the motion for a new trial upon the grounds under consideration.

6. Appellant states as a further contention as follows: "Not only were the claimed damages too remote, but, in view of the obscure language of the dispatch, were not within the contemplation of the parties, or within the contract involved in the dis

patch." This refers to the damage claimed for the loss of the horse. *Hadley v. Baxendale*, 9 Ex. 341, cited and approved in *Milhill's Mfg. Co. v. Day*, 50 Iowa 250, cited by appellant, states the rule as follows: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally (i. e., according to the usual course of things) from such breach of contract itself, or such as may reasonably be supposed to have been in contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the ⁵³⁸ amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach." Defendant's agent at Hedrick, who received the dispatch for transmission, did not know Bravo, nor the persons named in the dispatch, but he did know, from the dispatch itself, that Bravo was sick; that Hendershott and Miller were wanted to come at once; and, as he expresses it, that it was a "hurry dispatch." He was also asked to send it promptly. Defendant's manager at Ottumwa did not know Bravo, nor whether Bravo was man or animal, but he says: "I knew Dr. Miller. I implied from the message some one was sick. When I saw it addressed to Hendershott, and it said, 'bring Miller,' it occurred to me that it meant 'send physician.'" With this knowledge of the special circumstances, surely these parties must have understood that it was their duty to make prompt delivery of the dispatch, to avoid injury to the sick Bravo. They must have foreseen from the dispatch itself that delay in delivering it might result in injury or death or both because of the sickness, and that the purpose of the dispatch was to avoid such consequences. The case is, we think, clearly within the rule above quoted. Appellant cites *Western Union Tel. Co. v. Kirkpatrick*, 76 Tex. 217; 18 Am. St. Rep. 37;

Western Union Tel. Co. v. Smith, 76 Tex. 253, and Western Union Tel. Co. v. Bryant, 17 Ind. App. 70, where it was held that the damages claimed were too remote. The damages claimed in those cases were so different from that under consideration that the cases are not in point. Our conclusion finds support in Brown v. Western Union Tel. Co., 6 Utah, 219; Garrett v. Western Union Tel. Co., 83 Iowa, 257; Herron v. Western Union Tel. Co., 90 Iowa, 129; Mentzer v. Western Union Tel. Co., 93 Iowa, 752; 57 Am. St. Rep. 294; Taylor v. Western Union Tel. Co., 95 Iowa, 744; Evans v. Western Union Tel. Co., 102 Iowa, 219.

7. Appellant's next contention is, that "plaintiff was guilty of contributory negligence in not seeing that the horse received more frequent attention during his sickness." As we view the case, there is no question of negligence on the part of the plaintiff or the surgeon involved in this case. The question is, whether it is shown that in all reasonable probability the horse died because of the delay in being treated in consequence of the failure to deliver the dispatch in time. Any evidence tending to rebut the conclusion that the death resulted from that delay is certainly competent, regardless of whether or not negligence is shown. The only complaint is that the surgeon failed to visit the horse as often as he should have done. Now, if such failure tends to account for the death of the horse, it is immaterial whether or not the failure was negligence on the part of the surgeon or of the plaintiff. Collins v. Council Bluffs, 32 Iowa, 324; 7 Am. Rep. 200, and Rice v. Des Moines, 40 Iowa, 638, are cited, but are not in point, as in those cases the question of negligence was involved. Counsel discuss, with numerous citations, the question whether the plaintiff is responsible for the failure of the surgeon to visit the horse with sufficient frequency, but we think that is immaterial, inasmuch as the failure bears with like force upon the question of the cause of the death, whether or not the failure was negligent. The court instructed upon the theory that the question of contributory negligence was involved, and that "the negligence of Dr. Miller would, so far as the defendant is concerned, be the negligence of the plaintiff, and would have the same effect." We think the court erred in so instructing, and that the inquiry should have been submitted simply as to the cause of death, regardless of negligence in the treatment of the horse after the dispatch was received.

8. In the course of the cross-examination of Dr. Miller, and

of his examination in chief on behalf of the defendant, he was asked what the plaintiff said as to the ⁵⁴⁰ doctor's visiting the horse, and the report that had been received from the keeper as to the condition of the horse. To these questions the plaintiff objected, as calling for privileged communications, and the objections were sustained as being in conflict with section 3643 of the code of 1873, prohibiting a disclosure of professional communications. Plaintiff's counsel say in argument: "We have no case exactly in point to cite." We think that none can be found to sustain the ruling. The reasons upon which said section is based have no application whatever to a case like this. Communications are privileged in certain cases for the reason that full and free communication in those cases is necessary and to be encouraged, but these reasons do not apply to veterinary surgeons called to treat animals. The ruling must be presumed to have been prejudicial, as the evidence sought might have had an important bearing upon the cause of death.

Other questions are argued, but they are not such as are likely to arise upon a retrial. Our conclusion is, that for the errors pointed out the judgment of the district court must be reversed.

TELEGRAPH COMPANIES—DUTY TO FIND ADDRESSEE OF MESSAGE.—It is the duty of a telegraph company to deliver a message to the addressee, though he is away from his home or place of business, if he can by reasonable efforts of the company be found: *Western Union Tel. Co. v. Mitchell*, 91 Tex. 454; 66 Am. St. Rep. 906. It is not enough to attempt a delivery only at the office or place of business of the person addressed, especially when he, as well as his residence, is well known in the town where the message is received: See monographic note to *Western Union Tel. Co. v. Houghton*, 27 Am. St. Rep. 923.

TELEGRAPH COMPANIES—DELAY IN DELIVERING MESSAGE—NOTICE FROM TERMS OF MESSAGE.—A telegraphic message may, by its terms, put the telegraph company upon notice of the damages which would probably result to the sender of the message from negligence in failing to deliver it promptly: *Western Union Tel. Co. v. Hines*, 96 Ga. 688; 51 Am. St. Rep. 159. There is an evident tendency on the part of the courts to adopt the principle that it is sufficient to render the company liable if the message discloses its importance on its face and shows that loss will probably result from delay in delivering it: See monographic note to *Western Union Tel. Co. v. Cooper*, 10 Am. St. Rep. 786, 787.

TELEGRAPH COMPANIES—DAMAGES FOR DELAY IN DELIVERING MESSAGE.—The rule of damages for negligence in the transmission of a telegram is that the sender is entitled to recover nominal damages, and such substantial damages as he has sustained which were naturally the proximate consequence of the wrongful act: *Pegram v. The Western Union Tel. Co.*, 100 N. C. 28; 6 Am. St. Rep. 557. To authorize the recovery of special damages, the company must have had notice, either from the face of the message or

otherwise, at the time of receiving it, of the circumstances out of which special damages might arise: Gulf etc. Ry. Co. v. Loonie, 82 Tex. 323; 27 Am. St. Rep. 891, and note. See monographic note to Western Union Tel. Co. v. Cooper, 10 Am. St. Rep. 778.

STOLTENBERG v. CONTINENTAL INSURANCE CO.

[106 IOWA, 566.]

INSURANCE—UNOCCUPIED BUILDING.—A policy of fire insurance containing a condition that it shall be null and void if the building insured be or become vacant or unoccupied, is forfeited if the tenant in possession had vacated such building a short time before the loss and it was not subsequently occupied by a tenant or other occupant.

INSURANCE—EVIDENCE—HEARSAY.—The fact that a witness had heard another person tell the agent of the insurer that he was occupying the building insured, is hearsay and inadmissible, as against the insurer, on the issue of occupancy of the building at the time of the loss.

INSURANCE—VACANCY OF BUILDING—PRESUMPTION. Insured buildings appearing to have been recently vacated by a tenant before the loss are presumed to continue vacant, unless shown to have been subsequently occupied.

INSURANCE—UNOCCUPIED PREMISES—LETTER AS ADMISSION.—A letter from an insurance agent to the adjuster of the insurer, stating that the insured premises had been let and sublet, and that the subtenant had left the premises about four hours before the loss, does not admit the occupancy of the buildings at the time of the fire.

INSURANCE—UNOCCUPIED BUILDINGS.—An insurance policy, conditioned that it shall be void if the insured buildings shall be or become vacant or unoccupied, is forfeited when the premises on which such buildings stand are leased to and cultivated by one who lives near by, but does not occupy nor make any use of such buildings, and they are not occupied by anyone else.

J. W. Cory, for the appellant.

McVey & McVey, for the appellee.

^{see} LADD, J. The policy of the defendant, dated September 30, 1892, covered the dwelling-house and barn situated on plaintiff's farm, in Osceola county, consumed by fire May 20, 1893. On May 25th of the same year, its agent at Lake Park mailed to the general western agent of the defendant particulars of the loss, as required, on one of its blanks. This was not accompanied by any affidavits or proofs of loss, and none were ever furnished. The plaintiff alleged waiver of such proofs, and the defendant pleaded forfeiture of the policy by reason of the transfer of title, and vacancy of the building. At the conclusion of the plaintiff's evidence, the jury, under the

instructions of the court, returned a verdict for the defendant. Conceding that the company's adjuster, Henry Paine, had authority to deny liability, and that such denial dispensed with proofs of loss, as a useless ceremony (*Boyd v. Cedar Rapids Ins. Co.*, 70 Iowa, 325; *Carson v. German Ins. Co.*, 62 Iowa, 410; *Tayloe v. Merchants' etc. Ins. Co.*, 9 How. 390; *Western Home Ins. Co. v. Richardson*, 40 Neb. 1), the ruling of the district court must be sustained because of the vacancy of the building. The policy contains a condition that it shall be null and void if the building insured "be or become vacant or unoccupied," and to this especial attention is directed in another portion of the contract. The vacancy of the buildings at the time of the fire is established by the undisputed evidence. The plaintiff was about to leave Lake Park in the spring of 1893, and directed M. D. Green to rent the farm on which these buildings were located to another, in event the tenant concluded to move away. Upon being informed the tenant had left, Green leased the premises to one Smith, living south of the land. Green testified: "I cannot give you the name of the man who occupied the premises when plaintiff left. I didn't know him. It was a man with his family, living on the land. I do not know how long he had ⁵⁶⁷ been living there. When I went down to rent the farm, the plaintiff's man who had been living on it had just moved out. Mr. Smith, to whom I rented this farm, lived south of this land. I do not think Mr. Smith lived on the land, or moved onto it. The contract between Mr. Smith and me was verbal. He was to pay grain rent. I don't think Mr. Smith was actually living on the land when the fire occurred." From this it clearly appears that the tenant in possession when the policy was issued had vacated the buildings a short time before the fire, and that they were not occupied by the subsequent lessee. On cross-examination, Green stated that he heard one Bowden tell Paine that he was occupying the buildings when the fire occurred, and this was stricken out because incompetent and hearsay. That it was hearsay admits of no doubt. If plaintiff claimed such occupancy, Bowden or others who knew the facts should have been called to so testify. The buildings, appearing to have been recently vacated by the tenant, are presumed to continue in that condition, unless shown to have been subsequently occupied. A letter by Paine to the general adjuster, dated June 20, 1893, was received in evidence, and it contained this statement: "The farm has been rented to a Mr. Smith, living near, and he had sublet the build-

ings to a single man, who was running a breaking outfit. He left the place about 7 A. M., and fire was discovered between 10 and 11 A. M.; all the farm buildings being destroyed." But this does not admit the occupancy of the buildings. It goes no further than stating they had been sublet. Whether the man had moved into the house, or was living there, is not disclosed by the record.

The appellant insists that change of possession is not pleaded. While the policy prohibits any such change, the defendant does not urge forfeiture on that ground. But that the policy was suspended because the buildings were vacant and unoccupied is expressly averred in the answer. We understand the appellant to say that the control and use of the premises by Smith as tenant, without living in ⁵⁶⁸ the house, would obviate this condition of the policy. To this we cannot assent. Occupancy of a house implies its actual use as a dwelling-house; and that of the barn, its use as is ordinarily incident to a barn belonging to an occupied house. The insurer has a right to the care involved in such an occupancy: *Ashworth v. Builders' etc. Ins. Co.*, 112 Mass. 422; 17 Am. Rep. 117. A house is unoccupied when no one is living in it: *Cook v. Continental Ins. Co.*, 70 Mo. 612; 35 Am. Rep. 438; *American Ins. Co. v. Padfield*, 78 Ill. 169; *Feshe v. Council Bluffs Ins. Co.*, 74 Iowa, 677; *Dennison v. Phoenix Ins. Co.*, 52 Iowa, 457; *Sexton v. Hawkeys Ins. Co.*, 69 Iowa, 99; *Herrman v. Adriatic Fire Ins. Co.*, 85 N. Y. 163; 39 Am. Rep. 644; *Weidert v. State Ins. Co.*, 19 Or. 261; 20 Am. St. Rep. 809.

As the undisputed evidence showed the policy void because of the buildings being unoccupied at the time of the fire, the ruling of the district court in directing a verdict must be approved. Our conclusion renders unnecessary any ruling on the motions filed.

Affirmed.

INSURANCE—FIRE—CONDITION AGAINST VACANCY AND UNOCCUPANCY OF PREMISES.—Occupancy implies actual use of a dwelling-house as such, and an insurer has a right, under a policy employing such word, to the care and supervision of the insured premises involved in such occupancy: *Limburg v. German Fire Ins. Co.*, 90 Iowa, 709; 48 Am. St. Rep. 468, and note. A temporary vacation of insured premises may not vitiate a policy containing proper provisions, where the loss does not occur during such vacancy: *Roe v. Dwelling House Ins. Co.*, 149 Pa. St. 94; 34 Am. St. Rep. 505. But compare *East Texas etc. Ins. Co. v. Kempner*, 87 Tex. 229; 47 Am. St. Rep. 99. The proper meaning of the provision will be adopted and recognized and the insurer given the protection to which it entitles him: See *Home Ins. Co. v. Scales*, 71

Miss. 975; 42 Am. St. Rep. 512; Connecticut etc. Ins. Co. v. Tilley, 88 Va. 1024; 29 Am. St. Rep. 770, and note. See monographic note to Moore v. Phoenix Ins. Co., 10 Am. St. Rep. 390, discussing the condition against vacancy and unoccupancy.

DETTMER v. BEHRENS.

[106 IOWA, 585.]

DEEDS—DELIVERY AFTER DEATH.—If the owner of a homestead sells it, receiving the greater part of the consideration during her life, and leaves a deed thereof with the depository of her will, to be delivered to the purchaser after the death of the grantor, upon the payment of the remainder of the purchase price to her executor, such transaction is valid as against her creditors, whether the deed is regarded as testamentary in character, or as deposited in escrow.

WITNESSES—COMPETENCY.—A wife who is present at a conversation between her husband and a deceased person, but does not participate therein, is competent as a witness, although her husband is prohibited by statute from testifying to such conversation.

DEEDS—DELIVERY AFTER DEATH.—The death of a grantor does not prevent the valid delivery of a deed, if the conditions under which it is held by a third person are complied with by the grantee, and the delivery to the latter relates back to the delivery to such third person.

J. D. M. Hamilton and J. L. Benbow, for the appellants.

Herminghausen & Herminghausen, for the appellee.

⁵⁸⁵ LADD, J. Philiphine Behrens died May 26, 1893; and on September 11th of the same year, her will, made July 27, ⁵⁸⁶ 1892, was admitted to probate. With it was a warranty deed, signed and acknowledged by her, conveying the house and lot in controversy to Fritz Behrens, and to which the third clause of the will evidently related: "The warranty deed inclosed herewith shall be held by my executor until the grantee, Fritz Behrens, shall pay over to the executor the sum of one hundred dollars, which shall be done within one year after my death; then the deed shall be given him." The deed and will were drawn by one Stoevener at the same time, and placed in one envelope, which was sealed. It was her direction and intention that he hold both, and deliver the deed when the one hundred dollars was paid; but, advising her the proper place was with the clerk, he left it there, inclosed as stated. As Stoevener failed to qualify as executor, though so nominated in the will,

Fritz Behrens was appointed administrator with the will annexed. On his application, showing the payment of the one hundred dollars, the court ordered the clerk to deliver the deed to him, which was accordingly done. The testatrix left neither husband nor children surviving her, and the real estate in controversy, though her homestead, unless disposed of to Behrens, is subject to the payment of any claims established against her estate: Code, sec. 2986. The plaintiff procured the establishment of her claim against the estate of the deceased in the sum of one hundred and sixty-nine dollars and five cents, with interest, as of the third class, and others aggregating about two hundred dollars were allowed. This action is brought to have the land mentioned sold, and the proceeds applied in payment of these claims. Behrens sets up in his answer that he purchased the property of the testatrix in 1890, for the agreed consideration of five hundred dollars, of which four hundred dollars was paid during the life of Mrs. Behrens in board and nursing, at the agreed price of three dollars per week, and that the remaining one hundred dollars was to be paid after her death, in order to provide for necessary funeral expenses, and upon this payment the deed which she was to leave fully prepared ⁵⁸⁷ with Stoevener should be delivered. The facts thus pleaded are fully established by the evidence.

Even though it be conceded that Behrens was prohibited from testifying by section 4604 of the code, his wife, who claimed to have been present, and not to have participated in the conversation, is competent as a witness: *Auchampaugh v. Schmidt*, 77 Iowa, 17; *Lines v. Lines*, 54 Iowa, 600; *Johnson v. Johnson*, 52 Iowa, 586. She testified to the facts alleged in the answer, is uncontradicted, and we must regard them as established. From her evidence it also appears that the testatrix told Behrens, who had been a tenant, that the lease was at an end, and he should take possession at once. He continued in occupancy of the premises, and made some improvements. The testatrix boarded with him from June 6, 1890, till November 6, 1892, after which she occupied rooms until her death, though taking her meals with others. We have, then, an agreement for the sale of the house and lot at a fair valuation, with the greater part of the consideration paid during life, according to the contract, and the deed to be delivered to the grantee after the death of the grantor upon the payment of the remainder of the purchase price to the executor of the grantor's estate. In our view of the case, it is not very material whether the deed be regarded

as testamentary in character, as contended by appellee, or the deposit with the will under the control of the executor named in the nature of an escrow, as urged by the appellant. In either event Behrens had the right to have the deed turned over to him upon the performance of the condition. If the deed had not been made or incorporated with the terms of the will, the executor would have been required, under the law, to complete the sale by executing a conveyance on the payment of the balance of the purchase price. Possession had been given, and a part of the purchase price paid, and surely the courts will order the completion of such a contract. The creditors were in no manner prejudiced. As it was her homestead, she might dispose of it during her life, regardless of their claims: Code, sec. 2973; *Delashmut v. Trau*, 44 Iowa, 613; *Officer v. Evans*, 48 Iowa, 557; *Griffin v. Sheley*, 55 Iowa, 513; *Addicken v. Humphal*, 56 Iowa, 365; *Aultman v. Heiney*, 59 Iowa, 654; *Butler v. Nelson*, 72 Iowa, 732; *Wheeler etc. Mfg. Co., v. Bjelland*, 97 Iowa, 637. And, in the absence of prejudice to the creditors, she might lawfully prescribe the entire manner in which her estate shall be administered: Code, sec. 3336. So, it is quite immaterial whether she direct the executor to execute the deed upon the payment of the balance of the purchase price, or leave the deed for him to deliver upon the happening of the contingency: See *Robinson v. Schly*, 6 Ga. 526.

If, however, we agree with the appellant, and say that this deed shall not be construed as a part of the will, we must regard Behrens as having acquired the title by its delivery. The rule is well settled that the death of a grantor will not prevent the delivery of a deed if the condition under which it is held by a third person is complied with: *Lindley v. Groff*, 37 Minn. 338; *Ruggles v. Lawson*, 13 Johns. 285; 7 Am. Dec. 375; *Stone v. Duvall*, 77 Ill. 480; *Davis v. Clark*, 58 Kan. 100. Here all conditions are met; i. e., the death of the grantor and the payment of one hundred dollars to her executor. True, there are cases holding that if a grantor places a conveyance in the hands of a third party, to be delivered to the grantees after the grantor's death, a delivery under such circumstances is inoperative, as the agency created ends with the death of the principal: See *Wellborn v. Weaver*, 17 Ga. 267; 63 Am. Dec. 235. It has been said that a deed may not be delivered by a dead hand. But delivery may be incomplete in life to become absolute after death: *Stone v. Duvall*, 77 Ill. 480; *Foster v. Mansfield*, 3 Met. 412; 37 Am. Dec. 154. And where the grantor places the deed in the hands

of a third person, to be delivered to the grantee named therein after the grantor's death, without reservation to recall, and it is not recalled, but remains in the hands of the depositary till the happening of that event, and is then turned over to the grantee, there appears to be no good reason ⁵⁸⁹ why the delivery shall not be regarded as valid and effectual, and relate back to the first delivery: *Wheelwright v. Wheelwright*, 2 Mass. 447; 3 Am. Dec. 66; *Belden v. Carter*, 4 Day 66; 4 Am. Dec. 185, and note; *Shed v. Shed*, 3 N. H. 432; *Morse v. Slason*, 13 Vt. 296; *Hatch v. Hatch*, 9 Mass. 307; 6 Am. Dec. 67; *Howard v. Patrick*, 38 Mich. 905; *Phillips v. Houston*, 50 N. C. 302; *Hockett v. Jones*, 70 Ind. 227; *Stephens v. Huss*, 54 Pa. St. 20; *Garnons v. Knight*, 5 Barn. & C. 689; *Mather v. Corliss*, 103 Mass. 568; *Hathaway v. Payne*, 34 N. Y. 92. Appellee asserts the deed never passed beyond the control of the grantor. The facts that it was left with the depositary with her last testament, and in accordance with her agreement, that she repeatedly remarked that it would be delivered to Behrens upon payment of the balance of the consideration, and that she yielded possession, and accepted the part of the consideration, fully established her determination never to recall it. As said in *Newton v. Bealer*, 41 Iowa, 339: "Where one who has the mental power to alter his intention, and the physical power to destroy a deed in his possession, dies without doing either, there is, it seems to us, but little reason for saying that his deed shall be inoperative simply because during life he might have done that which he did not do. It is much more consonant with reason to determine the effect of the deed by the intention existing up to the time of death than to refuse to give it that effect because the intention might have been changed." In *Trask v. Trask*, 90 Iowa, 318, 48 Am. St. Rep. 446, this language is used: "The facts attending the delivery to a third person which may pass the title to the grantee are not required to be such as that it is beyond the mental power of the grantor to alter his intention, or that he has not the physical power to regain possession of the deed: *Newton v. Bealer*, 41 Iowa, 334. As we have seen, the intention of the grantor is the polar star by which courts must be guided in determining the question." The rights of the creditors are in no way involved, because in no event would Behrens be held liable for more than the balance of the purchase price. We discover no reason ⁵⁹⁰ for interfering with the consummation of this agreement in the manner agreed upon by the parties. The deed, when given, related back to the time it was deposited with Stoevener and the title became

perfect in Behrens. The motion to strike requires no consideration, and is overruled. The decree of the district court is reversed.

DEEDS—DELIVERY AFTER DEATH.—If a grantor executed a deed and placed it in the hands of a third party to be held and delivered to the grantee after the grantor's death, reserving to himself no control over, nor right to recall or revoke it, these facts constitute a valid delivery: *Shea v. Murphy*, 164 Ill. 614; 56 Am. St. Rep. 215. If a vested right to the present or future enjoyment passes, it is sufficient as a deed, but the right thus passing must be to some specific thing then owned by the person executing the conveyance, and to the grantee designated in the instrument. An instrument possessing these requisites, and wanting nothing in form, substance, or legal ceremony to give it effect, is a deed and not a testamentary paper: See monographic notes to *Wilson v. Carrico*, 49 Am. St. Rep. 219, and *Brown v. Westernfield*, 53 Am. St. Rep. 553.

WITNESSES—COMPETENCY—HUSBAND AND WIFE.—Cases exist which hold that the wife is not competent to prove what was said by another in conversation with her husband, nor to prove any act done by the other in connection with, and which might be explained by, such conversation, but this view is opposed by the weight of reason and authority: See monographic note to *Commonwealth v. Sapp*, 29 Am. St. Rep. 418.

EHRCK v. EHRCK.

[106 Iowa, 614.]

HOMESTEADS—RIGHT OF SELECTION.—A wife living apart from her husband is primarily entitled to select a homestead in lands owned by her, and after her selection is made it cannot be set aside and the selection of her husband adopted in its stead, merely because she has selected the most unproductive portion of the tract and it is cut off from convenient access to the highway.

HOMESTEADS—DESERTION OF WIFE—HUSBAND'S RIGHTS TO BENEFITS.—A wife, so long as she lives apart from her husband, is not entitled to any benefit in a homestead set off in lands belonging to her, and the husband is entitled to the full right to cultivate it and enjoy the profits thereof, so long as he continues to live upon and occupy it as a homestead.

Zink & Rosberry, for the appellant.

I. S. Struble, for the appellee.

¶16 GIVEN, J. 1. Plaintiff and defendant were married in Iowa in 1880, and soon thereafter removed to Oregon, where they lived together for a time, after which the defendant returned to Plymouth county, Iowa; the plaintiff remaining in Oregon. After about eleven years' separation, the defendant returned to Oregon, and there lived with her husband until 1893, when they returned to Plymouth county, and went to live

together on a certain eighty-acre tract of land owned by the defendant. They lived together thereon until October 20, 1896, when the defendant left the plaintiff, and has ever since lived apart from him; he continuing to live upon and cultivate said land. Defendant brought an action for divorce on the ground of cruel and inhuman treatment, and in November, 1896, after a hearing on the merits, her petition was dismissed. Soon thereafter the defendant, without the plaintiff's knowledge, caused a survey and plat of a homestead in said land to be made and recorded, which she now asks to have confirmed. Thereafter plaintiff commenced this action to set aside said selection, and to restrain the defendant, as already stated. Pending this action the plaintiff caused the west forty of said eighty acres to be surveyed, platted, and recorded as a homestead, and it is this selection which he asks to have confirmed.

2. Appellant's counsel state the questions to be considered as follows: "1. Which of the homesteads selected, platted, and recorded (the one by the appellant, or the one by her husband) shall be preferred, and allowed to stand as the homestead of the family? 2. Who is entitled to cultivate the homestead, whichever it may be, and to enjoy the crops, the rents and profits therefrom?" They say: "As to which one of the two selections of homestead shall be allowed to stand depends upon the rights of the respective parties, at the times they made their respective selections, to select, plat, and record a homestead from the eighty acre tract ⁶¹⁷ owned by the appellant, and occupied by them as a homestead, and not upon the form, the fairness, or the convenience of such selections." Appellee does not question that the right to select the homestead was primarily in the owner, nor that her selection, if fairly made, with due regard to his rights, should control. He insists that her selection was made in bad faith, and with intent to deprive him of his homestead rights; that she selected the poorest, roughest, and most unproductive part of the land; and that her selection is cut off from convenient access to the highway. Appellant's selection is out of the southeast corner of the eighty; the lines being at right angles, and so as to include the buildings, and ready access to a highway. If it be true that the land selected by appellant is not the most productive part of the eighty, yet we know of no law that would compel the appellant to select the most productive part. There are many reasons that might control in making such a selection—as, for instance, that the most productive part should be reserved for the purpose of renting. If

it may be said that appellant was bound to make her selection with regard to the rights of appellee, we think the evidence fails to show that her selection was not so made. The right to select being primarily, if not exclusively, in the appellant, and she having made the selection that she did, we conclude that that selection must control. Having reached this conclusion, we are not required to determine whether the right of selection was exclusively with the appellant, nor whether appellee had any right to select.

3. The further contention as to which of these parties is entitled to enjoy the homestead is easily answered. They are both entitled to live upon and enjoy it, but, so long as appellant chooses to live elsewhere, she is not entitled to any benefit from the homestead, and appellee is entitled to have the full right to farm and cultivate the same so long as he continues to live upon and occupy it as a homestead. The decree of the district court is reversed, and the case remanded for a decree in conformity with this opinion.

Reversed.

HOMESTEAD—WHO ENTITLED TO—WIFE SEPARATED FROM HUSBAND.—A wife permanently separated from her husband by agreement, after his neglect to support her, may acquire a homestead: *Kenley v. Hudelson*, 99 Ill. 493; 39 Am. Rep. 31. See monographic note to *Wade v. Jones*, 61 Am. Dec. 591.

HOMESTEAD—RIGHTS OF WIFE DESERTING HUSBAND.—In Texas it is held that where a wife, without good cause, voluntarily abandons her husband for several years preceding his death, she forfeits her claim to the homestead and widow's allowance, but courts are not agreed as to this point: See monographic note to *Succession of Christie*, 96 Am. Dec. 414; *Stanton v. Hitchcock*, 64 Mich. 316; 8 Am. St. Rep. 821; *Duffy v. Harris*, 65 Ark. 251; 67 Am. St. Rep. 925, and note.

BADER v. DYER.

[106 Iowa, 715.]

DEEDS — HUSBAND AND WIFE — MISTAKE IN GRANTEE.—Although a husband paid the greater portion of the purchase price of land, this is not conclusive that the name of his wife was inserted in the deed as a grantee by mistake, when it appears that the wife contributed substantially to such purchase price, and to improvements on the land, and that the husband read, recorded, and kept the deed.

COTENANCY—HUSBAND AND WIFE.—Under a deed to husband and wife, they take and hold as cotenants and not as tenants by entirety, under a statute providing that conveyances to two or more in their own right create a tenancy in common.

COTENANCY—HUSBAND AND WIFE—ADVERSE POSSESSION.—If land is conveyed to a husband and his wife, and they occupy the premises together and jointly share in its benefits, the husband's possession is not adverse to that of his wife.

COTENANCY—ADVERSE POSSESSION.—If one cotenant has the sole use and possession of the subject of the tenancy, knowing that such tenancy exists, for more than thirty years without making claim of entire ownership, his possession is not adverse to his cotenants who have no knowledge of the tenancy nor of their rights or that the tenant in possession claims to hold adversely to them.

COTENANCY—ADVERSE POSSESSION—BURDEN OF PROOF.—The possession of one cotenant is presumed to be the possession of all, and, in order to rebut this presumption and make the possession adverse, it must be shown that the possession was with the intent to hold adversely, and such intent must be indicated by acts calculated to exclude the cotenant.

TRIAL—FINDING NOT PREJUDICIAL.—An erroneous finding by the trial court that a tenant in common has conveyed his interest in the land in dispute is cured by another finding that such interest has been reconveyed to him.

D. A. Wynkoop and Murray & Farr, for the appellants.

Hayes & Schuyler and Thomas & Thomas, for the appellees.

⁷¹⁶ **ROBINSON, J.** On the twenty-ninth day of May, 1855, John H. Armitage and Martha Armitage executed to Augustus L. Dyer and Elizabeth M. Dyer a warranty deed which purported to convey to the grantees a tract of one hundred and sixty acres of land, in Clinton county, for the consideration of eleven hundred and twenty dollars. During the same year a small house was built upon the land, and the grantees, who were husband and wife, moved upon it and made it their home until December, 1864, when the wife died intestate and without issue. The husband lived upon the land about twenty years after the death of his wife, and then moved to Maquoketa. He continued in possession of the land, however, until January, 1896, when he conveyed his interest therein to Jesse A. Anderson, and received a mortgage thereon for the purchase price, which he now holds. Three brothers and two sisters of Mrs. Dyer survived her, and the sisters and one brother are the plaintiffs. The defendants are the husband and his ⁷¹⁷ grantee, Anderson, who was a brother of Mrs. Dyer. D. H. Anderson, who was the third brother, has executed a quitclaim deed for the land to Dyer, and is not made a party to the action. The plaintiffs claim that each of them is entitled to an undivided one-tenth of an undivided one-half of the land described; that Jesse A. Anderson and D. H. Anderson were entitled to like shares; and that Dyer was entitled to but an undivided three-fourths of the

entire tract. The defendants allege that all the land was purchased and owned by Dyer, and that Mrs. Dyer's name was inserted in the deed therefor erroneously and by mistake, and that the mistake was not discovered until the conveyance to Jesse A. Anderson was made. Other defenses are also pleaded. The district court found and adjudged that each plaintiff was entitled to the share claimed, or to an undivided one-twentieth of the entire tract of land; that Jesse A. Anderson was the owner of the remainder; that the premises could not be divided equitably; and ordered a sale thereof, and that the defendants pay the costs of witnesses and reporter's fees.

1. Much evidence was submitted in regard to the property owned by Mr. and Mrs. Dyer, respectively, and as to the sources from which the money paid for the land in controversy was obtained. Their parents lived in Virginia. They were married there, and came to this state in the year 1853. The husband had some property which he had obtained from his father and by his labor, which he converted into money, and claims to have brought to this state about four hundred dollars in money and some other personal property. His wife also had a small amount of property, which she received from her father. She was a glovemaking and tailoress, and made gloves and clothing for others, and derived considerable revenue from that source. In June, 1854, they purchased eighty acres of prairie land and ten acres of timber for one hundred and fifty dollars, and in October of the same year the eighty-acre tract was sold for five hundred and fifty dollars, and a contract for the land in controversy was made. The five hundred and fifty ⁷¹⁸dollars so received and three hundred and fifty dollars borrowed by Dyer constituted the first payment on the land, and he claims to have paid the remainder of the purchase price, and to have repaid the money borrowed from his share of his father's estate. He received from that source, in the year 1855, about one thousand dollars. Improvements were made upon the land to the value of about six thousand dollars. It is probable that the larger part of the purchase price of the land was paid from the resources of Dyer, but, if that be true, it does not follow that a mistake was made by inserting in the deed the name of the wife as one of the grantees. It is probable that she contributed a substantial amount to the purchase price and to the cost of the improvements, nearly all of which were made during her lifetime, and it was proper and commendable to give her an interest in the land. The Armitages resided in Indiana, and the

land in question was purchased of them through their agent, named Beard, who resided near the Dyers, in Clinton county. The deed was executed in Indiana, acknowledged there before a justice of the peace, and sent to Beard, who delivered it to Dyer. When the deed was first received, Beard called Dyer's attention to the fact that a certificate showing the official character of the justice had not been attached, and the deed was returned to Indiana for a certificate of that character. The presumption is, that Dyer read the deed when he received it, and knew that his wife was named as grantee. It was not, and is not, usual in conveying land to a husband to insert the name of his wife as a grantee, unless that is required by the contract of purchase. It is true that Dyer testified that he first learned of or was informed that the deed in question was drawn to himself and his wife jointly in January, 1896, but the claim is unreasonable. He could read and write. The deed was examined when it was received. He kept it in his possession for several weeks and then had it recorded. After it was recorded it was returned to him, and ever since has been in his possession. We are satisfied that ⁷¹⁹ the deed was drawn as intended, and that he knew how it was drawn when he received it.

2. It is claimed, if a mistake in the deed in question be not shown, that it created in Dyer and his wife an estate by the entirety, which passed to him on the death of his wife, according to the rule of the common law. But section 2923 of the code provides that "conveyances to two or more in their own right create a tenancy in common, unless a contrary intent is expressed." That was the law of this state when the conveyance in question was made: Code 1851, section 1206. The effect of a conveyance to the husband and wife, under that provision as it appeared in the revision of 1860, was determined in the well-considered case of *Hoffman v. Stigers*, 28 Iowa, 302, and held to vest in them an estate in common, and with that decision we are content.

3. It is next contended that Dyer held possession of the land in question from the time the deed was delivered to him until January, 1896, under a claim of absolute and exclusive ownership adverse to all others, and that the claims of the plaintiff are barred by the statute of limitations. It is also insisted that the plaintiffs have been so grossly negligent in asserting their claims that a court of equity should not give its aid to enforce them. It is well settled that the seisin and possession of one of several tenants in common are the seisin and possession of all. It was

said in *Burns v. Byrne*, 45 Iowa, 285, "that the seisin and possession of one tenant in common are the seisin and possession of the others. One can never be disseised by another without actual ouster. By actual ouster is not meant a physical eviction, but a possession attended with such circumstances as to evince a claim of exclusive right and title, and a denial of the right of the other tenants to participate in the profits. An actual ouster, and consequent adverse possession, might be inferred from sole possession, and an exclusive reception and enjoyment of the rents and profits, with the knowledge and implied acquiescence of the other tenant in common, for the period of ten years." The rule of that case has been followed frequently ⁷²⁰ in this state: See *Kinney v. Slattery*, 51 Iowa, 353; *Hume v. Long*, 53 Iowa, 299; *Killmer v. Wuchner*, 74 Iowa, 359; *Moore v. Antill*, 53 Iowa, 612. There is not the slightest ground for claiming that the possession of Dyer during the lifetime of his wife was adverse to her nor that it was exclusive. So far as the facts are disclosed by the record, they occupied the premises together and jointly shared in its benefits. After the death of his wife, Dyer was in the sole possession of his farm until January, 1896. It does not appear that any of the plaintiffs had knowledge of the condition of the title until the farm was sold to Jesse A. Anderson. They were then asked to execute to Dyer quitclaim deeds in order to perfect his title. It thus appears that we have a case where one tenant in common had the sole use and possession of the subject of the tenancy, and knew that such tenancy existed, for more than thirty years, while his cotenants had no knowledge of the tenancy nor of their rights. It is true that in many cases the statute of limitations will begin to run against the owner of real property, or of an interest therein, even though he may not have any actual knowledge of the adverse possession and claim of the person in whose favor the statute runs; but that rule does not apply to tenants in common who have no knowledge of and no reason to know that the tenant in possession is holding adversely to them under a claim of right. The evidence in this case shows that the plaintiff knew, or must be charged with knowing, that Dyer, after the death of his wife, occupied and used the property as his own; and had he claimed title adverse to them, and had they known or had sufficient reason to know that fact, they would be barred by the statute of limitations from now recovering any interest in the land. But there is no evidence that he publicly or openly claimed the entire ownership of the land until the year 1896. It is not shown

that he rented it and appropriated the rents after he moved to Maquoketa, but the claim and proof are that he continued in possession of it. Had he rented the land after he moved to Maquoketa, and appropriated the rents to his own use, a different question might have ⁷²¹ been presented: *Moore v. Antill*, 53 Iowa, 612; *Burns v. Byrne*, 45 Iowa, 285.

But it is the rule that one tenant in common is not liable to his cotenant "for mere use and occupation of the entire lands, without any agreement with the others to pay rent and without any demand from them for possession, or refusal to surrender possession, and without his having rent for such premises from a third person": *Reynolds v. Wilmeth*, 45 Iowa, 693. Since the possession held by Dyer was presumptively for his cotenants as well as for himself, and not adverse to them, the burden is on him to show that it was adverse for the requisite length of time to give him title as against them, and that they knew, or had sufficient reason to know, the true character of his possession; but that he has failed to do. He has not shown any claim of ownership which was known to the plaintiffs, or which, in the exercise of ordinary care, they would have known, prior to January, 1896, inconsistent with his rights as a tenant in common in possession, and he has therefore failed to establish title in himself by virtue of adverse possession under a claim of entire ownership. Our conclusion finds support in the following authorities: *Lapeyre v. Paul*, 47 Mo. 590, in which it is said that, for the purpose of an ouster by a tenant in common, "there must be outward acts of exclusive ownership of an unequivocal character, overt and notorious, and of such a nature as by their import to impart information and give notice to the cotenants that an adverse possession and an actual disseisin are intended to be asserted against them": *Colman v. Clements*, 23 Cal. 245, in which it is said: "The possession of one tenant in common is presumed to be the possession of all, and, in order to rebut this presumption and make the possession adverse, it must be shown that the possession was with the intent to hold adversely, and such intent must be indicated by acts calculated to exclude the cotenant": See, also, *Warfield v. Lindell*, 30 Mo. 281; 38 Mo. 561; 90 Am. Dec. 443; *Dubois v. Campau*, 28 Mich. 304; *Thornton v. York Bank*, 45 Me. 161; *Colburn v. Mason*, 25 Me. 435; 43 Am. Dec. 292; *Parker v. 722 Proprietors*, 3 Met. 91; 37 Am. Dec. 121; *Mansfield v. McGinnis*, 86 Me. 118; 41 Am. St. Rep. 532; *McClung v. Ross*, 5 Wheat. 116; 1 Am. & Eng. Ency. of Law, 2d. ed., 801; 11 Am. & Eng. Ency. of Law, 1st ed., 1112.

4. The defendant, Jesse A. Anderson, has taken a separate appeal and complains of the action of the district court in finding that his share and that of D. H. Anderson in the property in question had been conveyed to Dyer, and in finding that Jesse A. Anderson was represented by counsel. The record shows that the defendant Anderson was represented in the district court by an attorney, and that the answer filed by him admitted that D. H. Anderson had conveyed his interest in the land to Dyer. If the record is erroneous, it should have been corrected in the district court. It cannot be assailed here for the first time. If the district court erred in finding that Jesse A. Anderson had conveyed his interest to Dyer, the error was without prejudice, as the court found that the interest was reconveyed to Jesse A. Anderson. The pleadings showed that D. H. Anderson did not have any interest in the property. If that was not true, Jesse A. Anderson cannot complain of the error. The decree of the district court is sustained by the evidence, and appears to be correct. It is therefore affirmed.

HUSBAND AND WIFE—CONVEYANCE TO—TENANCY CREATED.—A husband and wife may hold property as tenants in common: Robinson, Appellant, 88 Me. 17; 51 Am. St. Rep. 367. Whether they take as cotenants or tenants by the entirety is to be gathered from the instrument which passes the estate to them, and if it appears from such instrument that it was the intention for them to take as cotenants, that intention must prevail: Fulper v. Fulper, 54 N. J. Eq. 431; 55 Am. St. Rep. 590, and note. See Wilkins v. Young, 144 Ind. 1; 55 Am. St. Rep. 162, and note; Thornberg v. Wiggins, 135 Ind. 178; 41 Am. St. Rep. 422, and note.

HUSBAND AND WIFE—ADVERSE POSSESSION BETWEEN. It seems to be generally agreed that a husband cannot hold adversely to his wife, nor the wife hold adversely to her husband, premises of which they are in joint occupancy: Extended note to Gafford v. Strauss, 18 Am. St. Rep. 113.

COTENANCY—ADVERSE POSSESSION BETWEEN.—The possession by one cotenant of the common property is presumed to be the possession of all, and each cotenant has a right to rely upon such presumption until the acts or declarations of the tenant in possession are palpably inconsistent with it: Wheeler v. Taylor, 32 Or. 421; 67 Am. St. Rep. 540, and note. See Fuller v. Swensberg, 106 Mich. 305; 58 Am. St. Rep. 481; Price v. Hall, 140 Ind. 314; 49 Am. St. Rep. 196. Adverse possession by one cotenant is not sufficient to create a title by prescription against the others unless there is a clear, positive, and continued disclaimer of title, and the assertion of an adverse right brought home to the knowledge of the others, although great lapse of time, with other circumstances, may warrant the presumption of a disseisin or ouster by one cotenant or other joint owner: Pillow v. Southwestern etc. Co., 92 Va. 144; 53 Am. St. Rep. 804. Cotenants, to be barred of their rights by the possession of another cotenant, must be aware of such rights, and of their repudiation by such other cotenant: Wheeler v. Taylor, 32 Or. 421; 67 Am. St. Rep. 540.

CASES
IN THE
SUPREME COURT
OF
KANSAS.

TAYLOR v. WINNIE.

[59 KANSAS, 16.]

EXEMPTIONS IN FAVOR OF NONRESIDENTS NOT HEADS OF FAMILY NOR MINORS.—If a statute provides that the library of a professional man residing in the state is exempt from execution, and that, on the death of a person leaving a child but no widow, all exempt property shall belong to such child, a son of a deceased professional man leaving no widow is entitled to his library free of the claims of his creditors, though such son resides in another state, and is not the head of a family nor a minor.

Fred. W. Casner, H. Pierce, and Le Roy Kramer, for the plaintiff in error.

McKinstry & Fairchild, for the defendants in error.

¹⁷ **JOHNSTON, J.** H. C. Johns, who was engaged in the practice of law at Hutchinson, Kansas, died intestate, leaving no widow surviving him, but only a child, who was self-supporting, was more than twenty-one years of age, and a nonresident of the state. He owned, and died in the possession of, a law library, valued at two thousand four hundred and fifty-seven dollars and fifty cents, the right to which is the subject of the present controversy. The substantial point of dispute between the parties is, whether the library constitutes assets of the estate, to be administered upon by the administrator, or whether being exempt, it passed absolutely to the surviving child.

While Johns was not the head of a family and had no one depending upon him for support, his library was nevertheless exempt from attachment and execution. The statute provides that

the library of a professional man residing in this state, who is not the head of a family, is exempt: Gen. Stats. 1897, c. 118, sec. 5. The statute makes provision for the disposition of exempt property, and prescribes that the widow shall be allowed to keep absolutely out of the estate for the use of herself and children all the personal property of the deceased which was exempt to him from sale or execution at the time of his death. "If there be no children, then the said articles shall belong to the widow; and if there be children and no widow, said articles shall belong to such children." The property so kept out of the estate is not to be appraised as assets of the estate, nor is it liable in any event for the debts of the deceased: Gen. Stats. 1897, c. 107, secs. 60-62. To entitle a widow or children to the benefits of the ¹⁸ foregoing provision it is not necessary that they should have been residing with the deceased at the time of his death, or that they should have been dependent upon him for support. Neither are the benefits confined to minor children, nor to those who are residents of the state. There are, doubtless, greater reasons for providing exemptions in favor of the head of a family and extending the protection of the exemption to a widow or children who were dependent on him for a support. From considerations of public policy, however, an exemption is absolutely given to one who is not the head of a family; and the statutes provide without qualification that personal property of the deceased at the time of his death shall be kept by the widow or the children regardless of condition, age, or residence. It is contended that where there is no family relation or family needing protection there is no reason why the property of the deceased should not be appropriated to the just claims of creditors. But this is an argument to be addressed to the law-making department. It was competent for the legislature to extend the exemption to one who was not the head of a family, and to provide that upon his decease the property should pass absolutely to the widow and children. It has done so in terms that admit of no doubt; and with the necessity or wisdom of such provision the court has nothing to do. It cannot be regarded as a hardship upon creditors, as credit could not have been extended or satisfaction anticipated from the property in question. As has frequently been declared, exempt property is something toward which the eye of the creditor need never be turned. Under the statutes the property passed absolutely to the son of the deceased, and was not subject to the payment of the costs and expenses of administration or the payment of debts. He hav-

ing the right to keep the library absolutely ¹⁹ out of the estate, the administrator was not entitled to the possession of the same, and the court ruled correctly in sustaining the demurrer to the plaintiff's petition.

Judgment affirmed.

EXECUTION—EXEMPTION IN FAVOR OF NONRESIDENTS. In Maine, the exemption extends to the property of a "debtor," and is not limited to the property of a citizen. Thus a citizen of another state or county, becoming a debtor while temporarily residing within the state of Maine, is not excluded from the benefit of the exemption laws of that state except in the single case of a fishing boat: *Everett v. Herrin*, 46 Me. 357; 74 Am. Dec. 455. But the exemption laws of Tennessee were enacted for the protection of citizens of that state only and nonresidents cannot avail themselves of their benefit: *Prater v. Prater*, 87 Tenn. 78; 10 Am. St. Rep. 623.

EXECUTIONS—EXEMPTIONS—RIGHTS OF CHILDREN OF DECEASED DEBTOR.—The library and implements of a professional man are exempt from execution whether he is the head of a family or not: *Roberts v. Moudy*, 30 Neb. 683; 27 Am. St. Rep. 426, and note. Property exempted to heads of families, if the father dies, is protected in the hands of his personal representative, for the use of his children: *Denny v. White*, 2 Cold. 283; 88 Am. Dec. 596.

GORDON v. BODWELL.

[50 KANSAS, 51.]

EXECUTION WITHOUT A SEAL, WHETHER VOID.—An order of sale issued without a seal is void, and cannot be amended so as to support a sale previously made thereunder, if the constitution of the state provides that all courts of record shall have a seal, to be used in the authentication of all process.

Mills, Smith & Hobbs, for the plaintiffs in error.

Samuel Maher, for the defendants in error.

⁵¹ ALLEN, J. In this case we are called on to decide the single question, whether an order of sale issued ⁵² without a seal may be amended by affixing the seal after a sale has been made thereunder by the sheriff. An order of sale was issued on the judgment, but by mistake the clerk failed to affix the seal. The omission was not discovered until after a sale had been made of the property described in the order and the purchase money had been paid. On the application of the plaintiff, the court permitted the seal to be affixed, and afterward confirmed the sale. The defendants bring the case here, alleging error in these proceedings.

On the part of the plaintiff in error, attention is called to

section 1, of article 3, of the constitution, which provides: "All courts of record shall have a seal to be used in the authentication of all process." By section 441 of the code it is provided that executions shall be deemed process of the court. The first paragraph of the syllabus in *Dexter v. Cochran*, 17 Kan. 447, is, "A summons issued without a seal from a district court is void." In *Insurance Co. v. Hallock*, 6 Wall. 556, it was held that an order of sale issued on a judgment of a court of common pleas in Indiana without a seal was void, and that a sale of property thereunder conveyed no title. In the case of *Boal v. King*, 6 Ohio, 11, it was held that a writ of fieri facias issued without a seal, from a court having and using a seal, is void. In *Weaver v. Peasley*, 163 Ill. 251, 54 Am. St. Rep. 469, it was held that an execution issued without a seal was void, and that it could not be amended. In *Choate v. Spencer*, 13 Mont. 127, 40 Am. St. Rep. 425, it was held that a summons without a seal was void. In the case of *Lindsay v. Commissioners*, 56 Kan. 630, it was held that the signature of the clerk is essential to a valid summons. These are all the authorities cited by the plaintiff in error bearing on the question before us.⁵³ The others relate to the force of constitutional requirements.

On the other hand, it is contended by counsel for the defendant in error that, whatever the rule may be with reference to the necessity of authenticating original process, through which the court obtains jurisdiction, by affixing the seal, paragraph 4222 of the General Statutes of 1889, which provides that "the court may before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding by adding or striking out the name of any party, or correcting a mistake in the name of a party, or a mistake in any other respect," applies to this case, and authorized the amendment allowed. In support of this contention the cases of *Arnold v. Nye*, 23 Mich. 287, *Bridewell v. Mooney*, 25 Ark. 524, *Taylor v. Courtney*, 15 Neb. 190, *Sawyer v. Baker*, 3 Me. 29; *Corwith v. State Bank*, 18 Wis. 587 (*560), 86 Am. Dec. 793, and *Purcell v. McFarland*, 1 Ired. 34, 35 Am. Dec. 734, holding that an execution issued without a seal is not absolutely void, but may be amended by leave of the court, are cited.

In the following cases it was held that a summons issued without a seal might be amended: *Strong v. Catlin*, 3 Pinney, 121; *State v. Davis*, 73 Ind. 359; *Cartwright v. Chabert*, 3 Tex. 261; 49 Am. Dec. 742. In *Lowe v. Morris*, 13 Ga. 147, it was held that a writ of error might be amended by attaching the seal,

and in *People v. Steuben*, 5 Wend. 103, that a writ of certiorari might be amended in like manner. In *Jump v. Batton*, 35 Mo. 193, 86 Am. Dec. 146, it was held that a writ of attachment issued without a seal was not void, but might be amended; and the same was held with reference to a writ of replevin in *Spratley v. Kitchens*, 55 Miss. 578, and in *Potter v. Smith*, 7 R. I. 55. In Massachusetts, the constitution provides that every ⁵⁴ original writ shall be under seal and signed by the clerk. It was held, in *Austin v. Lamar Ins. Co.*, 108 Mass. 338, that a summons issued without the signature of the clerk was not absolutely void, but might be cured by amendment: *Henderson v. Graham*, 84 N. C. 496, is to the same effect; though the requirement that the summons be signed by the clerk is statutory.

Counsel for defendant in error also contends that the first proposition stated in the syllabus to *Dexter v. Cochran*, 17 Kan. 447, was not necessary to the decision of the case, and is therefore not binding as authority, because the court held the summons valid, and that the record failed to make an affirmative showing of the absence of the seal. It is also argued that the seal is not a part of the process itself, within the meaning of the constitutional and statutory requirements, but that it is merely evidence used to authenticate the process; and on the authority of *State v. Foulk*, 57 Kan. 256, *Entrekin v. Howard*, 16 Kan. 551, and *Simon v. Stetter*, 25 Kan. 155, it is argued that, where the process is issued by one officer of the court—the clerk, to another officer of the same court—the sheriff, and is not to be served on any outside party, the authentication by a seal becomes a mere matter of form; and that within the spirit of the code omissions of such mere formal matters may, by leave of the court, be supplied at any time.

The writer is of the opinion that the ruling of the trial court is supported by a decided preponderance of authority, and accords with the modern tendency to disregard all mere technical requirements which do not affect substantial rights. The majority of the court, however, adhere to the rule announced in *Dexter v. Cochran*, 17 Kan. 447, and hold that, as the constitution requires the use of a seal in the authentication of ⁵⁵ all process, no distinction can be drawn between original, mesne, and final process; that the constitutional provision is mandatory, and its force may not be impaired by the legislature, either by attempting directly to dispense with its requirements or through the indirect method of allowing the process to be amended after it has spent its force.

The order of the district court is reversed, and the cause remanded with directions to set aside the confirmation of the sale, and to overrule the motion of the plaintiff for leave to attach the seal to the order of sale.

Allen, J., dissenting.

EXECUTION WITHOUT SEAL.—An execution not under the seal of the court is void, and cannot be made valid by an amendment after a sale thereunder: *Weaver v. Peasley*, 163 Ill. 251; 54 Am. St. Rep. 469. Compare monographic note to *Choate v. Spencer*, 40 Am. St. Rep. 430; note to *Oelbermann v. Ide*; 57 Am. St. Rep. 950.

WALKER v. BRANTNER.

[50 KANSAS, 117.]

NEGLIGENCE—CONTRIBUTORY—WHEN DOES NOT APPEAR AS A MATTER OF LAW.—An engineer who, at a point about three hundred feet distant from a crossing, stops his train and blows two long blasts as a crossing signal, and, looking out to see that the crossing is clear, then starts toward it with his train, cannot be adjudged guilty of contributory negligence as a matter of law, because he did not send a flagman ahead to see that the crossing was clear, nor, at a later moment, look ahead at a point where he might have seen an approaching train of another road, and did not keep his train under such control that he was able to stop, and thus avoid a collision. Whether he took precautions commensurate with the dangers involved is a question to be determined by the jury from all the evidence.

EVIDENCE—DECLARATIONS OF INJURED PERSON AS EVIDENCE AGAINST HIS WIDOW SUING TO RECOVER FOR HIS DEATH.—Declarations made after an accident, but on the same or the following day, by an engineer injured by a collision at a railway crossing, are admissible in evidence against his widow in an action brought by her to recover of the railway company on the ground that his injury and subsequent death were due to defendant's negligence. These declarations, so far as they refer to the circumstances preceding the accident, were, when made, if they tended to show want of care on the part of the decedent, declarations of the person against his interest, and admissible on that ground.

EVIDENCE—CONVERSATION OF A DECEASED PERSON WITH AN AGENT OF HIS ADVERSARY.—A superintendent of a railway corporation is not precluded from testifying to a conversation between himself and an injured engineer, who subsequently died from his injury, if it does not appear that in holding such conversation the superintendent was authorized to represent the corporation.

Action to recover for the death of the plaintiff's husband through, as was alleged, the negligence of the servants and employees of the railway corporation of which the defendants were

receivers. The decedent was an engineer in charge of a locomotive and train of the Memphis railway. The tracks of that railway and of the Frisco railway, operated by the defendants, crossed each other nearly at right angles at a point near the intersection of the Memphis and Santa Fe railroads. The decedent, on the day of the accident, stopped his train two hundred and ninety-three feet south of the crossing and blew two long blasts as crossing signals, and he and his fireman looked out on both sides of the engine to see that the crossing was clear. He then gave signals and started his train across the track, taking his position on the right side of the cab of his engine. The fireman commenced picking coal and putting it in the fire, and sweeping the deck. As the train reached the roundhouse, about fifty feet south of the crossing, a blast of a whistle was heard, and decedent immediately reversed his engine, and took other measures to stop his train, but his engine, notwithstanding, ran into the train on the track of the defendants' railway, and the decedent, just before the collision, jumped from his engine, but got caught, receiving injuries from which he died. The facts relating to the management of the defendants' train were such as to warrant a finding of negligence, and another question was, whether the decedent had not also been negligent and thus contributed to his injury. The defendants offered to prove by their superintendent that he conversed with the decedent either on the day of the accident or the next day, and that the decedent then said that, after whistling for the crossing, he did not look out of the west side of his cab to see whether another train was approaching on the defendants' road, and that if he had looked, he might have stopped his train in time to avoid the accident. This evidence was rejected, on the ground that the statements sought to be proved were incompetent, hearsay, and were transactions with a deceased person. The defendants asked the court to submit to the jury certain questions which were numbered 6, 7, 16, and 17, which were as follows: "6. Did the said engineer, Brantner, look out of the west side of the cab of his engine toward the Frisco track after he had whistled for the crossing? 7. Did the fireman on decedent's engine look for a train on the Frisco road after his engineer, Brantner, had whistled for the crossing?" "16. Was the east end of the Frisco depot and a portion of the Frisco track visible from the point where the engineer Brantner whistled for the crossing? 17. Could the Frisco train have been seen by the crew of the Memphis train while the Memphis train was traveling from the point

where it whistled for the crossing to a point one hundred and seventy-two feet south of the crossing, if the Frisco train was as far east as the east end of the Frisco depot, had they been looking?" These the court refused to submit to the jury. Verdict and judgment in favor of the plaintiff, and the defendants appealed.

J. W. Gleed, J. L. Hunt, Gleed, Ware & Gleed, D. E. Palmer, and C. Hamilton, for the plaintiff in error.

J. D. McCleverty, for the defendant in error.

¹²³ ALLEN, J. It is earnestly insisted on behalf of the plaintiffs in error that no recovery can be sustained under the facts shown by the record in this case. No claim is made that there was not a sufficient showing of negligence on the part of the engineer and other employes in charge of the Frisco train. That they might have seen the Memphis train approaching the crossing as the Frisco train came out from behind the depot is clear and beyond dispute. The Memphis train, consisting of an engine and fourteen cars, was more than five hundred feet long, and the caboose must at the time of the collision have been one hundred feet south of the point where the engine stopped and whistled. It would seem that if Dwyer, the Frisco engineer, looked, as he claims he did, he must certainly have seen the Memphis train moving toward the crossing. But counsel for the defendants do contend with much earnestness that the testimony shows that Brantner was guilty of such contributory negligence as bars a recovery. It is insisted that he proceeded toward the crossing without availing himself of the opportunity he had to look between the roundhouse and the Frisco depot before his view was cut off; that he did not look at the earliest opportunity after passing the roundhouse, and that he did not ¹²³ keep his train under such control as to be able to stop and avoid the collision. It is also urged that in approaching a crossing where the view in one direction was obscured to such an extent as in this case, it was the duty of those in charge of the Memphis train to send a flagman forward to ascertain whether the crossing could be safely made before proceeding. These are all considerations which it was eminently proper for counsel to urge to the jury, but under all the facts disclosed by the testimony, it cannot be declared as matter of law that Brantner was guilty of contributory negligence. An engineer, while approaching a railroad crossing with his train, must take precautions commensurate with the dangers of the situation.

Whether Brantner, after having stopped and given the crossing signal and having looked in the direction from which the Frisco train came, had a right to proceed to the crossing without taking other precautions than he did, was a question to be determined from all the evidence. There was some conflict in the statements of different witnesses with reference to the giving of signals, the relative time of starting trains, the speed at which they moved, and the position of the Memphis engine when the Frisco engine first came in sight at the east end of the depot. It is not our province to determine whether, as a matter of fact, the view of the Frisco track was entirely cut off from Brantner, before the Frisco engine came in sight. Nor do we deem it incumbent on us to declare, as matter of law, that Brantner was bound to send a flagman forward past the roundhouse and get an unobstructed view to the west along the Frisco track before proceeding to make the crossing. The Frisco train had to cross the Santa Fe road before reaching the Memphis, and at the crossing of the Santa Fe the engineer had a view of the ¹²⁴ Memphis track for a considerable distance and could have seen Brantner's train approaching the crossing. Whether, under these circumstances, Brantner had a right to assume that he would look and would see the train is for the jury to determine. There was no error in overruling the demurrer to the plaintiff's testimony.

The defendant sought to prove statements made by Brantner after the collision with reference to his conduct immediately prior to it. This testimony was excluded. It is apparent that Brantner's declarations would have much weight with the jury, and also that the offered testimony bore directly on the vital issue in the case. It may be that some of the statements which the defendant claimed it could prove were in the nature of expressions of opinion, or deductions from other facts, yet, being the statements of Brantner with reference to the occurrence, they were admissible as declarations against interest. At the time the statements were made Brantner alone had a cause of action against the railway company for the injury. No cause of action had then accrued in favor of the plaintiff, for Brantner was living. The declarations offered fall within the rule allowing the admission of statements of third parties as declarations against interest. They were made by a person since deceased concerning a transaction of which he had knowledge, and were against the interest of the person making them. The cases of Louisville etc. R. R. Cos. v. Berry, 2 Ind. App. 427, and

Johnston v. Oregon etc. R. R. Co., 23 Or. 94, give some support to the ruling of the trial court, but the matter does not seem to have received full consideration in either case, and we are not satisfied with the conclusions reached. The citation of *Bradford v. Downs*, 126 Pa. St. 622, is a ¹²⁵ mistake. We have not been able to find the case. In section 147 of *Greenleaf on Evidence*, fifteenth edition, the author says: "This class embraces not only entries in books, but all other declarations or statements of facts, whether verbal or in writing, and whether they were made at the time of the fact declared, or at a subsequent day. But to render them admissible, it must appear that the declarant is deceased, that he possessed competent knowledge of the facts, or that it was his duty to know them; and that the declarations were at variance with his interest. When these circumstances concur, the evidence is received, leaving its weight and value to be determined by other considerations." See, also, *Lax v. Forty-second etc. R. R. Co.*, 14 Jones & S. 448; *Stein v. R. R. Co.*, 10 Phila. 440. It is insisted that the spirit, if not the letter, of section 333 of the code, General Statutes of 1897, prohibits O'Hara, the superintendent of the railway company, from testifying to a conversation had personally by him with Brantner; that O'Hara represented the railway company, and stands in the relation of a party in this case adverse to the heir at law of a deceased person. Cases are cited where the representative of a corporation who had personally entered into a contract for the corporation with one who afterward died has been held incompetent to testify concerning the transaction in an action between the corporation he represented and the personal representative of the other party to the contract.

If we concede the soundness of the rule declared in these cases, concerning which, however, we express no opinion, they are distinguishable from this. It does not appear that O'Hara was authorized to represent the railway company in any transaction with Brantner. The conversation, so far as the record discloses, was not connected in any manner with any ¹²⁶ negotiations, or business transaction, conducted by O'Hara for the company. He, therefore, stands in the same relation to the conversation as any other witness to it. The error in rejecting this testimony is emphasized by the refusal of the court to submit to the jury the sixth and seventh special questions, which call for answers as to whether Brantner and the fireman looked out for a train from the west after the signal for the crossing was given. These questions were quite as pertinent as any that were submitted,

and bore directly on the turning point of the case, namely, the question as to the contributory negligence of Brantner. The sixteenth and seventeenth questions also appear to be proper ones. We are at a loss to know on what theory the court struck them out. Other errors are alleged, but it seems unnecessary to discuss them. For the error in excluding the testimony as to the statements of Brantner, and in refusing to submit the special questions mentioned, the judgment must be reversed, and the case remanded for a new trial.

NEGLIGENCE—CONTRIBUTORY—QUESTION FOR JURY, WHEN.—What is contributory negligence is generally a question of fact for the jury to determine from all the circumstances of the case: *Note to Bamberger v. Citizens' Street Ry. Co.*, 49 Am. St. Rep. 920. The two essential elements in contributory negligence are a want of ordinary care on the part of the plaintiff, and a causal connection between that and the injury complained of: *Hollenback v. Dingwell*, 16 Mont. 335; 50 Am. St. Rep. 502. When the question is not free from doubt the facts should be submitted to the jury: *Moon v. Northern Pac. R. R. Co.*, 46 Minn. 106; 24 Am. St. Rep. 194, and note; *Promer v. Milwaukee etc. Ry. Co.*, 80 Wis. 215; 48 Am. St. Rep. 905, and note.

PROVIDENT LOAN TRUST CO. v. MARKS.

[59 KANSAS, 230.]

MORTGAGE—FORECLOSURE OF—WHEN CONCLUSIVE OF AN ADVERSE TITLE.—If, in a suit to foreclose a mortgage, it is alleged that a party defendant has or claims some interest in the mortgaged premises, which, if it exists, has accrued subsequently and is subordinate to the plaintiff's mortgage, a judgment by default against such defendant is conclusive that his title is subsequent and subordinate to the mortgage, and precludes him from afterward asserting a title held by him at the commencement of the former suit, and which was anterior and paramount to the plaintiff's mortgage.

MORTGAGE—FORECLOSURE OF.—A claimant of title paramount to a mortgage is a proper party to a suit to foreclose it, and, if the decree is against him, it is conclusive of his claim of title.

A JUDGMENT IN FAVOR OF THE PLAINTIFF in an action in which he claimed to be the owner and entitled to the immediate possession of real property, and that the defendants unlawfully kept him out of possession thereof, does not prevent the subsequent assertion by the defendants of a mortgage held by them on the same property, because such mortgage, if presented in the former suit, would not have constituted any defense thereto.

James V. Humphrey, for the plaintiff in error.

D. H. Brown, for the defendant in error.

²³⁰ **ALLEN, J.** The essential facts on which the questions presented in this case arise are as follows: On the 9th of August,

1886, Caroline Matthews brought ²³¹ an action in the district court of Morris county to foreclose a mortgage executed by Daniel B. Jackson and wife on a quarter section of land in that county. Burt S. Dolloff was made a party defendant. It was alleged in her petition "that defendants, Burt S. Dolloff . . . have or claim to have some interest in, or lien upon said premises, or part thereof, which interest or lien, if any such exists, has accrued subsequently and is subject to plaintiff's lien thereon under said mortgage."

Service by publication was duly made, and a judgment rendered for foreclosure of the mortgage and sale of the mortgaged property and barring each and all of the defendants of all right, title, and interest in the mortgaged property. In pursuance of this judgment the property was duly advertised, sold, and deeded to Martin McCleery for the sum of six hundred and sixty-six dollars, which was more than two-thirds the appraised value. The sheriff's deed was executed on the 19th of April, 1887. At the time of the execution of the mortgage under which this sale was made, Burt S. Dolloff in fact held the paramount title to the land. His title was prior and superior to that of Jackson, the mortgagor. He had no actual notice of the pendency of the suit. After the execution of the sheriff's deed to him, Martin McCleery and his wife executed to the Central Kansas Loan and Investment Company a mortgage, which the plaintiff in error sought to foreclose in this action. The mortgage was duly assigned to T. S. Blodgett, and by him assigned to the plaintiff. Neither of these assignments was ever recorded. In May, 1887, Burt S. Dolloff executed a quitclaim deed of the land to Isaac Hopper, who on the 19th of November, 1887, deeded it to Allen Gale. On the 12th of December, 1887, Allen Gale brought an action against Martin McCleery ²³² and the Central Kansas Loan and Investment Company, alleging that he was the owner and entitled to the immediate possession of the land in controversy and that the defendants unlawfully kept him out of the possession and praying judgment for the recovery of the possession of the premises. McCleery answered, and contested the plaintiff's right of recovery. The Central Kansas Loan and Investment Company made default. The trial resulted in a judgment in favor of Gale, against both defendants, for the recovery of the possession of the land on the payment of a tax lien of seventy-three dollars and forty cents.

The case now under consideration is an action brought by the Provident Loan Trust Company against Martin McCleery and

wife, Allen Gale, and E. J. Marks, to foreclose the mortgage executed by McCleery and wife to the Central Kansas Loan and Investment Company, which the plaintiff held by assignment through Blodgett. The defendant Marks claimed in this action to have the title paramount, under a conveyance to him by Gale. The case was tried without a jury, and the court made special findings showing the facts above stated and rendered judgment in favor of the defendant Marks. On proceedings in error this judgment was affirmed by the court of appeals. Afterward, on the petition of the plaintiff in error, the case was ordered to be certified to this court. Two questions are presented by the record: 1. Did the judgment in the action brought by Caroline Matthews against Jackson, Dolloff, and others, and the sale thereunder to McCleery, pass Dolloff's title to McCleery? 2. Is the judgment in the action brought by Allen Gale against McCleery and the Central Kansas Loan and Investment Company a bar to plaintiff's claim of a lien on the mortgaged property?

In support of the view of the law taken by the lower ²³³ courts, it is contended that the object of a suit to foreclose a mortgage is to secure a judicial sale of the estate which the mortgagor held in the land at the time of the execution of the mortgage; that all persons acquiring interest subsequently through the mortgagor are proper and necessary parties defendant; that the holder of a prior paramount title is neither a necessary nor a proper party, and that a judgment of foreclosure by default in such a case does not affect the paramount title. It is also urged that the averments in the petition of Caroline Matthews were that the interests of Dolloff were subsequent and inferior to her mortgage, when, in fact, they were superior; and that the judgment rendered on this petition would have barred any subsequent interest that Dolloff might have had, but did not bar his prior paramount title, which was not mentioned in her petition. This view seems to have been adopted by the court of appeals. The reasoning, however, appears to us fallacious. The effect of a default is to admit the truth of the averments of the petition. Those under consideration, with reference to Dolloff's title, were that he had or claimed some interest in the premises, but that is interest accrued subsequently and was subject to the lien of the plaintiff's mortgage. On his admission by his default that these averments were true, a judgment was entered and a sale of the property made to McCleery. The contention in this case has been, and now is, that the averments in the petition of Caroline Matthews with reference to

title were false. Marks now denies that which by his default Dolloff admitted. The very object and purpose of judicial proceedings is to determine the truth or falsity of the allegations of fact, of the parties to controversies in the courts, as well as their rights under the law applicable to the facts as finally found. When summoned in an action, the defendant is called on to challenge ²³⁴ the truth of any statement of fact which he denies, and the correctness of any claim of right under the law applicable to the facts alleged. If it should be held that a judgment by default is binding only when based on a truthful pleading, there would be very little advantage in making any appearance in actions relating to land unless some present right to the use of the property should be threatened, for nothing would be lost by the default, and the same defense could be made at any time thereafter. Although Dolloff held the full title to the land in controversy, by his default he admitted the superiority and validity of the mortgage which was foreclosed.

But it is said that the holder of the title paramount is not a proper party to an action to foreclose a mortgage, and that for this reason the district court had no jurisdiction over Dolloff. Many authorities from other states are united in support of this position. It is conceded by counsel for the plaintiff in error that not only in those states where the courts of law and equity are distinct, but also in most of the code states, this rule is recognized. In *Bradley v. Parkhurst*, 20 Kan. 462, it was held, Chief Justice Horton dissenting, that "the question of adverse and paramount title may be litigated in an action to foreclose a mortgage." And this rule was affirmed and applied in *Fisher v. Cowles*, 41 Kan. 418, and was recently recognized in *Park v. Busenbark*, 59 Kan. 65. In *Barton v. Anderson*, 104 Ind. 578, it was held: "In a suit to foreclose a mortgage, a judgment by default against one who is made a party to answer as to any interest he may have in the mortgaged property is conclusive as to any prior claim of interest or title adverse to the plaintiff."

Whatever the course of decisions may be in other states, we are entirely satisfied with the rule established ²³⁵ in Kansas. The advantages accruing to litigants through a full determination in one action of all conflicting claims of title to the property which is the subject of litigation are so numerous and so great, and accord so thoroughly with the spirit of our laws, that we should not hesitate to stand alone in upholding the interpretation heretofore placed on our code. Some of the courts seem to take the position that, although title paramount may not be litigated, the extent of the interest of the mortgagor at

the time of the execution of the mortgage may be determined in the action to foreclose it. It is exceedingly difficult to trace any definite boundary between such an adjudication and a full determination of all adverse claims to the property. The practice of clearing up all clouds on the title and entering decrees binding on all claimants is so general and so advantageous that, in this very action, the fact that Marks, the defendant in error, in whose favor the lower courts have decided, claimed adversely to the plaintiff in error by title paramount in an action to foreclose the plaintiff's mortgage, seems to have been lost sight of. In this case Marks occupied precisely the same relation to the action that Dolloff did to the action brought by Caroline Matthews; yet the court rendered a judgment in favor of Marks, relieving the land from the burden of the plaintiff's mortgage, while denying the right of the plaintiff in the former action to make Dolloff a party defendant.

Was the judgment in the action brought by Allen Gale against McCleery and the Central Kansas Loan and Investment Company a bar to the enforcement of the plaintiff's mortgage in this action? It is conceded by counsel for the plaintiff in error that, owing to the fact that the assignments of the mortgage were not recorded, ²³⁶ the case stands precisely as though the plaintiff in this action had been made a defendant in that, and had suffered judgment to be entered against it by default. Did the judgment in that action determine any question as to the validity of the plaintiff's mortgage lien? The only relief asked in the petition was a judgment for the recovery of the possession of the property, and that was the only relief granted by the judgment rendered in the case. The plaintiff in this action does not now claim, and never has had or claimed, any right to the possession of the land. McCleery claimed both title and right of possession. He contested those rights with Allen Gale, and was defeated. The judgment was binding on him. It was also binding on the plaintiff to the full extent of the matter adjudicated. It determined that the plaintiff in this action had no right to possession of the property. It might even be conceded for the purposes of this case that it determined that the plaintiff had no title to the land. None is claimed here.

The claim of the plaintiff is, first, that it is entitled to a money judgment against McCleery for the amount of the note secured by the mortgage. No question is raised as to its right to such a judgment. It claims further that it has a lien on the mortgaged land to secure the payment of the money due it from McCleery, and it seeks to enforce that lien in this action. Its

right to do so was not barred in terms by the judgment rendered in favor of Gale, nor was there anything in the pleadings or judgment in that action which by inference or implication constitutes a bar. The plaintiff had no defense to Gale's action, and was not called on to litigate its right to a lien under its mortgage. The judgment, therefore, constitutes no bar to a foreclosure in this action. The judgment of the court of appeals and that of the district court²³⁷ are reversed, and the cause is remanded to the district court with directions to enter a judgment in favor of the plaintiff, on the facts found, against the defendant Marks, for the foreclosure of the plaintiff's mortgage and a sale of the mortgaged premises.

On the Litigation of Paramount Titles in a Suit to Foreclose a Mortgage.*

At the outset of our inquiry into this subject it will be of assistance to state, and to keep in mind during later investigations, several propositions, so well settled that the citation of supporting authorities would be superfluous, and sufficiently removed from the exact question in hand to render anything more than a bare statement of them little less than inexcusable. The foreclosure of a mortgage is an equitable proceeding. It is a matter of which chancery has inherent original jurisdiction, and in the many states where statutes have been enacted conferring jurisdiction of such matters upon equity courts, and in those where the distinction between law and equity has been abolished, the foreclosure of mortgages follows the principles and rules of practice already established by courts of equity in the exercise of their general jurisdiction. The foreclosure of a mortgage is intended merely to determine the existence of the mortgage lien and nothing else, to ascertain the amount due and to obtain a decree directing the sale of the premises for its satisfaction: *McMillan v. Richards*, 9 Cal. 365; 70 Am. Dec. 655; *Boggs v. Fowler*, 16 Cal. 559; 76 Am. Dec. 561; *San Francisco v. Lawton*, 18 Cal. 465; 79 Am. Dec. 187. Its proper scope and effect is to bar the rights of the mortgagor and those claiming under him: See monographic note to *King v. Mason*, 89 Am. Dec. 434. It is not a proper proceeding for the investigation of land titles: *Jones on Mortgages*, 4th ed., sec. 1444; and by the great preponderance of authority the title to realty is not properly triable in foreclosure proceedings: See monographic note to *King v. Mason*, 89 Am. Dec. 434. It is well established that subsequent mortgagees or incumbrancers, claiming priority of liens, are proper defendants in a foreclosure suit for litigating that issue, because the only proper object of the proceeding is to bar all rights subsequent to the mortgage. See monographic note to *Strobe v. Downer*, 80 Am. Dec. 714.

The foregoing propositions being established beyond question, it follows inevitably and logically that the principal case is opposed to the weight of American authority. To these propositions there

*REFERENCE TO MONOGRAPHIC NOTES.

Actions in which title to real estate may not be tried or questioned: 89 Am. Dec. 434.

are recognized exceptions as there must be to all general statements of law, but with such a foundation it is not surprising that our courts, with few dissenting voices, have held that, in a proceeding to foreclose a mortgage, persons claiming the mortgaged premises by title adverse and paramount to that of the mortgagor are neither necessary nor proper parties defendant: *Dial v. Reynolds*, 96 U. S. 340; *Wells v. American Mortgage Co.*, 109 Ala. 430; *Hambrick v. Russell*, 86 Ala. 199; *Adams v. Edgerton*, 48 Ark. 419; *Croghan v. Minor*, 53 Cal. 15; *Marlow v. Barlew*, 53 Cal. 456; *Carbine v. Sebastian*, 6 Ill. App. 564; *Whittemore v. Shiell*, 14 Ill. App. 414; *McAlpin v. Zitzer*, 119 Ill. 273; *Pattison v. Shaw*, 6 Ind. 377; *Pancoast v. Travelers' Ins. Co.*, 79 Ind. 172; *Chamberlain v. Lyell*, 3 Mich. 448; *McClure v. Holbrook*, 39 Mich. 42; *Dickerson v. Uhl*, 71 Mich. 398; *Newman v. Home Ins. Co.*, 20 Minn. 422; *Banning v. Bradford*, 21 Minn. 308; 18 Am. Rep. 398; *Shellenbarger v. Biser*, 5 Neb. 195; *Coe v. New Jersey etc. Ry. Co.*, 31 N. J. Eq. 105; *Bogey v. Shute*, 4 Jones Eq. 174; *Eagle Fire Ins. Co. v. Lent*, 6 Paige, 635; *Corning v. Smith*, 6 N. Y. 82; *Merchants' Bank v. Thompson*, 56 N. Y. 7; *Lyman v. Little*, 15 Vt. 576; *Kinsley v. Scott*, 58 Vt. 470; *Pelton v. Farmin*, 18 Wis. 222; *Helka Fire Ins. Co. v. Morrison*, 56 Wis. 133. The reasoning upon which the holding is based is conclusive. "It results from the nature, scope, and purpose of a foreclosure suit, as we have defined it," says the court in *Wells v. American Mortgage Co.*, 109 Ala. 430, "that parties claiming title paramount, adversely to the mortgagor and mortgagee, are not proper parties, and may not be drawn into the suit to litigate and settle their rights. The estate or interest in the lands which is drawn within the operation of the suit, which will be affected and bound by the decree, is the estate created and passing by the mortgage, or estates or interests subsequently acquired by the mortgagor, inuring by way of estoppel to the benefit of the mortgagee. Prior or subsequent encumbrancers are proper parties, for they do not hold or claim in hostility to the title of the mortgagor—they claim under and through him. But parties claiming by independent, distinct titles, adversely to the mortgagor and mortgagee, are not proper parties. The suit cannot be properly constituted for the purpose of litigating such titles—the parties in whom they reside derive from them no rights or interests the decree of foreclosure can affect, and are without right to resist its rendition." They have no interest in the subject matter of the action: *Croghan v. Minor*, 53 Cal. 15.

By an equal agreement of the authorities, the proposition is established as the corollary and companion of that stated in the preceding paragraph, that the object of an action to foreclose a mortgage is to bar the mortgagor and those claiming under or through him and subsequent to the mortgage, and that in such an action questions of title, adverse or paramount, cannot be litigated: *Hambrick v. Russell*, 86 Ala. 199; *Randle v. Boyd*, 73 Ala. 282; *Lyon v. Powell*, 78 Ala. 351; *Adams v. Edgerton*, 48 Ark. 419; *Dial v. Reynolds*, 96 U. S. 340; *Chapin v. Walker*, 2 McCrary, 175; *San Francisco v. Lawton*, 18 Cal. 465; 79 Am. Dec. 187; *Gage v. Perry*, 93 Ill. 176; *Whittemore v. Shiell*, 14 Ill. App. 414; *Summers v. Bromley*.

28 Mich. 125; Horton v. Saunders, 13 Mich. 409; Comstock v. Comstock, 24 Mich. 39, and note citing cases; Banning v. Bradford, 21 Minn. 308; 18 Am. Rep. 398; Coe v. New Jersey etc. Ry. Co., 31 N. J. Eq. 105; Eagle Fire Co. v. Lent, 6 Paige, 635; Corning v. Smith, 6 N. Y. 82; Merchants' Bank v. Thomson, 55 N. Y. 7; Rathbone v. Hooney, 58 N. Y. 463; Faublon v. Rogers, 66 Tex. 472; Wolf v. Harris, Tex. Civ. App., Dec. 1898; Kinsley v. Scott, 58 Vt. 470; Pelton v. Farmin, 18 Wis. 222; Whitney v. Robinson, 53 Wis. 309; California etc. Trust Co. v. Cheney Electric Light etc. Co., 12 Wash. 138.

The litigation of such titles in foreclosure proceedings is refused because equity will not usurp jurisdiction to try the validity of a legal title which is independent of the mortgage and accrued prior to its execution: Lyon v. Powell, 78 Ala. 351. A court of equity has no jurisdiction to try the relative merits of legal titles held by adverse litigants in such a suit. Any holder of such a title, when brought in dispute, has a constitutional right to have its validity tried by a jury in an action of ejectment; and a court of law will furnish adequate remedy for testing the relative superiority of the claimants' respective titles: Hambrick v. Russell, 86 Ala. 199. Said the court in Corning v. Smith, 6 N. Y. 82, per Foot, J.: "I have, consequently, sought earnestly and diligently for some authority to justify this court in holding that a court of chancery, on a bill for foreclosure, can entertain a question concerning a legal title between a third person and the mortgagor arising anterior to the giving of the mortgage, but can find none; and, on the contrary, all concur in upholding the rule stated by Chancellor Walworth in Eagle Fire Co. v. Lent, 6 Paige, 637." There is no privity between an adverse claimant who is a stranger to the mortgage, and the estate: Faublon v. Rogers, 66 Tex. 472. It follows necessarily that as to the rights of such an adverse claimant a decree of foreclosure can have no effect whatever.

The general rules already stated are supported by technical considerations as to the character and purpose of foreclosure proceedings, and as to the original jurisdiction of equity, which are of the weightiest sort. In perhaps three states, however, these rules are refused adherence, and in the other states the application of them has resulted in the recognition of various exceptions. The motive in each class of decisions has been to promote convenience and expedition in the administration of justice, and to prevent multiplicity of actions. The latter is an elementary ground for the assumption of jurisdiction by equity courts in any case, and in this particular class of cases it is supported by another principle of equity jurisprudence, that although equity has no original jurisdiction of contests concerning legal titles, it may nevertheless assume such jurisdiction when essential and incidental to the proper exercise of its original jurisdiction. In Indiana and Connecticut, the litigation of adverse and paramount claims has been allowed under the authority of statutory provisions to the effect that "any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved": *Masters v.*

Templeton, 92 Ind. 447; *De Wolf v. Sprague Mfg. Co.*, 49 Conn. 282. Similar provisions are in force in other states: See Cal. Code Civ. Proc., 1890, sec. 379; Iowa Code, 1897, sec. 3462; but do not seem to have been so construed. In construing such a provision in *Masters v. Templeton*, 92 Ind. 447, the court, after extolling its beneficent qualities, says: "Prior to the adoption of our code system there was some reason for holding that the question of title could not be adjudicated in a foreclosure proceeding; for questions of title were triable only by courts of law, while the question of a right to a foreclosure was cognizable only by courts of chancery, and there was thus a conflict of jurisdiction whenever a legal title was asserted. This cannot happen under the code, where both law and equity are vested in one tribunal, where provision is made for bringing into court all parties interested, either in the property or the controversy, and where ample authority is conferred to determine all rights and adjust all equities in one suit."

Kansas seems to be the only state in which it is held directly, that, in the absence of statute, adverse and paramount titles may be litigated in foreclosure proceedings. It is true that in *Bradley v. Parkhurst*, 20 Kan. 462, from which case the Kansas doctrine dates, the decision is ostensibly based upon a statute authorizing the joinder of several causes of action, legal or equitable, or both, in certain cases, but it is apparent that such statute was not its real basis. The decision delivered by Brewer, J., now of the supreme court of the United States, and dissented from by Horton, C. J., who characterized it as "against authority," and one which would "be a surprise to the profession," is very thorough and able, and concludes its treatment of the matter in question thus: "To conclude upon this question, it seems to us that a foreclosure suit is, as to one branch, in the nature of a proceeding in rem; that the aim and scope of such a proceeding is to seize the rem and convey it discharged of all claims and liens; that the objections formerly existing to the adjudication of adverse titles on account of the jurisdiction of the court and the form of action, have been done away with; that the litigation of an adverse title is as truly and closely connected with the right to subject the real estate to the payment of the plaintiff's mortgage as the determination of the validity and extent of other liens, and that the joinder of the two is therefore authorized by the statute. We come to this conclusion with hesitation because of the course of decisions elsewhere; but it seems to us justified by the statute, and it upholds a practice which has become common in this state." Later Kansas cases have followed this decision: *Nooner v. Short*, 20 Kan. 624; *Fisher v. Cowles*, 41 Kan. 418; *Provident Loan Trust Co. v. Marks*, 59 Kan. 230; ante, p. 349. Whether or not the Kansas court will be followed by other courts as to its extreme doctrine is not for us to forecast, but a consideration of the tendency among courts which adhere to the general rule, to relax its vigor where the ends of justice and expediency demand, as well as of the growing spirit in our law which prefers substance to technical forms, makes such a result seem possible and even probable.

Exceptions to General Rule.—Senior encumbrancers or mortgagees may be made parties to foreclosure suits for the sake of liquidating their demands and paying them out of the proceeds of the sale, or in order to adjudicate as to the rank of their claims: *First Nat. Bank v. Salem Capital Flour Mills Co.*, 31 Fed. Rep. 580; *San Francisco v. Lawton*, 18 Cal. 465; 79 Am. Dec. 187; *Cochran v. Goodell*, 131 Mass. 464; *Foster v. Johnson*, 44 Minn. 290; *Missouri etc. Trust Co. v. Richardson*, Neb., Feb. 1899; *Emigrant etc. Sav. Bank v. Goldman*, 75 N. Y. 127. A mortgagee may make judgment creditors of the mortgagor's grantor parties to his foreclosure suit when these creditors assert a claim on the ground that the transfer to the mortgagor was in fraud of their rights, and that, therefore, their executions, levied after the execution of the mortgage, are prior liens on the land: *Converse v. Michigan Dairy Co.*, 45 Fed. Rep. 18. In that case it was objected by the defendants that the court could not adjudicate their rights in the lands mortgaged, because their rights, as asserted, were paramount to those of the mortgagor, and hostile thereto. It was insisted that upon a bill to foreclose a mortgage only those matters can be litigated which affect the equity of redemption, and that parties claiming titles or liens originating prior to the mortgage cannot properly be made parties to the suit. These objections were overruled, however, the court considering that the rule insisted upon is not an inflexible one. A claim which is adverse to that of the mortgagee in a foreclosure suit cannot be so used as to protect one which is not adverse but subject to the latter, so where an adverse claimant is also owner of an interest in the equity of redemption, it is proper to make him a party for the purpose of foreclosing his interest: *Horton v. Saunders*, 13 Mich. 409; *Whittemore v. Shnell*, 14 Ill. App. 414; *Lyon v. Powell*, 78 Ala. 851. The question whether an asserted claim is such an adverse one as to come within the prohibition of the general rule depends not upon what is set up in the answer regarding it, but rather upon what the bill charges and the proofs show to be its real character: *Wilkinson v. Green*, 34 Mich. 221.

While, in accordance with the general rule, if objection is taken, questions of paramount legal title will not be examined in foreclosure proceedings, yet, where in opposition to such legal title, the mortgagee alleges a superior equitable title in the mortgagor, and that it is covered by the mortgage, it would seem that such equitable title ought to be examined: *Palmer v. Yager*, 20 Wis. 91. The rule has been held not to exclude one who claims adverse title, and also claims to hold a mortgage on the same premises, who submits his claims to the adjudication of the court and asks that, in case the court finds the title to the premises invalid, he may have a decree for the amount due on the mortgage. These defenses were plainly inconsistent, but, the plaintiff having joined issue upon the pleadings and testimony having been taken, it became the duty of the court to consider all the questions at issue: *Shellenbarger v. Blser*, 5 Neb. 195. A novel exception to the general rule was raised in *Hunt v. Nolen*, 40 S. C. 284, where, upon suit to foreclose a purchase money mortgage, the defendant claimed a breach of warranty. The

conveyance, which was with a general warranty, included land held by a third person, possession of which was never given to the defendant. This deficiency was interposed as constituting a breach of warranty, and its value depended upon the estate of the third person, whether it was a fee or an estate per autre vie, with reversion in the defendant. It was held that such third person should, and might properly, be made a party to the proceedings in order that his title, whether paramount or not, should be determined. Where there has been a mistake in description in the deed to the mortgagor, and the mortgage follows the description given in the deed, the mortgagee, in a suit to foreclose, may join as defendants, and have their interests in the mortgaged premises litigated, third persons who have acquired title to the premises intended to be mortgaged which they claim adversely to the mortgagee. This was held where the conveyance by proper description to the adverse claimants was part of the mortgagor's scheme to defraud the mortgagee: *Cummings v. Freer*, 26 Mich. 128. Where one is made defendant in a foreclosure action under an allegation "that he claims to have some interest or lien upon the mortgaged premises, or some part thereof, which lien, if any, has accrued subsequently to the time of said mortgage," he may by his answer set up a paramount claim to the mortgaged premises or to some part thereof, and such right may be tried and adjudged in the foreclosure action: *Lego v. Medley*, 79 Wis. 211; 24 Am. St. Rep. 706. The general rule as recognized in California has been held not to apply where the title of a third person is paramount only to that of a nominal mortgagor, and in fact subordinate to the lien of the mortgage: *Randall v. Duff*, 79 Cal. 115.

Litigation of Tax Titles in Foreclosure Suits.—The question as to the litigation of adverse or paramount title in foreclosure suits is frequently presented where the title in question is a tax title. The nature of the title acquired by a purchaser at a tax sale is determined by local statutes, but in general, after the expiration of the period of redemption, he is vested with an estate in fee simple, all prior interests, liens and encumbrances being extinguished, the theory being that the land itself is taxed and sold, and not the owner's title. This may be varied by statute: See 25 Am. & Eng. Ency. of Law, 1st ed., 717. Before the issuance of a deed the purchaser has only a lien upon the land for the amount paid, with the legal interest: *Blackwell on Tax Titles*, 5th ed., sec. 962. Where the tax title in question is a fee, no reason is evident why the litigation of it in a foreclosure suit should not be prohibited by the general rule against the litigation of adverse or paramount titles in such proceedings. The majority of our courts hold it to be so prohibited: *Gage v. Perry*, 93 Ill. 176, and cases cited above to the general rule just referred to. But courts seem particularly liberal in allowing exceptions where the litigation of tax titles is brought in question. Where the tax title is subsequent in time to the mortgage, courts do not agree as to whether it may be litigated in a suit to foreclose the mortgage, though under the general theory as to the nature of tax titles, such a title is paramount in right to the mortgage title, as well as to that acquired by purchase at a sale under fore-

closure. That under such circumstances a tax title may be litigated, see *Cohen v. Solomon*, 66 Fed. Rep. 411; *Wilson v. Jamison*, 36 Minn. 59; 1 Am. St. Rep. 635, and note; *Roosevelt v. Dowley*, 57 How. Pr. 489. This is affirmed where the tax title is connected with or comprises an interest in the equity of redemption: *Horton v. Saunders*, 13 Mich. 409; *Whittemore v. Shiell*, 14 Ill. App. 414; and also upon the ground that the holder of a tax title subsequent in time to a mortgage does not claim under a stranger, but, in effect, claims an interest in the equity of redemption: *Lyon v. Powell*, 78 Ala. 351. The supreme court of the United States has held that a court of equity, in a suit to foreclose a mortgage, may permit a person to whom the land has been sold and conveyed for nonpayment of taxes, assessed after the date of the mortgage, to be made a party, and may determine the validity of his title: *Hefner v. Northwestern Life Ins. Co.*, 123 U. S. 747. See, also, *Hoffman v. Groll*, 35 Kan. 652; *Fisher v. Cowles*, 41 Kan. 418; *Broquet v. Warner*, 43 Kan. 48; 19 Am. St. Rep. 124.

Opposed to these decisions are those of other courts that, in a suit to foreclose a mortgage, the validity of a tax title to the mortgaged premises cannot be litigated, even though the latter is subsequent in time to the mortgage: *Odell v. Wilson*, 63 Cal. 159; *Roberts v. Wood*, 38 Wis. 60; *Gage v. Board of Directors*, 8 Ill. App. 410; *Gage v. Perry*, 93 Ill. 176; though an exception is allowed where the holder of the tax title also claims an interest in the equity of redemption, thus raising a privity between himself and the mortgagee in respect to the subject matter: *Carbine v. Sebastian*, 6 Ill. App. 564; *Whittemore v. Shiell*, 14 Ill. App. 414. It has been held that although the holders of tax titles are improper parties to foreclosure proceedings, when made such they have a right to defend their title: *Hurley v. Cox*, 9 Neb. 280; also, that where a party made defendant in such a suit, as claiming some interest in the land, sets up a tax title as a full defense, he cannot object afterward that equity has no jurisdiction over tax titles: *Kelsey v. Abbott*, 18 Cal. 609. Compare, *Cromwell v. MacLean*, 123 N. Y. 474; *Shellenbarger v. Biser*, 5 Neb. 195; *Wicke v. Lake*, 21 Wis. 410; 94 Am. Dec. 552. When a mortgagee comes into equity and asserts his rights as against a tax sale of the mortgaged property, alleged by him to have been collusively made by the mortgagor and purchaser to remove the mortgage lien, he may proceed against both the purchaser and mortgagor: *Mendenhall v. Hall*, 134 U. S. 559.

Effect of Default Judgment Against Holder of Adverse or Paramount Title.—The usual allegation by which persons other than the mortgagor are brought in as parties in proceedings to foreclose real estate mortgages is that set forth in the petition in the principal case, and is to the effect that certain defendants "have or claim to have some interest in, or lien upon said premises, or part thereof, which interest or lien, if any such exists, has accrued subsequently, and is subject to plaintiff's lien thereon" under the mortgage set forth. Just what is put in issue by such an allegation, and consequently, what is the effect of a judgment by default against the holder of an adverse or paramount title, are questions upon

which courts do not agree. It is held that the superior right of a senior mortgagor is not placed in issue in a suit to foreclose a junior mortgagee by making him a party to the bill therein and alleging that he claims title to the premises by deed or otherwise: *Buzzell v. Still*, 63 Vt. 490; 25 Am. St. Rep. 777; *Strobe v. Downer*, 13 Wis. 10; 80 Am. Dec. 709. By a similar interpretation of pleadings it is held that a bill which simply brings in adverse claimants under the usual allegations in foreclosure bills against subsequent purchasers and encumbrancers, is not properly framed to raise the issue of adverse title, or to support a decree as to the title of such adverse claimants: *Summers v. Bromley*, 28 Mich. 123. In such a case a disclaimer of being such subsequent purchaser or encumbrancer is all that is necessary to protect the rights of such claimant: *Comstock v. Comstock*, 24 Mich. 39; and he need not anticipate that the decree will go farther in affecting his rights than is warranted by the issue between him and the complainant: *Dawson v. Danbury Bank*, 15 Mich. 489. It is further held that an allegation of the ordinary form quoted above implies that the interest of the defendant is not adverse, but that it, and the interest of the plaintiff, are derived from a common source: *Pringle v. Dunn*, 37 Wis. 449; 19 Am. Rep. 772; and that the setting up of a paramount title by answer is equivalent to a disclaimer of the kind of interest mentioned in the complaint, and the action may be dismissed as to such defendant: *Roberts v. Wood*, 38 Wis. 60. In New York it was long since decided that a decree against a defendant made a party to a foreclosure suit under the general averment that he claimed some interest in the premises "as subsequent purchaser or encumbrancer, or otherwise," bars rights and interests in the equity of redemption, but not those which are paramount to the title of both mortgagor and mortgagee: *Lewis v. Smith*, 9 N. Y. 502; 61 Am. Dec. 706. For a similar holding, see *Strobe v. Downer*, 13 Wis. 10; 80 Am. Dec. 709.

It is elementary that the plaintiff in a suit to foreclose a mortgage can recover upon a default only on the cause stated in his bill: *Knowles v. Rablin*, 20 Iowa, 101; *Converse v. Blumrich*, 14 Mich. 109; 90 Am. Dec. 230. The effect of the holdings referred to in the preceding paragraph is that paramount or adverse title is not put in issue by the general averment in foreclosure bills against subsequent purchasers and encumbrancers, or in the form appearing in the principal case, and, not being in issue, cannot be affected by a decree upon default. Accordingly, the supreme court of Illinois holds that such a default decree can have no effect upon a paramount or adverse title, but may merely foreclose the equity of redemption: *McConnick v. Wilcox*, 25 Ill. 274. In Indiana, the decisions incline toward an opposite view. In *Barton v. Anderson*, 104 Ind. 573, it was held that such a default judgment, under similar pleadings, concluded the holder of a tax title who was made a party to foreclosure proceedings. In referring to the effect of default judgments the court said: "As applicable, however, to a suit to foreclose a mortgage, and other kindred suits, in the nature of a proceeding in rem, where a party is made a defendant to answer as to his supposed or possible, but unknown or undefined, interest in

the property, we think that as against him, a default ought to be construed as an admission that, at the time he failed to appear as required, he had no interest in the property in question, and hence as conclusive of any prior claim of interest or title adverse to the plaintiff. Any less rigid rule of construction might, and in many cases doubtless would, defeat the very object properly had in view in making the party a defendant": See, also, *Bundy v. Cunningham*, 107 Ind. 360; *O'Brien v. Moffitt*, 133 Ind. 660; 36 Am. St. Rep. 566; *Provident Loan etc. Co. v. Marks*, 59 Kan. 230; ante, p. 349. This line of reasoning is entitled to great consideration. In our judgment, but one answer can be made to it, and that is, that in a suit to foreclose a mortgage, the subject matter of the action does not extend, and cannot, by the parties, be extended beyond the title held by the mortgagor at the making of the mortgage, and that, therefore, there cannot be drawn within the jurisdiction of the court any other claim of title, however well adapted the allegations of the complaint may be to accomplish this end; and this is the position taken by a majority of the decisions upon the subject. Thus, speaking of the general allegation in a complaint that a party named therein had or claimed some interest in the premises, "which interest or claim is subsequent to and subject to the lien of the plaintiff's mortgage," the supreme court of California said that the only object of this allegation was to show that the party thus named was a proper party defendant; that, however, the character of his interest was immaterial to the plaintiff, and need not be set forth in the complaint, and that any averment respecting it did not relate to an issuable fact, and hence "if he has any interest in the mortgaged premises paramount to the mortgage, it will not be affected by the judgment or the sale thereunder. A sale of the mortgaged premises under the judgment entered against him by default will be limited in its effect to the rights acquired therein by him subsequent to the mortgage, irrespective of the character of the judgment": *Sichler v. Look*, 93 Cal. 600; *Cody v. Bean*, 93 Cal. 578; *Elder v. Spinks*, 53 Cal. 293; *Frost v. Koon*, 30 N. Y. 428; *Emigrant Sav. Bank v. Goldman*, 75 N. Y. 127; *Smith v. Roberts*, 91 N. Y. 477.

ERB v. POPRITZ.

[59 KANSAS, 264.]

RECEIVER OF NATIONAL COURT—FAILURE TO PRESENT CLAIM TO BEFORE PROPERTY WAS SOLD.—The fact that a national court which appointed a receiver of a railway corporation had made an order requiring all persons having claims or demands against him to present the same to a special master on or before a day designated, and the failure to present the claims as required by such order, do not constitute a bar to the prosecution of an action in a state court against such receiver for personal injuries sustained by an employé, though the receiver had sold the property, the sale had been confirmed, a conveyance made to the

purchaser, and the proceeds of the sale disposed of under an order of the court.

EVIDENCE OF REPUTATION OF AN INJURED PERSON FOR CARE AND PRUDENCE.—In an action to recover compensation for the death of an engineer, claimed to have been due to the negligence of a railroad corporation in whose service he was, in not maintaining a safe and proper track and appliances, evidence of the general reputation on the part of the engineer and his fireman for care and prudence is not admissible to sustain a claim that he was acting with due care at the time of the accident.

WITNESSES—OPINION OF—WHEN NOT ADMISSIBLE. Witnesses who were not present when a locomotive was derailed should not be allowed to give their opinions as to the cause of the derailment and whether it resulted from a defective track.

EVIDENCE OF THE EXPECTANCY OF HUMAN LIFE—SECONDARY EVIDENCE OF THE CARLYSLE AND OTHER TABLES.—A witness should not be permitted to testify to the expectancy of life of a deceased person based upon recollection of mortality tables used by life insurance companies. The tables themselves should be introduced as the best evidence of their contents.

Waggener, Horton & Orr, for the plaintiff in error.

Fenlon & Fenlon, for the defendant in error.

205 **JOHNSTON, J.** In April, 1893, Max Popritz was employed as an engineer by the receiver of the Kansas City, Wyandotte & Northwestern Railroad Company, and on April 30, 1893, while operating a switch-engine in the yards of the company at Kansas City, he was killed by the derailment of the engine. Emma Popritz, his wife, brought this action in the district court against the receiver, alleging that the death of her husband was caused by the negligence of the receiver. The specific negligence alleged as a basis of recovery is that the railroad track was negligently constructed, "and in consequence thereof, the same and the bed thereof not having sufficient ballast and ties thereunder, the ties being rotten and too far apart, and the track and roadbed uneven, and the joints being low and sunken, and the switch and switch-rail being broken and otherwise out of order, and the iron rails being old and worn out and unfit for use, the engine jumped and ran off the track and turned over upon said Popritz, inflicting injuries which resulted in his death," et cetera.

The answer of the receiver was: 1. A general denial; 2. That the federal court which appointed Erb as a receiver made an order in December, 1893, requiring all persons having claims or demands against the receiver to present the same to the special master on or before January, 1894; but that the plaintiff did not present or file any claim with the special matter. In the same connection it was alleged that the receiver had sold the

railroad and its equipment, and the sale thereof had been confirmed and a deed issued to the purchaser; and, further, that the proceeds of the sale were thereafter, under the order ²⁰⁸ of the federal court, disbursed, and all assets which had come into the hands of the receiver had been taken therefrom and were beyond his control.

The third defense was that Popritz was an experienced engineer and thoroughly acquainted with the tracks, roadbed and engines of the company, and that all injuries received by him at the time of his death were the result of his own negligence; that he had traveled over the track many times each day for many months prior to the accident, and that if it was defective, as alleged, it must have been apparent to him; but that he made no complaint to the receiver or any of his superior officers. It was further alleged that he had run the engine in violation of the rules and regulations of the company.

A demurrer was filed by the plaintiff to the second ground of defense, which alleged that the plaintiff below had failed to present her demand to the special master, and further, that the receiver had sold the road and disposed of the property which had been committed to his care. The demurrer was sustained, the court holding that these averments were insufficient to constitute a defense to the plaintiff's action. Upon the trial the jury found in favor of the plaintiff and assessed her damages in the sum of eight thousand dollars. The receiver assigns as error the ruling of the court upon the demurrer to the second defense set up in his answer.

The first branch of the defense in question is manifestly insufficient. The fact that notice was given to claimants to present their claims to the special master within a specified time did not preclude the continuation of the action of the plaintiff below nor the final adjudication of her claim in the district court. The federal laws provide that a receiver may be sued in the state courts without leave of the federal courts ²⁰⁷ appointing the receiver, and the judgment rendered in the state court is conclusive upon the federal court as to the existence and amount of the plaintiff's claim: 25 U. S. Stats. at Large, 436; *Reinhart v. Sutton*, 58 Kan. 726. That it was not the purpose of the federal court to require claimants to adjudicate their claims before the master, or in the federal court alone, is manifest from the order appointing the receiver. It specifically provided that the receiver should operate the road conformably to the laws of the state, and might be sued in the state courts for debts and liabil-

ities incurred by him in the operation of the road; and in order to accommodate claimants, it was provided that the receiver should appoint an agent in each county through which the road runs upon whom process issued against the receiver might be served. There was a further provision that judgments obtained against the receiver in the state courts should be audited and allowed as of course as adjudicated claims upon the filing of a transcript of the same in the federal court.

The remaining averments, that the railroad had been sold, and that the property had passed out of the possession and beyond the control of the receiver, hardly measure up to a valid defense. It is true the liability of the receiver for the Popritz claim, if liable at all, is official, and not personal, and a judgment rendered against him as receiver is payable only out of trust property and funds in the custody of the court for which he was acting. When his agency has ceased and the receivership terminated, his successor should be substituted in any pending litigation upon liabilities arising during his administration. Here, however, it does not appear that the receivership is ended. His official character remains until he has been discharged ²⁰⁸ by the court which appointed him; and there is no averment that he has been discharged. Evidently the court has not relinquished its hold upon the case, and if it has reserved any fund out of which to meet liabilities like the one in question, it might require it to be paid through the agency of the receiver. At any rate, he is still receiver, and occupies the same status and relation toward the court that he has since his appointment. An order of discharge would have extinguished his representative character, but for some reason the court has not closed the receivership, and no substitution could well be made while it continued. We think the court ruled correctly in sustaining the demurrer.

To sustain the claim that Popritz was acting with due care at the time of the accident, a witness was asked and allowed to state as to the general reputation of Popritz and his fireman for care and prudence. Over an objection that the question called for a mere opinion and was not a proper subject for expert testimony the witness was allowed to answer, and he characterized Popritz and his fireman as first-class men for prudence and care in their work. An ineffectual effort was made in behalf of the defendant to have the evidence stricken out and although clearly inadmissible it was allowed to remain for the consideration of the jury. An issue had been tendered as to the care exercised

by Popritz, but it could not be established by proof of this character. It has already been determined in this state that evidence as to the character of an injured person for care and prudence is not competent or admissible. It is held that the matter of negligence is to be determined by the character of the specific act or omission, and not by the general character for care that the person may sustain: *South Kansas Ry. Co. v. Robbins*, 43 200 Kan. 145; *Cherokee etc. Mining Co. v. Dickson*, 55 Kan. 62. If the general character of the injured person may be shown, the company would necessarily have the right to show by the opinions or estimates of witnesses that he was a reckless and careless man; and it might also show that his co-employés had the reputation for being careful in the performance of their duties. The general rule is, that in cases of this kind the character of neither party thereto, nor of any other person, is involved. One exception to this rule is where it is charged that the master is negligent in employing unskillful or incompetent servants. In such a case it may be shown that a servant employed had a general reputation for incompetency, the theory being that it is the duty of the master to exercise care in the selection of employés; and where a person is generally known and reputed to be reckless and unfit, evidence of the fact that he bore that reputation is competent as tending to show that the master could and should have known of his unfitness and lack of care. The present case, however, does not come within this or any other of the exceptions and the authorities generally hold that evidence of the character introduced is incompetent: *Chase v. Maine Cent. R. R. Co.*, 77 Me. 62; 52 Am. Rep. 744; *Jolly v. Terre Haute Drawbridge Co.*, 9 Ind. 417; *McDonald v. Savoy*, 110 Mass. 49; *Tenney v. Tuttle*, 1 Allen, 185; *Adams v. Chicago etc. Ry. Co.*, 93 Iowa, 565; *Atlanta etc. R. R. Co. v. Smith*, 94 Ga. 107; 5 Am. & Eng. Ency. of Law, 2d ed., 861.

Some witnesses who were not present when the engine was derailed were allowed to give their opinions as to the cause of the derailment, and whether it was the result of defective track. The cause of the wreck was the main question involved in the case and was to be determined by the jury from all the testimony. Witnesses ²⁷⁰ cannot take the place of jurors, and their opinions cannot be substituted for that of the jury. Testimony as to the construction of the road and the conditions existing after the accident was competent. The appearance of the road, the quality of the ties, the condition of the rails, could be easily and adequately described to the jurors, leaving them to draw

inferences as to the ultimate fact or cause of the wreck. It was therefore, unnecessary to resort to opinion evidence, and the general rule is, that the opinion of witnesses is only admissible upon the ground of necessity, but can never be given upon the ultimate facts which it is the duty of the jury to determine. Here, the opinion of a witness, who was a basket-maker, was taken as to the cause of the engine leaving the track. He was without railroad experience or any qualification to speak as an expert, even if the injury could be regarded as a subject of expert testimony. Other witnesses of little or no railroad experience also gave testimony which was open to the same objection and should have been excluded from the jury.

Objection is also made to the testimony of a witness as to the expectancy of life of the deceased. Instead of offering standard life tables showing the probable duration of life, the witness was allowed to state his recollection of what the tables showed. He was engaged in the insurance business and claimed to be acquainted with the mortality tables used by life insurance companies. Among others, he stated that he had knowledge of the Actuaries, Carlisle and the American, but, instead of submitting the tables, he undertook to give the expectancy of life of one as old as Popritz was at the time of his death. The witness was not a physician and had no special qualifications which enabled him to determine the probable duration of Popritz's ²⁷¹ life, but depended entirely upon such information as he had acquired from standard tables which he happened to have consulted in connection with the insurance business. Where recovery is sought in cases of death or permanent injury, standard life tables may be introduced to show the probable duration of life of one injured or killed, but the statements of one who has no knowledge upon the subject, except such as he may have gained from consulting such tables, is not the best evidence.

Error is assigned on the rulings of the court in charging the jury, but we find nothing substantial in the objections made by the plaintiff in error; nor do we find anything to warrant special comment in the objections made to the rulings of the court upon the special questions which were presented for submission or submitted to the jury.

For the errors mentioned, however, the judgment will be reversed, and the cause remanded for a new trial.

RECEIVERS—APPOINTMENT BY FEDERAL COURT—LIABILITY TO SUIT.—Receivers appointed by United States courts are subject to suit in any court having jurisdiction of the subject matter, without asking leave of the court which appointed them:

Dillingham v. Russell, 73 Tex. 47; 15 Am. St. Rep. 753, and note. It is said that no court can interfere with the custody of property held by another court through a receiver, but may establish by its judgment a debt against the receivership, which must be recognized even by the court granting the receiver, and is not open to revision by it, if the court had jurisdiction of the subject matter and the parties: Gay v. Brierfield Coal etc. Co., 94 Ala. 303; 33 Am. St. Rep. 122, and note.

EVIDENCE—EXPECTATION OF LIFE—LIFE TABLES.—Standard life tables are often admissible in evidence as showing one's probable expectancy of life, but, taken as proof, they are subject to the conditions surrounding the individual investigation: Note to Damm v. Damm, 63 Am. St. Rep. 604. Secondary evidence is not admissible until the nonproduction of the primary evidence has been sufficiently accounted for: Georgia etc. Ry. Co. v. Strickland, 80 Ga. 776; 12 Am. St. Rep. 282; but it is admissible if the latter is unattainable: Allen v. State, 21 Ga. 217; 68 Am. Dec. 457.

COMMERCIAL BANK v. CHESHIRE PROVIDENT INSTITUTION.

[59 KANSAS, 361.]

A GUARANTY OF A NEGOTIABLE INSTRUMENT IS NEGOTIABLE.—Hence if one indorses on a negotiable note that he guarantees prompt payment of the interest and payment of the principal at maturity, and the note is afterward indorsed by the payee, the guaranty of payment is thus transferred to the indorsee, who may recover thereon upon default in the payment of the principal or interest.

GUARANTY, WHO MAY MAKE.—A banking corporation dealing in commercial paper may bind itself by a guaranty thereof.

J. D. McCue and James McKinstry, for the plaintiff in error.

Gleed, Ware & Gleed, for the defendant in error.

361 ALIEN, J. The defendant in error obtained judgment against the Commercial Bank for two thousand, six hundred and eighty-five dollars, on a guaranty, in the following form, indorsed on a negotiable promissory note executed by Daniel Dart:

"For value received, the Commercial Bank hereby guarantees prompt payment of the interest on the within obligation and the payment of the principal at maturity.

"Witness our hands this twelfth day of May, 1886.

"GEO. T. GUNERSEY,
Cashier.

"L. U. HUMPHREY,
President."

The note was made payable to the order of the Topeka Investment & Loan Company, and was by it indorsed before maturity

to the Cheshire Provident Institution. The petition alleges that, at the time the ³⁶² note and mortgage securing the same were executed, the Commercial Bank, in writing and for a valuable consideration, executed the guaranty above copied. The answer of the Commercial Bank alleges that it as a corporation never had any interest in the note, and never received any value for the execution of the guaranty, that the officers of the bank had no authority to execute the guaranty, and that these facts were known to the payee of the note at the time of its delivery. To this answer the plaintiff replied with a general denial. The case was tried to the court, and a general finding was made in favor of the plaintiff, on which judgment was entered for the amount of the note and interest. Counsel for plaintiff in error claim: 1. That the guaranty on which judgment was rendered was not a negotiable guaranty, because payable generally and not to order or bearer: 2. That the indorsement of the note did not assign the guaranty; 3. That, if it be conceded that the indorsement of the note operated as an assignment of it, all defenses against the first holder are available against the assignee; 4. That the guaranty is void because the bank had no power to lend its credit in that manner.

The first point presents the most important question in the case, and one on which the authorities are conflicting. It will be noticed that the guaranty under consideration in this case contains no words of negotiability, but is indorsed on a negotiable instrument. In Daniel on Negotiable Instruments, the conflicting views of the courts and textwriters are summarized; and, in section 1777, the author says: "On the other hand, there are cases which maintain that, although the guaranty on the paper, written at the time of delivery, specifies no person to whom the guarantor undertakes to be liable, and has no negotiable words, it runs with the instrument to which it refers, partakes of its quality of negotiability, and any ³⁶³ person having the legal interest in the instrument takes in like manner the guaranty as an incident, and may sue thereon. And it has been said in such a case, 'this view is consistent with the nature of the transaction, the evident intention of the parties, and the objects and uses of commercial paper.' This seems to us the better doctrine. By writing the guaranty on the paper, the guarantor evidences his intention to guarantee the contract of the maker. That contract, being negotiable, is made with any and every person who may be the holder, and the grantor is thus brought in privity with any and every person who becomes the holder."

This view of the law seems to us supported by reason and the weight of authority. A guaranty indorsed on a negotiable instrument is to be construed with the language of the instrument. The one under consideration in terms names no guarantee. The evident intent was to guarantee the payment to the legal holder of the note. We are unable to perceive any good ground for the position, taken by some of the authorities, that the guaranty inures to the benefit of the first holder of the paper only. The transfer of the note by indorsement must certainly operate as at least an assignment of the guaranty. We think it does more, and that the guaranty passes by the indorsement as fully as the note itself. The Commercial Bank by its guaranty became a party to a negotiable instrument. It employed no words limiting its liability, and it must make good the terms of its promise to the legal holder of the paper. This view of the law is sustained by the following authorities: Story on Bills of Exchange, sec. 458; Webster v. Cobb, 17 Ill. 459; Phelps v. Sargent, 69 Minn. 118; McLaren v. Watson, 26 Wend. 425; 37 Am. Dec. 260; Partridge v. Davis, 20 Vt. 499; Jones v. Berryhill, 25 Iowa, 289; Brandt on Suretyship and Guaranty, sec. 47.

The view opposed to the negotiability of a guaranty, ³⁰⁴ unless made negotiable by express terms, is taken by Mr. Randolph in his work on Commercial Paper, section 861, and the authorities sustaining that view are cited in the notes. Much stress and reliance are placed on the case of Briggs v. Latham, 36 Kan. 205. In that case a recovery was sought on a guaranty written on a mortgage securing the note. It was a guaranty of the payment of the mortgage. The mortgage itself was not a negotiable instrument, and there were no words of negotiability in the guaranty. We are entirely satisfied with the decision of that case. The dictum contained in the opinion, seemingly opposed to the conclusion reached in this case, being entirely outside of the question before the court, is not of binding authority. That the guaranty is assignable and passes with the assignment of the debt guaranteed does not admit of doubt: Reed v. Garvin, 12 Serg. & R. 100; Claffin v. Ostrom, 54 N. Y. 581; Harbord v. Cooper, 43 Minn. 466; Stillman v. Northrup, 109 N. Y. 473.

The record before us does not contain any of the evidence offered at the trial. The general finding resolves all doubts as to the facts against the plaintiff in error. We must, therefore, presume that the guaranty was executed for a valuable consideration, by the duly authorized officers of the bank, and in due course of business. The claim that a banking institution deal-

ing in commercial paper is without authority to bind itself by a guaranty thereof, has nothing to commend it to especial favor. It is true that in this case the paper itself does not indicate that the Commercial Bank ever owned it. Nevertheless it may have received the proceeds and the guaranty may have been made strictly in the interest of the bank. Attempts of corporations, organized solely for profit, to avoid their obligations on the ground that they are ³⁶⁵ ultra vires have never been received with marked favor by this court: *Kansas National Bank v. Quinnton*, 57 Kan. 750; *Arkansas Valley Town etc. Co. v. Lincoln*, 56 Kan. 145; *Alexandria etc. R. R. Co. v. Johnson*, 58 Kan. 175.

The general finding in favor of the plaintiff below is a complete answer to all questions urged on our consideration, except that as to the negotiability of the guaranty and the effect of the indorsement of the paper as an assignment of it.

The judgment is affirmed.

THE QUESTION OF THE NEGOTIABILITY OF A GUARANTY was again presented to the same court in the case of *Crissey v. Interstate Loan etc. Co.*, 59 Kan. 561. The corporation executed assignments of bonds to ——— or order, without recourse, save that it guaranteed: 1. The prompt payment of the interest thereon semi-annually until the principal should be paid; and 2. The payment of the principal within two years after maturity. It was the custom of the corporation, after thus executing assignments in blank, to lay them aside until a purchaser should be found, and then to deliver to him whatever he purchased, with the understanding that he might, if he chose, insert his name in the blank. A number of these bonds was offered by the corporation to one of its customers in satisfaction of the latter's debt. This assignee, without any attempt to collect the bonds thus assigned, commenced an action against the guarantor. One of the defenses was, that the guaranty indorsed upon the security was not negotiable, and that the indorsement of the assignment was not a completed contract, because the name of the assignee was not inserted in the blank for that purpose. The court said: "Neither of these objections is tenable. A transfer by assignment, as well as by commercial indorsement, may be made in blank, and a guaranty of payment is at least assignable, if not negotiable; and a guaranty, like an indorsement or assignment, may be made in blank."

NEGOTIABLE INSTRUMENTS—EFFECT OF INDORSEMENT OF GUARANTY.—A guaranty is not negotiable when written under a negotiable instrument, but made payable to no person: *Smith v. Dickinson*, 6 *Humph.* 261; 44 *Am. Dec.* 306, and note. A guaranty of a note or bill by a separate instrument is not negotiable, but it is held that a general guaranty indorsed on a note passes with it: *Note to McLaren v. Watson*, 37 *Am. Dec.* 270.

WERNER v. WERNER.

[50 KANSAS, 399.]

ALIMONY CANNOT BE ALLOWED where there is no marriage, though the parties lived together as husband and wife, believing themselves to be such.

MARRIAGE, VOID, DIVIDING PROPERTY ACCUMULATED DURING THE CONTINUANCE OF SUPPOSED MARITAL RELATIONS.—Where a marriage is void because the woman had a husband living when it was contracted, a court, in annulling it upon that ground, may decree that a division be made of the property accumulated by the parties while living as husband and wife and standing in the name of the man, where it appears that such division is equitable, because the woman was active, industrious, and faithful, and, besides household work, was efficient in conducting different branches of business.

EQUITY—RIGHT OF WOMAN TO APPLY TO, WHO HAS CONTRACTED A VOID MARRIAGE.—A woman who, having a husband living, contracted marriage and lived with her supposed husband many years as his wife, is not precluded from resorting to a court of equity to compel a division of the property accumulated with her assistance, where it appears that before contracting the second marriage, she told of her former marriage and the circumstances connected therewith as she understood them, and was thereupon persuaded by her intended husband that the former marriage was invalid and constituted no obstacle to the contracting of a second marriage.

Amidon & Conly, for the plaintiff in error.

Stanley, Vermilion & Evans, for the defendant in error.

400 JOHNSTON, J. This was an action brought by Rosa Werner to obtain a divorce from Emil Werner, upon the grounds of habitual drunkenness, extreme cruelty, and gross neglect of duty. She also set forth at length a description of property, and alleged that in some of it she owned an interest, and that the remainder stood in the name of the defendant, but was in fact the joint accumulation of the parties while they lived together as husband and wife. In his answer, Emil Werner alleged that he was induced to enter into the marriage relation with Rosa through her misrepresentation and fraud; that she was at the time the wife of John G. Cole, who was then living, and from whom she had not obtained a divorce; and that he had no knowledge of this fact until the present proceeding was begun. He also charged her with extreme cruelty, and asked that the marriage contract be declared null and void. In her reply, Rosa Werner asked that, if the marriage should be held to be null and void and no divorce should be granted to the plaintiff from the defendant, there be an equitable and just division of the property, which she alleges was the result of the joint earnings and

labors of the plaintiff and the defendant during the time they lived together as husband and wife.

At the trial, considerable testimony was offered as to the misconduct of Emil Werner, but the court found it unnecessary to determine whether the grounds alleged by the plaintiff below had been sustained. It appeared from the testimony that Rosa Werner had a ⁴⁰¹ husband living at the time she was married to Emil Werner, and, for that reason, the marriage was declared to be null and void, and a division of the property was made. Emil Werner complains of the ruling of the court awarding Rosa a share of the property, contending that she was never in fact his wife, and that alimony is never awarded to a woman who is not a wife.

It is true, as the plaintiff in error contends, that the marriage between the parties was absolutely void from the beginning. Although living together as husband and wife, they were not in fact married, and hence no allowance could be made as alimony. The rule is, that permanent alimony can only be allowed where the relation of husband and wife has existed; but this rule does not preclude an equitable division of the property where there is a judicial separation of the parties on account of the invalidity of the marriage contract: *Fuller v. Fuller*, 33 Kan. 582.

Strictly speaking, this action as it was tried was not a divorce proceeding, but it was rather one to annul a void marriage. Although instituted under the statutes to obtain a divorce, the pleadings were so drawn and the issues so shaped that it was within the power of the court to grant relief independently of the statutes relating to divorce, and it rendered a decree of nullity rather than a decree of divorce. The plaintiff below set forth at length the description and nature of the property which had been acquired by the parties, the manner in which it had been acquired, and her interest in the same, and in the prayer of her reply she asks to be allowed a just and equitable division of the same in case the marriage was held to be null and void. The court in its decree did not treat the award as alimony, but rather adjudged her a share of ⁴⁰² the property jointly accumulated by the parties during the time they lived together as husband and wife. *Fuller v. Fuller*, 33 Kan. 582, greatly relied on by the plaintiff in error, holds, it is true, that in an action of this character the defendant is not entitled to recover permanent alimony, but at the same time it is expressly stated: "That in all judicial separations of persons who have lived together as husband and wife a fair and equitable division

of their property should be had; and the court, in making such division, should inquire into the amount that each originally owned, the amount that each party received while they were living together, and the amount of their joint accumulations."

Even in cases where the marriage is valid, and a divorce is refused for any cause, the court may adjudge an equitable division and disposition of the property of the parties: Civ. Code, sec. 643. But, independently of the statute of divorce, we think the court had authority to decree, not only an annulment of the marriage, but also the division of the property which had been jointly accumulated by the parties. It was an equitable proceeding, and, within its equity power, the district court had full jurisdiction to give adequate relief to the parties.

The division that was made was eminently equitable and just. While Emil Werner had considerable property at the time of the marriage and Rosa had none, the testimony tends to show that the property which they had now is largely the result of their joint labor and earnings. She was active, industrious, and faithful, and, besides household work, she was an efficient aid in conducting and carrying on the different branches of business in which he was engaged. In the early days she performed labor of the hardest and most menial character, and throughout the twenty-two ⁴⁰³ years in which they lived together as husband and wife she was diligent, tireless, and economical in building up a business, and in gathering the property which they held at the time of the trial. She appears to have been a valuable assistant in managing the business and in caring for the property in which their earnings were invested. A portion of the time the title to the property was in her name, but at the time of the separation he held the legal title to most of it. The fact, however, that the legal title stood in the name of one or of the other of the parties does not prevent a just distribution of the property jointly contributed and in fact jointly owned by both. If a separation had occurred while the property stood in her name, it would hardly be contended that he would be deprived of any share or interest in the same. No more should she be deprived of a fair share of the fruits of her skill, industry, and toil while she occupied a partnership relation with him. The court has the same power to make equitable division of the property so accumulated as it would have in case of the dissolution of a business partnership.

It is claimed that defendant in error had no right to appeal to the equitable consideration of the court, because the marriage

contract was entered into through deception and fraud on her part, while the conduct of the plaintiff in error was faultless in this respect. The testimony hardly sustains the contention. She states that she frankly told Werner of her former marriage to Cole, and she further told him that Cole claimed, at the time he abandoned her, that when he married her he had a living wife. Werner advised her that as Cole had another living wife her marriage with him was void, and that she was at liberty to marry again. He produced a law book and read from the same to convince her that the former ⁴⁰⁴ marriage was no obstacle to a legal marriage with him. There is considerable testimony tending to show that there was no deception or fraud, and that her misconception of the law was largely due to the advice and influence of the plaintiff in error. No reason is seen why she was not entitled to ask and obtain a share of the joint accumulations, and, in our view, the share which was awarded her was no more than she was justly entitled to.

The judgment of the court will, therefore, be affirmed.

On Compelling the Division of Property Accumulated During a Void Marriage.

Marriage Relation a Prerequisite to Allowance of Alimony.—Where a woman sues for the annulment of a marriage which is alleged to be void for any of the causes which may prevent the creation of the relation of husband and wife by a marriage apparently legal, she may ask for alimony, pendente lite or permanent, or for a division of property which she claims to belong to the community. The equitable division allowed in the principal case is somewhat unusual. The existence of a valid marriage relation is generally held to be a prerequisite to the allowance of permanent alimony, and, for the allowance of alimony pendente lite a presumption of the existence of such relation must be raised by the pleadings or evidence: *Daniels v. Daniels*, 9 Colo. 133; *Cowan v. Cowan*, 10 Colo. 540; *McFarland v. McFarland*, 51 Iowa, 565; *McKenna v. McKenna*, 70 Ill. App. 340; *Vreeland v. Vreeland*, 18 N. J. Eq. 43; *Brinkley v. Brinkley*, 50 N. Y. 184; 10 Am. Rep. 460; *Bardin v. Bardin*, 4 S. Dak. 305; 46 Am. St. Rep. 791. Consequently, where the relief asked for is based upon the invalidity of a marriage, where it is alleged that the marriage never had a legal existence, being null and void ab initio, it is held that, in the absence of statute, alimony cannot be allowed as an incident to a decree adjudging the marriage null and void: *Werner v. Werner*, 59 Kan. 399; ante, p. 372; *Chase v. Chase*, 55 Me. 21; *Davol v. Davol*, 13 Mass. 264; *Calame v. Calame*, 24 N. J. Eq. 440; *Bartlett v. Bartlett*, 1 Clarke Ch. 460. See monographic note to *Methwin v. Methwin*, 60 Am. Dec. 665, on alimony and its allow-

ance. But it has been held that a second wife, being blameless, is entitled to alimony where her husband concealed the fact from her that he had an undivorced wife living in another state, and the second wife believed him to be her lawful husband at the time of her marriage, and had no reason to doubt it until his answer disclosed that he had another wife: *Strode v. Strode*, 8 Bush, 227; 96 Am. Dec. 211. See *Lea v. Lea*, 104 N. C. 608; 17 Am. St. Rep. 692.

Property Rights Arising out of Void Marriage.—The foregoing is meant merely to serve the purpose of illustration. It is the undoubted doctrine of the common law that community property rights cannot arise from a void marriage, for community of property between husband and wife presupposes a valid marriage: 6 Am. & Eng. Ency. of Law, 297; *Summerlin v. Livingston*, 15 La. Ann. 519. Either party to a null marriage may disregard it, and neither can pretend to derive from it any of the consequences of a lawful marriage: *Succession of Minvielle*, 15 La. Ann. 342. Property, to become a part of the community, must be accumulated during the existence of a valid marriage relation, and property acquired by a man during cohabitation with a woman whom he subsequently marries does not become community property: *Hatch v. Ferguson*, 57 Fed. Rep. 966. Said the court in *Chapman v. Chapman*, 11 Tex. Civ. App. 392: "The community estate is created by law as an incident of marriage and does not arise from contract between the parties. It is created by law only as between those who occupy toward each other the relation of husband and wife. Whatever be the interest of parties related to each other as were appellant and Thomas Chapman, such interests do not constitute the community estate recognized by law to exist between the parties to a lawful marriage. If appellant had an interest in any of the property which was sought to be brought into this litigation, it was because she acquired the right or title to it in some other way than by the mere operation of the statute under which the right to half of the property acquired by either husband or wife during marriage is vested in the wife. Such right is given by law to the wife, as such, because she is the wife, and not because of the performance of services to the husband, or because she is permitted by her companion to assume the station, and enjoy the other privileges belonging to a wife, where she is not such in law or fact."

In the case from which quotation has just been made, a man had contracted a second marriage while his first wife was yet alive and undivorced from him. The property, the right to administer upon which was in controversy, was mostly accumulated during the second marriage, but was held to be a part of the community under the first marriage, which was in accord with *Routh v. Routh*, 57 Tex. 589. In a state where common-law marriages are not recognized, land acquired with the earnings of a man and woman who live together and hold themselves out to the world as man and wife is not community property, and, if no trust relation be established, the land must be regarded as belonging to the one in whose name the legal title stands: *Stans v. Baitey*, 9 Wash. 115. Compare *Succession of Llula*, 44 La. Ann. 61.

It is not impossible, however, that valid and enforceable property rights may arise from cohabitation under a void marriage. In Louisiana, whose peculiar doctrines in this connection we will notice in a separate paragraph, it has been held that even "the relation of concubinage does not prevent the concubine from demanding a settlement of the affairs during its existence, and a participation in profits derived from capital and labor which she contributed, although the property is immovable and stands in the name of the deceased." The cases to be considered in this connection are usually similar to the principal case. In them courts have been called upon to determine the rights of a woman who in good faith contracts marriage with a man, which is invalid because of the fact that he has another wife living, lives with him and assists in amassing property, to a share of which she asserts claim. The equitable considerations which favor a woman in such a situation are patent enough and have appealed effectively to courts in a number of cases. While debarred of dower rights, she may recover the value of her work and labor during the relation: *Higgins v. Breen*, 9 Mo. 497. Where the husband, under such a void marriage, took possession of his second wife's property, a decree declaring the marriage void may order him to surrender such property and account for rents and profits: *Young v. Naylor*, 1 Hill Eq. 383. See *Wheeler v. Wheeler*, 79 Wis. 303. Where complainant lived with defendant as his wife, though not in fact so, and advanced money with which he paid for property which was conveyed to him, she was held to have a lien on the property for the sum advanced, with interest: *McDonald v. Fleming*, 12 B. Mon. 285. In *Fuller v. Fuller*, 33 Kan. 582, the court expresses this opinion, which, though clearly *obiter*, prepared the way for the decision in the principal case. "In all judicial separations of persons who have lived together as husband and wife, a fair and equitable division of their property should be had; and the court, in making such division, should inquire into the amount that each party originally owned, the amount each party received while they were living together, and the amount of their joint accumulations."

The Civil Law Rule.—The principal case seems to stand almost, if not quite, alone, as far as the decisions of common law states are concerned. In the exercise of its equity powers the court adopted a doctrine which has long been recognized by the civil law and by the courts of some states where the influence of the latter has been dominant. The necessity of a valid marriage as a prerequisite to the allowance of permanent alimony, as well as to the existence of community property rights between Emil and Rosa Werner, is recognized, but the facts presented such a strong case in favor of the defendant in error that the court conceived the relation between her and Emil Werner to be a kind of partnership, and determined their rights upon that basis. The system of community property belongs to the civil law, and now exists under statutes in several of our states once subject to French or Spanish dominion, and whose annexation to the United States was subsequent to the adoption of the federal constitution.

The doctrine of the civil law, to which we have referred as analogous to the holding of the principal case, is best set forth in the Spanish law, by which, where a husband, during marriage, contracts a second marriage with a woman ignorant of the existence of the first, one-half of the acquets and gains will go to each wife; one-half to the first wife, because the marital cohabitation did not fail through her fault, and the other half to the second wife, because, by virtue of her good faith at the time of her marriage, she is reputed a lawful wife, though the marriage be null, for the same reason that her issue is recognized as legitimate. The second marriage is the putative marriage of the civil law: *Patton v. Philadelphia*, etc., 1 La. Ann. 98. This doctrine was later incorporated into the laws of Louisiana: *Hubbell v. Inkstein*, 7 La. Ann. 252; *Summerlin v. Livingston*, 15 La. Ann. 519; *Abston v. Abston*, 15 La. Ann. 137; *Jermann v. Tenneas*, 39 La. Ann. 1021. Where a woman, in good faith, marries a divorced man, and his divorce is later declared a nullity, the marriage, though null and void, will produce civil effects, and the community will be settled as if under a marriage as to the legality of which there was no question: *Succession of Barry*, 48 La. Ann. 1143. Where both parties to a marriage, subsequently declared null, were in good faith, one of the civil effects in Louisiana is the legal community or partnership of acquets and gains which results from a lawful marriage: *McCaffrey v. Benson*, 40 La. Ann. 10. A concubine, however, can claim no interest in the community as a widow. While the relationship of concubinage does not prevent the concubine from demanding a settlement during its existence, she must assert her rights only as a concubine, and in such a case the rule as to putative marriages is not brought in question: *Succession of Llula*, 44 La. Ann. 61.

In Texas, the doctrine of the civil law as to putative marriages was recognized in *Smith v. Smith*, 1 Tex. 621, 46 Am. Dec. 121, and *Lee v. Smith*, 18 Tex. 141. The introduction of the common law in Texas dates from 1840, and, in all propriety, should have resulted in the abrogation of the civil-law doctrine under consideration. Such, however, has not been the result. In *Morgan v. Morgan*, 1 Tex. Civ. App. 315, the question was directly presented whether or not a woman who in good faith contracts marriage with a man, by reason of whose previous invalid divorce such marriage is a nullity, may assert community rights in the property accumulated while the two lived together under such marriage, and the question received an affirmative answer. After a review of previous decisions, the court, per Head, A. J., said: "It will thus be seen that the strong tendency of our judges in the past has been to hold that property acquired in this state, under our community laws, by a man and woman living together as husband and wife, should belong to them in equal shares, whether they were legally married or not. And why should this not be so, especially when they have attempted to enter into a marriage contract, and believing that they were lawfully husband and wife? In such cases, by attempting to enter into the marriage contract, they agreed, as far as they had power to agree, that they would live together as husband and wife,

and that all property that they might thereafter acquire should be community property, and belong to them in equal portions. . . . It will not do to refer to the decisions in common-law states to sustain the proposition that the woman, under such circumstances, has no right to any of the property so acquired. In those states, by entering into the marriage contract, she understood that all the property they might acquire while living together should belong to the husband, but in this state she understood that their rights in the property they might accumulate should be equal." Later decisions do not seem to have diminished the force of this decision, which may be regarded as stating the Texas doctrine, though in two later cases an inclination to depart from it is exhibited: *Routh v. Routh*, 57 Tex. 589; *Chapman v. Chapman*, 11 Tex. Civ. App. 392, affirmed in 88 Tex. 641.

CRONKHITE v. BUCHANAN.

[89 KANSAS, 541.]

JUDICIAL SALE OF TWO OR MORE PARCELS OF LAND AS ONE.—Where two quarter-sections of land are included in one mortgage and are ordered to be sold to satisfy the debt, an order confirming the sale will not be reversed, because it appears that the whole land was offered for sale and sold as one parcel, there being, however, no showing that any request was made to have them sold separately, or that they were not at first offered separately, and there being some evidence that they would sell better as one tract than if divided. The fact that one of the parcels was occupied by the defendants as their homestead did not render it imperative on the sheriff to offer them in separate parcels in the absence of any request that he do so.

JUDICIAL SALES—CONFIRMATION OF, WHO MAY MOVE FOR.—An administrator of a purchaser of lands at a judicial sale and the assignees of the judgment under which the sale was made are proper parties to move for its confirmation.

JUDGMENT, REVIVOR OF, WHEN WILL BE PRESUMED.—Where a sale has taken place under a judgment after the death of the judgment creditor, and such sale has been confirmed, it will be presumed that the judgment was revived in favor of the administrator of the decedent.

JUDICIAL SALE—CONFIRMATION OF AFTER THE DEATH OF THE BIDDER.—Though a purchaser at a judicial sale has died, it may be confirmed, and an order made that the sheriff execute a deed to the purchaser.

JUDICIAL SALE.—THE DEATH OF A PURCHASER at a judicial sale before its confirmation does not avoid the sale.

F. E. and J. A. Smith, for the plaintiffs in error.

David Martin, for the defendants in error.

⁵⁴¹ ALLEN, J. The plaintiffs in error seek the reversal of an order of the district court of Ottawa county confirming a

sale of real estate, based on a judgment in favor of Sarah J. Buchanan against H. B. Cronkhite and others, made during the lifetime of the plaintiff, and under which certain mortgaged lands were bid in by her. The sale was made on the 20th of February, 1893. The plaintiff died on the second day of December of the same year. On the 24th of August, 1896, motions to set aside the sale were filed by Cronkhite and wife and the Citizens' National Bank of Kansas City, Missouri. On the same day motions to confirm the sale were filed by Leah V. Buchanan, as administratrix with the will annexed of the estate of Sarah J. Buchanan, and by Rees and Tomlinson, ⁵⁴² as assignees of the judgment. The court sustained the motions to confirm and overruled the motions to set aside the sale. A motion to dismiss this proceeding is interposed on various grounds, but none of them are deemed sufficient to prevent a consideration of the case on its merits. Numerous errors are alleged, and discussed at much length with elaborate citations of authorities. The record, however, narrows the field of inquiry and renders it unnecessary to consider all the matters discussed by counsel.

Two quarter sections of land between which there is a public highway were sold as one tract. It is contended that each quarter section should have been sold separately. Both were included in one mortgage and ordered sold to satisfy the debt. The sheriff's return merely shows that the whole of the land was offered for sale, and sold to S. J. Buchanan for three thousand five hundred dollars, that being the highest and best bid made therefor. It is not shown that any request was made by the defendant that the tracts be offered separately, nor does it affirmatively appear that they were not so offered. There was evidence tending to show that it could be sold more advantageously as one tract than if divided. The fact that the defendants Cronkhite and wife resided on one quarter section as their homestead did not render it imperatively necessary that the sheriff should offer it in separate parcels without any request to do so having been made.

There is no merit in the contention that the court erred in confirming the sale because the parties moving for the confirmation were not the proper parties to do so: *Ferguson v. Tutt*, 8 Kan. 370; *Galbreath v. Drought*, 29 Kan. 711.

It is said that the judgment in favor of Sarah J. Buchanan was never revived by the administratrix of ⁵⁴³ her estate; that the judgment became dormant, and that while dormant no judicial step could be taken based on it; that in the confirma-

tion of a sale the court acts judicially, and must therefore have proper parties before it. This proposition is the one most elaborately argued by counsel for plaintiff in error. Under the rule declared in *Kelley v. Stevens*, 58 Kan. 569, the record does not present the question sought to be raised. It does not affirmatively show that the judgment was not revived. In the case mentioned it was held that, where one of the parties died after the action was brought and before trial, the revivor would be presumed, in support of the judgment of the court, unless negated by the record.

It is finally urged that, at the time of the confirmation, Sarah J. Buchanan, who was both plaintiff in the action and purchaser at the sale, was dead; that the order of confirmation directs the sheriff to make to the purchaser a deed to the land sold; that the purchaser, being dead, cannot receive or accept a deed, and without such acceptance the deed, if executed, would be without legal force.

The order of confirmation follows the language of the statute, and directs the sheriff to make the deed to the purchaser. No provision is made by statute for a case like the one under consideration, where the interest of the purchaser is transferred by operation of law. If it should be held that the deed must be made to the party deriving title to the property under it according to the state of facts existing at the date of confirmation or of the execution of the deed, it would be necessary in many cases to bring new parties into court, and to frame issues between heirs, devisees, legatees, creditors, assignees, and others, and to determine complicated questions of fact and of law. The rule is well settled that the rights of parties are ⁵⁴⁴ fixed at the time of the sale, and that the deed when issued relates back to the date of sale: *Missouri Valley Land Co. v. Barwick*, 50 Kan. 57, and cases cited. It is not incumbent on us at this time to determine the legal effect of a deed executed in pursuance of the order of confirmation. The question now considered is, whether the court erred in confirming a sale, where the purchaser died intermediate the sale and the confirmation.

Can it be said that the mere fact of the death of the purchaser avoids the sale? It would be anomalous to hold that neither the heirs nor the personal representatives of a deceased person could assert the rights which had accrued to him. Must the court set aside the sale, and cause the land to be again advertised and offered to whomsoever would bid? This might have the effect to deprive the estate of the purchaser of a valuable piece

of property, or on the other hand it might subject the debtor, not only to additional cost, but to the loss of a favorable sale of his property. No such consequences flow from the death of a party in interest. We need not now decide whether the interest in the land acquired by Sarah J. Buchanan under her bid passed to Rees and Tomlinson under their assignment, or to the devisees and distributees of her estate under her will. We do hold that her rights were not lost, but at the time of the confirmation still subsisted in favor of the person or persons having the right under the law to assert them. The order of confirmation was rightly made in the language of the statute.

Other matters are discussed in the brief, but do not appear of sufficient merit to require mention here.

We find no error in the proceedings of the court and the order of confirmation is affirmed.

JUDICIAL SALES—FORECLOSURE OF MORTGAGE—SALE EN MASSE.—A foreclosure sale is not invalid because the premises are not sold in parcels, according to the subdivisions made after the execution of the mortgage: *Street v. Beal*, 16 Iowa, 68; 85 Am. Dec. 504; *Eslava v. Lepetre*, 21 Ala. 504; 56 Am. Dec. 266. But compare, for a contrary doctrine, *Lay v. Gibbons*, 14 Iowa, 377; 81 Am. Dec. 487; *Piel v. Brayer*, 30 Ind. 332; 95 Am. Dec. 699, and note. An execution sale in the lump of several parcels of real estate is not void: *Power v. Larabee*, 3 N. Dak. 502; 44 Am. St. Rep. 577; and will not be set aside unless it is shown that a larger sum would have been realized from the sale if the property had been sold in parcels, or that a sale of less than the whole tract would have brought sufficient to satisfy the execution: *Hudepohl v. Liberty Hill Water etc. Co.*, 94 Cal. 588; 28 Am. St. Rep. 149, and note.

JUDGMENT—REVIVAL OF.—The revival of a judgment in the name of an administrator results from the filing of his appointment for record, and an execution may issue in his name: *Durham v. Heaton*, 28 Ill. 264; 81 Am. Dec. 275. See *Day v. Sharp*, 4 Whart. 339; 84 Am. Dec. 509.

JUDICIAL SALES—CONFIRMATION—WHEN ORDERED.—It is difficult to lay down a general rule by which to determine whether a judicial sale will be confirmed or set aside. The approval or disapproval of such a sale rests in the discretion of the court, and depends in a great measure upon the circumstances of the case: *Moran v. Clark*, 30 W. Va. 358; 8 Am. St. Rep. 66. An order confirming a judicial sale has the effect of a final judgment and cures all irregularities in the proceedings leading up to the sale: See monographic note to *Watson v. Tromble*, 29 Am. St. Rep. 495.

PARKER v. UNION ICE AND SALT CO.

[50 KANSAS, 526.]

BAILOR AND BAILEE—OWNERS OF STORAGE WAREHOUSE, LIABILITY FOR UNFITNESS OF.—If the owners of a cold-storage warehouse, before opening it, issue a circular advertising it as free from taint, but in its construction use hard pine boards in the inside, and another person obtains the right to put eggs therein, and, both during the construction and afterward, has ample opportunities to observe its structure and the use of such timber, and has experience in shipping and keeping eggs, while the owners of the warehouse were without experience, and the eggs are damaged by contracting the taint of such boards, all the parties are negligent, and hence there can be no recovery for the damage to the eggs.

S. W. Leslie, for the plaintiffs in error.

F. F. Prigg, for the defendant in error.

DOSTER, C. J. The defendant in error erected a cold-storage warehouse for the keeping of perishable goods for hire. It was sheeted on the inside with hard pine boards. Among its first patrons were the plaintiffs in error, who very soon after the completion of the building deposited eggs in it for preservation through the summer. These articles became tainted and thereby damaged from the odor of the hard pine mentioned. Before opening the warehouse to customers, the defendant in error had by circular letter, a copy of which was sent to plaintiffs in error, represented its rooms to be "free from taint." Action for damages was brought; the case was tried to the court; the above matters found by it, and in addition thereto the following specific findings were made:

"10. I find that the officers and agents of defendant had no experience in keeping the building or keeping cold-storage houses until they erected the cold-storage house in question, and I find that the plaintiffs ⁶²⁷ had no experience in the erection of cold-storage houses or the keeping thereof, but I find that one of the plaintiffs, Thomas Parker, had many years' experience in shipping, buying, and selling butter and eggs and in storing and keeping the same in ordinary ice boxes.

"11. I find that James F. Redhead, president of the company, and one of the plaintiffs, Thomas Parker, talked frequently about the erection of a cold-storage house before the defendant company began the construction of the house in question, and I find that plaintiff, Thomas Parker, frequently inspected the building when it was in the course of construction and frequently talked to Mr. Redhead about it, and he inspected the

room in which the eggs in question were stored before they were placed in storage and during the time they were in storage, and while the eggs were in storage he and his employ  s frequently handled and turned the cases containing them for the purpose of keeping the yolks in the center and during the said time made no complaint about the material of which the building was constructed or the ways in which the eggs were keeping, but on the contrary frequently expressed himself as being highly pleased with the defendant's cold-storage house and the manner in which it was constructed and operated; that these observations and inspections were not contractual and were made simply because Parker expected to patronize the house and that the plaintiff and defendant at no time knew the goods were being damaged by taint.

"12. I find that the defendant and its officers and agents were negligent in using hard pine boards for the inside walls of the building; being inexperienced, they were negligent in failing to take proper care to determine what kinds of boards were adapted for that purpose.

"13. I find further that plaintiffs were also negligent in failing to use proper care when they had ample opportunity by inspecting defendant's cold-storage house to ascertain the kind of material of which the house was constructed and what effect, if ^{any}, hard pine boards would have upon their goods which were perishable."

From the above facts the court concluded as matter of law that the parties being equally negligent no recovery could be had.

The court's conclusion was sound. The ordinary rules of liability for negligence and contributory negligence obtain in cases of bailment, such as the one in question. A bailor who knows the unfitness of the place of storage of goods provided by his bailee, or who has equal opportunities with the bailee of knowing it, who sees and inspects the place of storage, and who, there being no latent defects in it, passes judgment upon it as a fit place for his purposes, will be deemed equally at fault with the bailee if damage result to his goods. The cases upon the precise question do not seem to be numerous, and but few of them are directly in point, but the rule stated is fairly deducible from and supported by *Knowles v. Atlantic etc. R. R. Co.*, 38 Me. 55; 61 Am. Dec. 234; *Brown v. Hitchcock*, 28 Vt. 452, 458. See, also, *Hale on Bailments*, 67. It will be observed that the rule as announced is not stated as inclusive of the liability of bailees quasi

public in character, such as common carriers. We do not have such kind of case before us.

No special importance is attached to the representation contained in the circular letter of defendant in error that its rooms were free from taint. The law implied as much, without any affirmative representation, to those who were ignorant and without opportunity of knowing for themselves.

Other claims of error are made, but all of them involve a consideration of the evidence in the case. This cannot be given, because it is nowhere stated or in any manner shown in the record that the case made contains all the evidence.

The judgment of the court below is affirmed.

WAREHOUSEMEN—NEGLIGENCE IN STORING GOODS—CONTRIBUTORY NEGLIGENCE OF OWNER.—Warehousemen are responsible for due care in storing the goods intrusted to them in a place of reasonable safety, and are to be charged only upon proof of their own negligence, or that of their servants in the course of their employment: *Aldrich v. Boston etc. R. R. Co.*, 100 Mass. 31; 1 Am. Rep. 76. The doctrine of contributory negligence no doubt applies to this as well as to other cases of liability for negligence. So where it is claimed that goods have been injured by storage in an improper place, the warehouseman may show that the plaintiff himself selected the place, or, with knowledge of its character, assented to its selection: See monographic note to *Schmidt v. Blood*, 24 Am. Dec. 158, 159.

SMITH v. WORSTER.

[59 KANSAS, 640.]

LIS PENDENS—DEED NOT RECORDED UNTIL AFTER SUIT BROUGHT.—After a suit is brought to foreclose a mortgage to which a grantee of the mortgagor is not made a party, because his conveyance is not recorded, and the plaintiff has no notice thereof, and a decree of foreclosure is entered, and an order of sale issued thereon, after which the conveyance is filed for record, the grantee in such conveyance must be deemed a purchaser pendente lite. Hence, if a sale is made under the decree, though after the recording of the conveyance, the purchaser acquires a perfect title free of the claims of the grantee of such conveyance.

CONVEYANCES.—AN UNRECORDED CONVEYANCE IS, by the law of Kansas, invalid while it remains unrecorded, nor does it, upon its recordation, become operative or valid as of the day of its execution as against one who had no knowledge of it prior to such recordation. If, before that time, he has commenced a suit against the grantor, omitting to make the grantee a party, because of want of notice of the conveyance, such suit may proceed; but, after the conveyance is recorded, the grantee, with respect to it, will be regarded as a purchaser pendente lite.

J. A. Smith, for the plaintiff in error.

Buck & Spencer, for the defendants in error.

¶40 DOSTER, C. J. This was an action to quiet title to a tract of land, brought by the defendant in error Worster, as plaintiff, against C. W. Smith, the plaintiff ¶41 in error, as defendant. The court below made findings of fact which, summarized, are, that the land was under mortgage executed by one Kennedy; that the plaintiff Worster derived title to it through successive conveyances from the mortgagor; that in the deed to him he assumed and agreed to pay the mortgage; that on September 21, 1887, he conveyed it by warranty deed to one F. E. Smith, who assumed the payment of the mortgage, and who in turn conveyed it by warranty deed to his wife, Julia A. Smith, who, however, did not assume the mortgage, and who thereafter, on July 3, 1889, together with her husband, executed a deed of it to their son, C. W. Smith, the plaintiff in error. This deed was not filed for record until May 17, 1890, prior to which time, October 17, 1889, suit was brought to foreclose the mortgage. To this suit Worster, the defendant in error, and F. E. and Julia A. Smith were made defendants. The plaintiff in error, C. W. Smith, was not made a defendant, because of the non-record of his deed and because of the plaintiff's lack of knowledge of his claim to the land.

Judgment of foreclosure and for the amount of the mortgage was rendered November 8, 1889, against Worster and others liable therefor. May 9, 1890, an order of sale of the land was issued, and on June 10, following, the land was purchased at the foreclosure sale by Worster, the defendant in error, for a portion of the judgment, soon after which he paid the remainder to the judgment creditor. This sale was confirmed June 30, 1890. Although the deed to C. W. Smith, the plaintiff in error had been recorded intermediate the issuance of the order of sale and the sale of the land, the defendant in error Worster was ignorant thereof and of the said Smith's claim of title. C. W. Smith, however, knew of the pendency of the ¶42 foreclosure proceedings as they progressed. He never was in possession of the land, either personally or by tenant. Some other facts were found by the court, but in the view we take of the case it is not necessary to advert to them. They constitute additional grounds for affirming, as we do, the judgment of the court below.

The question at issue can be shortly stated. It is this: Can the grantee in a conveyance, with knowledge of the pendency of a suit to foreclose a prior mortgage lien upon the land,

brought and maintained upon the assumption that he had no interest in the subject matter of the action, and who never, by possession of the land or otherwise, gave notice of his claim to it, withhold his deed from record until the case has progressed to judgment and the issuance of an order of sale, and then by filing it in the register's office arrest the conclusion of the case and bring to naught the efforts that far made to convert the land into money for the payment of the debt; and when sued by the purchaser, can one of the judgment debtors who was legally bound for its payment, in an action to quiet his title, successfully defend upon the ground that he, not having been made a party to the case, had an equity of redemption or other interest in the land of which he had not been foreclosed and barred? Our very decided judgment is that he cannot do so. C. W. Smith was a grantee of mortgaged premises. He was a grantee before suit upon the mortgage, but he purchased with knowledge of the existence of the mortgage. He knew that without voluntary payment of the mortgage debt by those obligated to such duty the mortgage would be foreclosed as against those supposed to be interested in the land. With knowledge of this fact he neglected to put himself in the way of receiving information of the foreclosure ⁶⁴³ proceeding when it was instituted. He failed to record his deed and to thereby impart notice of his rights, and to put upon his adversary the obligation to inform him of the foreclosure action. What then results from this neglect of duty?

Section 21 of the act concerning conveyances of real estate declares: "No such instrument in writing shall be valid, except between the parties thereto and such as have actual notice thereof, until the same shall be deposited with the register of deeds for record": Gen. Stats. 1897, c. 117, sec. 21.

This statute, therefore, prescribes a penalty for the neglect of duty toward others and lack of diligence to protect one's own interests. That penalty is, that the unrecorded conveyance, except as between the parties thereto and those who have actual knowledge thereof, shall be invalid as long as it remains unrecorded. If, then, the deed of plaintiff in error was invalid until recorded, it was as though he had no interest in the land until record was made. If he had no such interest until record was made, his rights dated from the time of record the same as though they had not been acquired until then. That being true, he was as a purchaser *pendente lite*. He was as though he bought pending the suit.

It cannot be claimed that an unrecorded deed is invalid for the time being simply because unrecorded, but that when recorded it carries the grantee's rights back in time and effect to the period of purchase, as against those who have acquired rights meanwhile. The record of a conveyance gives it no such retroactive effect. Until recorded it is invalid; until then it has in legal contemplation no existence. Any other construction would not only nullify the intent, but would change the actual letter of the statute. Had another in good ⁶⁴⁴ faith purchased the land from C. W. Smith's grantors, he could have held it as against Smith. If therefore title by a purchaser of the land could have been thus acquired pending Smith's failure to give notice of his own title to it, why could not rights as a mortgagee in foreclosure be likewise acquired pending the same failure to give notice? The statute does not declare that an unrecorded deed shall be invalid as against subsequent purchasers or other particular classes of persons. It declares generally that such deed shall be invalid; and that means invalid as against all classes of persons, with any and all kinds of rights. If rights as a mortgagee in foreclosure could be thus acquired, could Smith thereafter do anything to deprive such mortgagee of his acquired rights? The answers to all these questions seem obvious. They do not need to be stated. What were the rights which the mortgagee, and for that matter all the other parties to the foreclosure action, acquired against C. W. Smith through his failure to record his deed? They were to institute and prosecute the foreclosure action upon the assumption that title to the land remained in the grantees of the last recorded conveyance, and hence to treat all unrecorded conveyances of which they might thereafter receive information as valid only from the receipt of the information; and that means to treat the grantees in such conveyances as purchasers pendente lite.

Before C. W. Smith placed his deed upon record—that is, before he in legal contemplation purchased the land, a judgment of mortgage foreclosure had been rendered against his grantors and sale proceedings had been commenced. That judgment was *res judicata*, and the right to institute and conduct the sale proceedings under the status fixed by the judgment followed as a necessary consequence. The principle ⁶⁴⁵ thus stated was declared in *Utley v. Fee*, 33 Kan. 689, wherein it was remarked: "The title and estate of a person holding an unrecorded deed is, as to third persons without notice, wholly in the grantor, and the grantee is in privity with its [his] grantor, and any

decree rendered against the grantor affecting the grantor's title is also in effect a decree rendered against the grantee, and it equally affects his title; and the decree is *res adjudicata* as to the interests of all." In that case it was likewise remarked: "Where a deed is recorded a long time after its execution, it probably takes effect, as to innocent third persons without notice, at the same time that it would if it were executed and recorded on the day on which it is recorded."

No construction can be evolved out of section 20 of the act concerning conveyances which militates against the above views. The declaration of that section that all subsequent purchasers and mortgagees shall be deemed to purchase with notice of recorded instruments from the time of their being filed for record means no more than it says. It simply establishes a rule of constructive notice. It does not assume to define rights, but only to declare a rule of notice as to rights. It gives to notice of rights no retroactive effect. On the contrary, it expressly limits the effect of such notice to the time of filing the instrument for record. Those rights, therefore, date only from the time of the notice as the origin of their existence. One of them, perhaps, was the right to redeem in equity, but the right to stay a foreclosure proceeding, intervene in the suit, and compel the parties to litigate the case anew, is not one of them.

As opposed to these views, the case of *Holden v. Garrett*, 23 Kan. 98, is cited and much commented upon. In that case it was held that an unrecorded mortgage, given before the levy of an execution issued upon a ⁶⁴⁸ general judgment, would take priority over a sale of the land made after the mortgage was recorded. The rule thus announced lends no support to the contention of the plaintiff in error. As pointed out in that case, liens of general judgments and execution levies upon land, by the very terms of the statute, can be acquired only upon the actual interest of the judgment debtor. Liens upon apparent but not actual interests cannot be obtained. The decision in the case was rested upon the further ground that a mere judgment creditor is not a bona fide purchaser and parts with nothing to acquire his lien, as does a purchaser for value; and, as a further ground of distinction, not adverted to in the case because not necessary to the decision, it may be remarked that a case in which a general judgment only, and not a specific lien is sought, is not a *lis pendens* as to third parties. No one not a party to such case can be charged with notice of it until the judgment is obtained, and inasmuch as the statute rests the

lien of such judgment only upon actual and not apparent interests, the judgment itself does not become *lis pendens* as to the actual owner of the land. If in such case a sale were made with the conveyance or mortgage still unrecorded, the purchaser would acquire the land to the exclusion of the real owner, not because the suit, or judgment, or levy, or sale, or all of them together, constituted a *lis pendens* as to the grantee or mortgagee of the unrecorded instrument, but he would acquire it as he might do by voluntary conveyance from the owner of the apparent title, that is, because he would buy in ignorance of the real ownership of the land. However, should the conveyance hitherto unrecorded be filed for record before his purchase, and the real owner be thus disclosed, his rights as purchaser would in consequence be affected.

647 The question we have determined is not a new one, although it has not often been before the courts. The views we express are in accord with all the decisions save that of *Grant v. Bennett*, 96 Ill. 513, and even in that case a most vigorous dissent to the majority opinion was entered by Mr. Justice Dickey. The rule collected out of the several cases on the subject is stated in 13 American and English Encyclopedia of Law, 907, and to it, as briefly stated, we likewise subscribe.

"The holder of an unrecorded deed at the time a suit is commenced and *lis pendens* comes in force must be placed in the category of a *pendente lite* purchaser. This is specially true where the recording laws declare that the instrument shall be effective as against purchasers and creditors from and after the filing for record or recording. As between the parties to the instrument it is valid without reference to its record; but under such statutes the instrument does not become effective as against purchasers and creditors until it is recorded. So, if prior to such record a suit is commenced involving the property, the *lis pendens* would take precedence to the rights of a grantee under an unrecorded deed or mortgage, and such grantee or mortgagee could have no better right than if the instrument had actually been made after the *lis pendens* had come in force, for the recording, as in favor of such persons, is one of the essentials to its validity. This is not an exception to the rule of *lis pendens*, but an application of the rule itself."

The judgment of the court below is affirmed.

LIS PENDENS—WHO BOUND BY—UNRECORDED CONVEYANCES.—As a general rule, neither an action at law nor a suit in equity can conclude the rights of anyone save the parties to the action and persons in privity with them. This general rule may be

modified by statutes, and especially by statutory provisions authorizing the recording of instruments affecting the title to real property and denying effect to those which are not so recorded. In many of the states, statutes have been enacted in which, in suits for partition or to foreclose mortgage or other liens, the plaintiff is exonerated from making parties to the action any persons whose claims do not appear of record, and providing that the notice of the action shall bind persons whose conveyances are not then recorded: See monographic note to *Stout v. Philippi Mfg. Co.*, 56 Am. St. Rep. 870, 871, on the law of *lis pendens*.

HINSDALE SAVINGS BANK v. NEW HAMPSHIRE BANKING COMPANY.

[59 KANSAS, 716.]

EVIDENCE—BOOKS OF A CORPORATION TO SHOW MEMBERSHIP THEREIN.—In an action to charge the defendant with liability as a stockholder in a corporation against one who denies his membership, a stub of a blank certificate book containing memoranda indicating that a certificate of shares of stock had been issued to him is not admissible against him.

Ferry & Doran, for the plaintiff in error.

Peters & Nicholson, for the defendant in error.

716 DOSTER, C. J. This was an action by the New Hampshire Banking Company as a judgment creditor of the Davidson Investment Company, a corporation, to charge the Hinsdale Savings Bank with liability as a stockholder in the corporation named. The action was in the form of a petition under the last clause of **717** section 50, chapter 66 of the General Statutes of 1897. The defendant filed an answer denying its membership as a stockholder. The only evidence in proof of membership was the stub of a stock certificate book containing memoranda indicating that a certificate of shares of stock had been issued to the defendant. This memoranda was in the following words: "Date of certificate, October 1, 1896. Number of certificate, 57. Number of shares, 60. To whom issued, Hinsdale Savings Bank."

Upon this evidence judgment was rendered against the defendant. The question of its sufficiency to support the judgment is brought here for review. It is wholly insufficient. It is evidence *res inter alios acta*—nothing more. Entries in the books of a private corporation are made by its officers, and concern nobody but the corporation and its members. If membership in a corporation be admitted, the books kept by its officers, with some exceptions, are admissible in evidence against the

member, but they are not admissible to establish even *prima facie* the fact of membership, as against one protesting his lack of connection with the company. As to him such books are hearsay of the baldest kind. A stock subscription book, in which one has entered his name as a subscriber for corporate shares, would constitute a contract receivable in evidence upon the issue of membership in the corporation, but a mere entry of his name as a subscriber, made upon the books by the secretary, or other officer, can be viewed in no other light than as the declaration of the corporation or the officer. Elementary as the rule of evidence adverted to is, the supreme court of the United States, in *Turnbull v. Payson*, 95 U. S. 418, and likewise a few of the state courts, have lent the sanction of their judgment to an opposing one. The doctrine of these cases is, however, caustically ⁷¹⁸ characterized by Judge Thompson in his *Commentaries on the Law of Corporations*, volume 2, section 1924, as "a strange aberration." The epithet seems not without propriety so far as necessary to give emphasis to the expression of opposing view. What would appear upon reason to be the indisputable rule of evidence is thus stated by the author named: "Perhaps no rule broad enough to cover all cases can be stated as to when, in an action to charge a shareholder, the books of the corporation are evidence against him. It may be stated that, as between members of the corporation, they are evidence of all corporate acts therein recorded; but they cannot be used against a stranger to connect him with the corporation, unless made so by act of the legislature. It is obvious that this must be the rule applied to the classes of actions we are considering. Otherwise the secretary of a company, by entering a man's name as a shareholder on its books, might, without his knowledge or consent, make him a stockholder; and where death or other circumstances had rendered countervailing proof impossible, this unauthorized act might charge him or his estate with a serious burden. Men should be allowed to make their own contracts; the courts should not, by establishing unreasonable rules, make contracts for them": *Thompson on Corporations*, sec. 1919.

The case of *Plumb v. Bank of Enterprise*, 48 Kan. 484, is unlike this one. There the question was whether the stubs of stock certificates, which, according to a practice of the corporation known to its members, were used to record or note the transfers of stock when made, but which in the particular case showed no transfer, could be used as evidence of the negative fact, as against one who admitted his membership in the com-

pany at one time, but claimed that he had parted with his shares, and who had failed to have the transfer noted by the company according to its custom on the stubs of the certificates. There the books of the corporation kept in a particular way to ⁷¹⁹ the knowledge of an admitted member, were used to show his continuing liability; here the books of the corporation were used as the sole evidence of an original contract of membership. It is not unlikely that upon an issue of membership in a corporation, the books kept by its officers may be introduced to establish the claimed connection with the company, but, if so, they would be received, not as independent, but as qualifying or explanatory, evidence. They could not be received as the sole dispositive evidence of the fact in dispute.

The judgment of the court below is reversed for proceedings in accordance with this opinion.

CORPORATIONS—EVIDENCE THAT ONE IS A STOCKHOLDER.—The entry of a person's name in the stock-book of a corporation, as a stockholder, supplemented by identifying testimony, will, in the absence of rebutting testimony, support a finding that he is a stockholder: *Holland v. Duluth Iron etc. Co.*, 65 Minn. 324; 60 Am. St. Rep. 480, and note; monographic note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 868. One is a stockholder in a corporation only when he holds shares on the books of the company, and not when he merely holds the certificate of such shares: *In re Argus Printing Co.*, 1 N. Dak. 435; 26 Am. St. Rep. 639. Compare *New Hampshire etc. R. R. v. Johnson*, 80 N. H. 890; 64 Am. Dec. 800.

ATWOOD v. STATE.

[30 KANSAS, 728.]

JUDGMENT FOR POSSESSION—WHO NOT BOUND BY SO AS TO BE GUILTY OF CONTEMPT OF COURT.—If a suit is brought by a plaintiff against a railway corporation and its mortgagee, to have the court declare that the corporation had forfeited its right of way over the plaintiff's lands, and, during the pendency of the action a receiver is appointed who is denied the right to appear, a judgment in favor of the plaintiff does not so bind the receiver that he is guilty of contempt in entering upon the property and operating it after a writ in favor of the plaintiff has been executed by placing him in possession, nor are the attorneys and agents of such receiver guilty of contempt.

POSSESSION, WRIT OF, WHO MAY BE EVICTED UNDER.—Persons who are not defendants in an action of ejectment, and who were not in possession before it was instituted, or who claim under titles distinct and independent from or to the title litigated, cannot be evicted under the writ.

POSSESSION, WRIT OF, WHETHER MAY REQUIRE OFFICER TO MAINTAIN PLAINTIFF IN POSSESSION.—In an

action in which a plaintiff has recovered judgment for the possession of real property, while a writ may properly issue requiring an officer to put plaintiff in possession, there is no authority for any other writ or order of the court requiring or authorizing the officer to maintain the plaintiff in possession.

CONTEMPT OF ONE COURT BY RECEIVER OF ANOTHER.—The agent of a receiver is the agent of the court appointing him, and neither he nor his agents can be punished by any court for contempt of it in resisting the enforcement of its judgment. If it is insisted that the receiver has run counter to the jurisdiction or claim of authority of a court other than that appointing him, the forum to which to apply for the correction of his conduct and the punishment of his offense is the court appointing and controlling him.

A. A. Hurd, W. Littlefield, O. J. Wood, and Baker, Hook & Atwood, for the appellants.

L. C. Boyle, attorney general, J. H. Wendorff, county attorney, and William A. Porter, for the state.

729 **DOSTER, C. J.** These cases are identical in all respects, and may be considered and disposed of together. They are appeals from sentences of the district court imposing punishments for contempts of its order and process. The operation of the Leavenworth, Topeka, and Southwestern Railroad was abandoned in 1894 by the corporation owning it. J. C. Stone claimed that, by the terms of a right of way deed executed to the railroad company, its cessation of the operation of the line worked a forfeiture of the easement over his land, and a restoration to him of the right of way. He instituted an action to declare the forfeiture, to restore his possession, and quiet his title. To this action the railroad company and the American Loan and Trust Company, a mortgagee of the railroad, were made defendants. Service was made upon both of them by publication. The trust company made no appearance in the case. The railroad company, failing to secure its dismissal from the action upon a claim of invalidity in the service upon it, filed an answer to the plaintiff's petition. Soon after the institution of this action one C. T. McLellan was appointed receiver **730** of the property and franchises of the railroad company, at the suit of the American Loan and Trust Company for the foreclosure of its mortgage. He immediately took possession and from thence on conducted the operation of the road. After taking possession he applied to the district court for leave to appear and file an answer in the suit of Stone v. Railroad and Trust Companies. His application was denied. About two and a half years after the beginning of the action by Stone, judgment, as

prayed for, was rendered against both the railroad and trust companies. An execution was issued upon this judgment commanding the sheriff to "forthwith cause restoration to be had of the above-described property, and to put and maintain the plaintiff in the quiet and peaceable possession thereof."

The sheriff went to the portion of the right of way in question and put Stone in possession, specially appointing an officer to assist him in maintaining it. They placed obstructions upon the portion of the railway track claimed by them. The appellant, Chaplin, was a minor in the official employ and acting under the instructions of McLellan, the receiver. The appellant, Atwood, was an attorney of the receiver. He advised Chaplin to disregard the claimed rights of Stone and the process under which possession of the disputed right of way had been taken. Together the appellants visited the place in question and caused the removal of the obstructions placed upon the track, whereupon trains began and continued to run over it as before. Atwood and Chaplin were thereupon attached and fined for contempt of the judgment and process of the court, and, as before stated, they have appealed from the sentences of conviction.

These sentences cannot stand, for two sufficient reasons: 1. The receiver was not a party to the ⁷³¹ action and was not bound by the judgment rendered in the case, and the process issued in behalf of the plaintiff Stone was not issued against the receiver; 2. The rule of comity between courts, which is likewise a rule of law, forbids interference, even by the officers of other courts, with property in the possession of a receiver, except by leave of the court appointing and controlling him.

It will be, of course, conceded that the attorney and agent of the receiver were bound by nothing which did not equally bind their principal. If the receiver was not bound to take notice of the writ under which the plaintiff Stone had been restored to the possession of the land, and would not be bound by it because not a party to the case in which it was issued, the appellants would not be bound by it, or required to take notice of it. Were they bound by it or required to take notice of it? It must be observed that the appellants were not the agent and attorney of the American Loan and Trust Company. They were the agent and attorney of the receiver, and the receiver was not the agent of the trust company and therefore bound by the judgment against it, but he was the agent of the court appointing him. It must also be observed that the appellants did not inter-

fere with the officer in the execution of the writ. The writ had been executed, the possession restored, and the officer had gone away. The sheriff, therefore, was not obstructed in the execution of his process. It may be, for the fullest purposes of the appellee's or respondent's contentions, admitted that the entry of the receiver upon the premises was unlawful as against Stone. The process, however, under which Stone had been given possession was not process against the whole world. It was against the defendants in the case, and against them alone. The ⁷³² unlawful entry of the appellants, if it were such, was a trespass for which an action for damages would lie. The ouster effected by them might give cause for an action against the receiver, if prosecuted in the proper court, but it constituted no obstruction of the process or violation of the orders of the court, because neither they nor the receiver were parties to the action. The writ in question was possessory in its nature. It was such as is properly issued to carry into effect a judgment in ejectment. The action in reality was an action in ejectment. As to such actions: "The doctrine seems to be generally established that persons who were not made parties to the ejectment, and who were in possession before it was instituted, or who claim under titles distinct and independent from or paramount to the title litigated in the ejectment, cannot be evicted under the writ": Sedgwick & Wait on Trial of Land Titles, sec. 562; Wilson v. State, 115 Ala. 129.

Of course, if one not a party to an ejectment action could not be evicted under the writ of possession, because not a party to the suit in which the process was issued, he could not be a violator of the writ or in contempt of the court issuing it if after the service he interfered with the plaintiff's possession.

But it may be suggested that the command of the writ was not alone to put the plaintiff in possession, but also to maintain him in the possession, and that a deputy under the sheriff was endeavoring to enforce the command of that portion of the writ. We pass by a question raised by appellants whether the writ in this respect conformed to the judgment of the court, and also pass by a question raised by them whether the deputization of the person put by the sheriff in charge of the premises was in sufficient legal form to confer upon him any authority. In the view we have taken of the case the determination of these questions ⁷³³ is unnecessary. The court had no power to order the sheriff to "maintain" the plaintiff in possession. Courts cannot, in such cases, by the mere issuance of process, "maintain"

successful litigants in the rights accorded to them. They cannot, in such cases, order the stationing of their sheriffs and bailiffs as guards over premises, to prevent the commission of trespass thereon. Besides, if the command to the sheriff to "maintain" the plaintiff in possession could have been legally made, it could only have been made as against the defendants in the case, and not against strangers to it. The untenability of a contrary position becomes manifest when we consider that the effective execution of a writ ordering a sheriff to "maintain" a successful plaintiff in an ejectment suit in the possession of the premises, might require maintenance, not for a day, or a week, or a month; it might require maintenance during the life of the first writ, and if possession was thereafter menaced might require the issuance of an alias, and after that a pluries writ; and if these writs in such a case as this are effective against strangers, any passenger who, with knowledge of the issuance and continuance of the writ of maintenance, rode over the plaintiff's land in one of the receiver's trains, would be equally guilty with the receiver and the receiver's agents of a violation of the writ.

A second and equally conclusive objection to the sentences of conviction is that the act of the appellants was in law the act of the receiver, and the act of the receiver was in law the act of the court appointing him. The doctrine of comity between courts will not permit the subjection of a receiver, or his agents or subordinates acting on his behalf and in his name, to attachment and conviction for contempt of another ⁷³⁴ court. If a receiver, in the execution of his trust, runs counter to the jurisdiction or claim of authority of another court, the forum to which appeal must be made for the correction of his conduct or the punishment of his offense is the court appointing and controlling him. This for the reason that a receiver is an arm of the court, exercising not his own authority, but the authority and power of the court. These principles have been so often decided that they have become settled in the law of receiverships. They were declared and enforced by this court in the recent case of *State v. Miller*, 54 Kan. 244, in which facts but slightly if at all different from those herein reviewed were under consideration.

The sentences of conviction of the court below are reversed, with directions to discharge the appellants.

EJECTMENT—WHO CONCLUDED BY JUDGMENT.—Judgment in ejectment binds only the parties thereto and their privies;

and no tenant whose possession is distinct from that of the parties to the action can be ousted by an execution: *Howard v. Kennedy*, 4 Ala. 592; 39 Am. Dec. 307. No person in possession of the premises, claiming title thereto prior to, or at the time of, the commencement of the action, can be dispossessed, unless he was made a party to the suit so as to be bound by the judgment: See extended note to *Howard v. Kennedy*, 39 Am. Dec. 313. One who enters into possession of disputed premises during the pendency of an action to recover, claiming under an adverse paramount title, is not affected by the judgment: Extended note to *Caperton v. Schmidt*, 85 Am. Dec. 210.

EJECTMENT—ALIAS WRIT OF POSSESSION.—A party put in possession under an execution in ejectment, if again disturbed, cannot have another execution on the same judgment, but must bring a new action: *Hinton v. McNeil*, 5 Ohio, 509; 24 Am. Dec. 315; *Fowler v. Currie*, 2 Dana, 52; 26 Am. Dec. 436; *Gresham v. Thum*, 3 Met. 287; 77 Am. Dec. 174.

CASES
IN THE
SUPREME COURT
OF
MASSACHUSETTS.

CONLEY v. FINN.

[171 MASSACHUSETTS. 70.]

SPECIFIC PERFORMANCE—PURCHASER OF REAL ESTATE—WHAT TITLE MUST BE SHOWN.—In order to maintain a suit for specific performance against a purchaser of real estate, the plaintiff must show that the title is good beyond a reasonable doubt; but the mere possibility or suspicion of a defect is not enough to relieve a purchaser from liability under his contract.

SPECIFIC PERFORMANCE—PURCHASER OF REAL ESTATE.—A TITLE BY ADVERSE POSSESSION may be so clearly proved and be so free from doubt as to be a proper foundation for a decree for specific performance against the purchaser.

SPECIFIC PERFORMANCE—PURCHASER OF REAL ESTATE—CHAIN OF TITLE—DELAY IN RECORDING DEED—ADVERSE POSSESSION.—If one agrees to purchase land, but refuses to complete the purchase on the ground that a deed, in the chain of title, nearly sixty years back, was not acknowledged and recorded until twenty years after its date, and he is sued for specific performance, and defends upon the ground that the plaintiff does not offer to give a good title, it must be held that the failure to acknowledge and record the deed mentioned does not make the plaintiff's title so doubtful and uncertain that the defendants ought not to be compelled to take the property and pay for it, particularly where there is nothing to show that the deed was not delivered on the day of its date, and there is evidence to show that the grantee's title, if he had any, has passed, by mesne conveyances, to the plaintiff, as well as evidence to show a title by adverse possession.

DEEDS—PRIMA FACIE EVIDENCE OF DELIVERY ON DAY OF DATE.—The date of a deed is prima facie evidence of its delivery at that date, although it was not acknowledged until a later day.

Bill for the specific performance of an agreement for the sale and purchase of certain real estate. A decree was entered dismissing the bill, and the case was reported for the determination of the appellate court.

F. B. Patten & J. R. Nichols, for the plaintiffs.

D. C. Delano, for the defendant.

⁷¹ KNOWLTON, J. The defense is, that the plaintiffs do not offer to give a good title. They tendered to the defendant a warranty deed of the premises, subject to a mortgage, which, by the terms of the contract, he was to assume and pay as a part of the consideration. It is agreed that this deed gives a perfect title to the property, unless there is an encumbrance or a cloud upon the title growing out of the fact that a deed from Nathan Conant to George Footman, under which the title is claimed, and which bears date February 11, 1839, was not acknowledged until August 3, 1859, nor recorded until August 4 of the same year. George Footman, the grantee, died in March, 1859, leaving a will, which was duly proved and allowed. The house and land in question were included in the executor's inventory as a part of his estate. The title of George Footman, if he had any, has passed by mesne conveyances to the plaintiffs. Among these conveyances are two warranty deeds, one from Edwin Rice to Henry T. Wheeler, dated April 23, 1868, and recorded April 28, 1868, and one from John H. Wheeler and others, being all the heirs of Henry T. Wheeler, to the plaintiff, dated June 20, 1889, and recorded June 26, 1889. It is agreed that there is testimony from credible witnesses who were in a position to know the facts which tends strongly to show that from a time prior to 1873 Henry T. Wheeler, and after him his heirs, and after them the plaintiffs, occupied the premises under a claim of ownership, living in the house, and maintained a continuous and undisturbed possession from that time until the present, and that none of them ever heard of any claim by Nathan Conant or his heirs, or any person representing them. Albert H. Conant testified that he is a son of Nathan Conant, that his father resided in this commonwealth from 1832 to 1876, and died a resident thereof; that neither said Nathan nor his heirs were ever of unsound mind, and that he never heard of any claim being made by Nathan ⁷² Conant or his heirs to the premises. It is not suggested that there is any evidence to contradict any of this testimony. The question is, whether the fact that the deed from Conant to Footman was not acknowledged or recorded until after the death of Footman makes the plaintiffs' title so doubtful and uncertain that the defendant ought not to be compelled to take the property and pay for it.

The general rule is, that, in order to maintain a suit for specific performance against a purchaser of real estate, the plaintiff

must show that the title is good beyond a reasonable doubt: *Sturtevant v. Jaques*, 14 Allen, 523; *Hayes v. Harmony Grove Cemetery*, 108 Mass. 400; *Jeffries v. Jeffries*, 117 Mass. 184, 187. But the mere possibility or suspicion of a defect is not enough to relieve a purchaser from liability under his contract: *Hayes v. Harmony Grove Cemetery*, 108 Mass. 400; *Dow v. Whitney*, 147 Mass. 1; *Lowes v. Lush*, 14 Ves. 547; *Franklin v. Brownlow*, 14 Ves. 550; *Pyrke v. Waddingham*, 10 Hare, 1. In *First African Methodist Episcopal Society v. Brown*, 147 Mass. 296, 298, Mr. Justice Devens says of the doubt which will relieve a purchaser of real estate from his obligation specifically to perform his contract, that it "must be reasonable, and such as would cause a prudent man to pause and hesitate before investing his money. It would be seldom that a case could occur where some state of facts might not be imagined which, if it existed, would defeat a title. When questions as to the validity of a title are settled beyond reasonable doubt, although there may be still the possibility of a defect, such mere possibility will not exempt one from his liability to complete the purchase he has made. . . . It would be often practically impossible for a party to negative all objections which might be imagined, and which, if they existed, would defeat his title."

In the present case, if the deed from Conant was not executed and delivered in the lifetime of the grantee, Footman, no title passed under it. But the fact that it was not acknowledged or recorded until after the grantee's death does not indicate that it was not delivered on the day of its date. At most, it merely suggests a question in regard to it. The date of a deed is *prima facie* evidence of its delivery at that date, even though it was not acknowledged until a later day: *Smith v. Porter*, 10 Gray, 73 66; *People v. Snyder*, 41 N. Y. 397; *Harman v. Oberdorfer*, 33 Gratt. 497; *Deininger v. McConnel*, 41 Ill. 227; *Ford v. Gregory*, 10 B. Mon. 175. Acknowledgment or equivalent proof is only required as a preliminary to recording: Pub. Stats., c. 120, secs. 5-9.

Although the presumption of delivery of a deed on the day of its date may be contradicted and controlled by evidence to the contrary, there is no such evidence in the present case. Moreover, if there was no title by deed, there is evidence to show a title by adverse possession, which is almost, if not quite, conclusive. We are not prepared to say that in no case would a purchaser be compelled in equity to take a title which rests on adverse possession. The case of *Noyes v. Johnson*, 139 Mass. 436, does not support the defendant's contention on this point.

but was decided on the ground that the special provisions of the contract of sale implied that the purchaser was to have a good title by the record. It has been held both in England and in America that a title by adverse possession may be so clearly proved and be so free from doubt as to be a proper foundation for a decree for specific performance against the purchaser: *Scott v. Nixon*, 3 Dru. & War. 388; *Games v. Bonnor*, 54 L. J. Ch., N. S., 517; *Ottinger v. Strasburger*, 33 Hun, 466; 102 N. Y. 692; *Pratt v. Eby*, 67 Pa. St. 396, 402; *Gump v. Sibley*, 79 Md. 165; *Hedderly v. Johnson*, 42 Minn. 443, 445; 18 Am. St. Rep. 521; *Logan v. Bull*, 78 Ky. 607.

Without going so far as the courts have gone in some of these cases, and, considering the case in the aspect most favorable to the defendant, the evidence makes applicable a doctrine which was stated by Judge Folger in *Murray v. Harway*, 56 N. Y. 337, 343, as follows: "The courts of equity in this state have not held that a title, though the proof thereof rests in part in parol, is, for that reason, so doubtful and uncertain as that specific performance by the purchaser will not be decreed. And it has been held that, where one of the paper links of title was defective, the lapse might be supplied by parol proof of possession, under color of title, sufficient to establish a good adverse possession; and that such a title is enough on which to found a decree": See, also, *O'Connor v. Huggins*, 113 N. Y. 511.

In view of all the evidence, we are of opinion that there is no ⁷⁴ reasonable doubt that the title of the present plaintiffs is good, and that the defendant can take it without special risk of being put to expense to defend his rights against unknown claimants who may appear hereafter.

Decree for the plaintiffs.

SPECIFIC PERFORMANCE—PURCHASE OF REAL ESTATE—DOUBTFUL OR UNMARKETABLE TITLE—PRESCRIPTION. Equity will not compel the specific performance of a contract for the purchase of land, if the title thereto is so uncertain as to affect its market value. The court will not compel the purchaser to accept such a title, nor cast upon him the risk of litigation and the embarrassment of a questionable title: *Townshend v. Goodfellow*, 40 Minn. 312; 12 Am. St. Rep. 736, and note showing that the possible existence of unrecorded deeds is not such a defect in title as will cause a denial of the right to specific performance: See, also, note to *Mason v. Caldwell*, 48 Am. Dec. 335. If the plaintiff tenders a title supported by prescription only, he must show the acquisition of title by prescription: Note to *Lewis v. Herndon*, 14 Am. Dec. 72.

DEEDS—DELIVERY OF, ON DAY OF DATE—PRESUMPTION. A deed is presumed to have been delivered on the day of its date, though it was subsequently acknowledged: *Lake Erie etc. R. R. Co. v. Whitham*, 155 Ill. 514; 46 Am. St. Rep. 855.

ANCHOR ELECTRIC COMPANY v. HAWKES.

[171 MASSACHUSETTS, 101.]

GOOD-WILL OF BUSINESS—RIGHT TO CONTRACT FOR SALE OF.—Whenever one sells a business, with its good will, it is for his benefit, as well as for the benefit of the purchaser, that he should be able to increase the value of that which he sells by a contract not to set up a new business in competition with the old; and the right to make reasonable contracts of this kind in connection with the sale of the good-will of a business is well established.

GOOD-WILL OF BUSINESS—SALE OF—COVENANT BINDING ON SELLER.—A person who sells the good-will of a business is bound by any covenant which is reasonably necessary for the preservation and protection of the property which he sells.

CONTRACT NOT TO COMPETE IN BUSINESS, WHEN VALID—SALE OF GOOD-WILL—CORPORATIONS—PUBLIC POLICY—RESTRAINT OF TRADE—INJUNCTION.—If three corporations, one of which is engaged in installing and constructing electric plants and appliances, and the other two in manufacturing and dealing in electrical appliances, organize a new company to carry on different, but closely connected, departments of the electrical business, under a written agreement that the manager of each of the old companies, who is a shareholder therein, shall become an officer and director of the new company, and that each shall subscribe for, and take, one-third of the capital stock of the new company, and each corporation further agrees to sell its assets and good-will to the new company, to discontinue business, to promote the interests of the new corporation, and not to enter into, conduct, or assist in conducting, any business that shall, in any way, interfere with, or compete, for a period of five years, with the proposed business of the new company, which is of a nature that may extend over the whole country, and the agreement is fully executed in all its parts, except the stipulation not to compete against the new company, a manager of one of the three corporations, who seeks to violate the agreement on the part of his company, will be enjoined from so doing, as such stipulation is necessary for carrying out the agreement, and is not void as against public policy on account of being in restraint of trade, for it goes no further than is reasonably necessary to protect the good-will of the business sold by the defendant's corporation, and should, therefore, be held valid and binding on the defendant, particularly where no clear distinction can be made concerning competition with one department of the new company and competition with another.

Bill in equity to restrain the defendant from competing with the plaintiff company and others in violation of a contract. The defendant had established himself in Boston, or in that vicinity, where he carried on the business sought to be enjoined. An injunction was ordered, and, at the defendant's request, the case was reported to the appellate court.

F. Hutchinson, for the defendant.

S. L. Whipple and W. R. Sears, for the plaintiffs.

¹⁰² **KNOWLTON, J.** The only question which we need to discuss in this case is whether the stipulation on which the bill

is founded is void as against public policy. The stipulation is as follows: "6. It is further agreed by all the persons whose names are set hereunder, officers of the corporations herein above described, that they will not hereafter at any time, directly or indirectly, as partner, agent, officer of a corporation, or in any other wise, enter into or conduct or assist in conducting any business that shall in any way interfere with or compete with the proposed business of said Anchor Electric Company for a period of five years; except that any one of said persons sever connection with said Anchor Electric Company as provided by paragraph 6 of ¹⁰³ said agreement of September 29, 1894." The defendant was the business manager of the Hawkes Electric Company, a corporation, and a shareholder therein; Norman Marshall was the business manager of the Iona Manufacturing Company, a corporation, and a shareholder therein; and Philip M. Reynolds was the business manager of the Brown Electric Company, a corporation, and a shareholder therein. On September 29, 1894, these three persons entered into an agreement in writing to form a new corporation under the laws of Maine, of which Hawkes was to be the president, Reynolds the treasurer, and Marshall the vice-president and assistant secretary, and of which these three were to be the managing board of directors. Four other persons were to be selected to make up the full board of directors, of whom one was to be chosen from the board of directors of each of the above-mentioned corporations. Each of these corporations was to sell all its assets to the new corporation, at their actual cash value, to be determined as provided in the writing, and an agreed price of a substantial amount fixed by the writing was to be allowed by the new corporation for the goodwill of each of the three corporations. Each of these three persons was to subscribe for and take one-third of the capital stock of the new corporation, and the assets of each of the three corporations, at the value ascertained as provided by the writing, were to be received pro tanto by the new corporation in payment for this stock, and the balance was to be paid for by the subscribers in cash. The three persons severally agreed that so long as the agreement should continue they would "devote themselves unreservedly to the interest and duties of the office which they occupy and the promotion in every way of the interests of the corporation to be formed." On the back of the writing was an agreement, signed by the three, fixing the salaries which they were severally to receive in the new corporation, and an additional stipulation as to the al-

lowance for assets of the three corporations. It was provided that the agreement should be binding only as approved by a majority of the shareholders or boards of directors of the three corporations. The Anchor Electric Company was afterward established as a corporation under the laws of Maine, in accordance with the contract. In this connection there was another agreement made on October 12, 1894, between the Anchor ¹⁰⁴ Electric Company and the other three corporations, whereby the assets and goodwill of the three were transferred to the new corporation at specified agreed prices, which were paid in stock of the new corporation. A part of this agreement of the three old corporations with one another and with the Anchor Electric Company was in these words: "They will not hereafter at any time continue the business of manufacturing and dealing in electrical goods or specialties of any sort or description, after the fifteenth day of October, 1894, except to sell and dispose of merchandise on hand at this date not herein transferred to the Anchor Electric Company, and will do no business of any sort or description except such as is necessary in the liquidation of said three electric companies." The agreement was signed by each of the four corporations, by their respective officers, Hawkes, Reynolds, and Marshall, and the stipulation in question was the sixth article of the agreement. The judge found that the instrument had been executed in all its parts, except this sixth article, and had been adopted by the corporations. There was a provision in the first agreement whereby any one of the three persons could withdraw from the new corporation if he was at any time put at a financial disadvantage by the other two in reference to salary or income, and could sell his stock to the others at a price to be agreed upon or fixed by arbitration. The judge before whom the case was heard found that the defendant sold his stock in the new corporation and withdrew from it, but not under the provision above referred to, and that he has violated and intends to violate the sixth article of the last agreement. He found that all the allegations of the bill bearing upon the validity of the sixth article were proved. He also found as a fact, so far as he could properly so find, that the sixth article was reasonable and necessary for the carrying out of the transactions set forth in the agreement, and that the value of the stock of the Hawkes Electric Company was largely dependent upon its being kept. It is found that the business of the plaintiff is of a nature that may extend over the whole country. We are thus brought to a consideration of the law applicable to the case.

From very early times certain contracts in restraint of trade have been held void as against public policy. They are objectionable ¹⁰⁵ on two grounds—they tend to deprive the party restrained of the means of earning a livelihood, and they deprive the community of the benefit of his free and unrestricted efforts in his chosen field of activity. The distinction was long ago taken between contracts involving a partial restraint of trade and contracts involving a general restraint of trade, the former being held valid if not unreasonable, and the latter invalid. The changes in the methods of doing business and the increased freedom of communication which have come in recent years have very materially modified the view to be taken of particular contracts in reference to trade. The comparative ease with which one engaged in business can turn his energies to a new occupation, if he contracts to give up his old one, makes the hardship of such a contract much less for the individual than formerly, and the commercial opportunities which open the markets of the world to the merchants of every country leave little danger to the community from an agreement of an individual to cease to work in a particular field. The general principle that arrangements in restraint of trade are not favored is, however, firmly established in law, and now, as well as formerly, is given effect whenever its application will not interfere with the right of everybody to make reasonable contracts. Whenever one sells a business with its goodwill, it is for his benefit, as well as for the benefit of the purchaser, that he should be able to increase the value of that which he sells by a contract not to set up a new business in competition with the old. The right to make reasonable contracts of this kind in connection with the sale of the goodwill of a business is well established. But the particular provisions which are reasonably necessary for the protection of the goodwill of many kinds of business are very different now from those required in the days of Queen Elizabeth. Then the courts had occasion to inquire whether a limitation upon the right to engage in the same business as that sold was unreasonable because it included a town instead of a single parish, or extended a distance of ten miles instead of five. Now the house of lords in England has held by a unanimous decision in a recent case that such a limitation which covered the whole world was not unreasonable. Because in early times it seemed inconceivable that an agreement to refrain from establishing a ¹⁰⁶ business of the same kind anywhere in the kingdom should be necessary to the protection of the goodwill of any existing business, it was laid down as an arbitrary rule that agreements

so comprehensive in their terms were void. Thus the distinction between a general restraint of trade and a partial restraint of trade grew up. Contracts applying to any territory less than the whole kingdom were considered in reference to their reasonableness, having regard to the purpose for which the contract was made. By the unanimous decision of the house of lords in the case of *Nordenfelt v. Maxim Nordenfelt etc. Co.* [1894], App. Cas. 535, affirming the unanimous judgment of the court of appeals in [1893] 1 Ch. 630, it is now settled in England that a covenant, unrestricted as to space, not to engage in a particular kind of business for twenty-five years, made in connection with the sale of the property of a manufacturing establishment, is valid, if, having regard to the nature of the business and the limited number of its customers, it is not wider than is necessary for the protection of the covenantee, nor injurious to the public interests of the country, as were found to be the facts in that case. The earlier English authorities are reviewed at length in the opinions, and it is unnecessary to refer to them here. Arbitrary rules which were originally well founded have thus been made to yield to changed conditions, and underlying principles are applied to existing methods of doing business. The tendencies in most of the American courts are in the same direction: *Oakdale Mfg. Co. v. Garst*, 18 R. I. 484; 49 Am. St. Rep. 784; *Fowle v. Park*, 131 U. S. 88, 97; *Oregon Steam Navigation Co. v. Winsor*, 20 Wall. 64; *Tode v. Gross*, 127 N. Y. 480; 24 Am. St. Rep. 475; *Diamond Match Co. v. Roeber*, 106 N. Y. 473; 60 Am. Rep. 464; *Whitney v. Slayton*, 40 Me. 224; *Western Wooden Ware Assn. v. Starkey*, 84 Mich. 76; 22 Am. St. Rep. 686.

In this Commonwealth the general doctrine of the cases seems to be that, in connection with the sale of the goodwill of a business, the vendor will be bound by any covenant which is reasonably necessary for the preservation and protection of the property which he sells: *Pierce v. Fuller*, 8 Mass. 223; 5 Am. Dec. 102; *Perkins v. Lyman*, 9 Mass. 522; *Stearns v. Barrett*, 1 Pick. 443; 11 Am. Dec. 223; *Palmer v. Stebbins*, 3 Pick. 188; 15 Am. Dec. 204; *Pierce v. Woodward*, 6 Pick. 206; *Angier v. Webber*, 14 Allen, 211; 92 Am. Dec. 748; *Dean v. Emerson*, 102 Mass. 480; ¹⁰⁷ *Morse Twist Drill etc. Co. v. Morse*, 103 Mass. 73; 4 Am. Rep. 513; *Boutelle v. Smith*, 116 Mass. 111; *Ropes v. Upton*, 125 Mass. 258; *Handforth v. Jackson*, 150 Mass. 149. In cases in which such covenants have been held bad they were deemed to go further than was reasonable to give full value to the property sold. In *Bishop v. Palmer*, 146 Mass. 469, 4 Am.

St. Rep. 339, relied on by the defendant, the covenant was unrestricted as to space, and was made in connection with the sale of the property and goodwill of a local business, not peculiar in its nature, for the protection of which so extensive a covenant was held to be unnecessary. The case of Gamewell Fire Alarm Tel. Co. v. Crane, 160 Mass. 50, 39 Am. St. Rep. 458, is not inconsistent with the contention of the plaintiffs. It is said in the opinion that the "plaintiff did not buy the goodwill of a mercantile business, and the defendant Crane had no customers for fire alarm and police telegraph machines and apparatus." A ground of the decision, stated by a majority of the court, is as follows: "The stipulation seems to us to be something more than is reasonably necessary to protect the plaintiff in the enjoyment of the property it bought, even if that should be adopted as the test, upon which we express no opinion."

Inasmuch as the stipulation in the present case is only to do no business for five years that shall interfere with or compete with the proposed business of the Anchor Electric Company, it seems quite clear under the authorities in Massachusetts that the stipulation goes no further than is reasonably necessary to protect the goodwill of the business sold by the defendant's corporation, and that it should therefore be held valid, unless a distinction is to be made between competition with the business of the Anchor Electric Company and competition with the business sold by the defendant and his company. The business sold by the defendant was chiefly installing and constructing electric plants and appliances. The business of the new corporation included with this that which formerly was done by the other two companies, namely, manufacturing and dealing in electrical appliances.

In considering this branch of the case, the nature of the contract of sale should be regarded. The defendant's business was sold to be conducted as a part of a new and more general business. Very likely the price paid for it was larger, and the goodwill ¹⁰⁸ was deemed more valuable because it was to be so conducted. The plaintiff corporation carried on different but closely connected departments of the electrical business, and the different departments were so related to one another that sometimes it would be difficult, if not impossible, to distinguish between competition with one department and competition with another.

Moreover, this was a contract for mutual profit in conducting the new business, which, under the findings of the court, has all presumptions in its favor. Each party was to devote himself to

the interests of the new corporation. Although the parties provided for the establishment of a corporation, their arrangement was in the nature of a copartnership. The profits of the new corporation were to be shared by the old corporations, which had sold their property and become stockholders in the new one. It is difficult to see any good reason why the contract of the three persons to promote the interests of the new corporation should not be binding upon them. This contract necessarily includes the agreement not to enter into competition against the new corporation. The case seems to come within the language of Chief Justice Chapman in *Morse Twist Drill etc. Co. v. Morse*, 103 Mass. 73, 75, 4 Am. Rep. 513, where he says the "defendant did not technically become a partner with the plaintiffs, yet he became the associate of the other stockholders in the business, he himself inducing them to join him in it, and having a large interest in the formation of the company; and the same principle that enables a partner to bind himself to do nothing in competition with the business of the firm ought to apply to him."

We are of opinion that the stipulation not to compete with the business of the plaintiff corporation is as binding on the defendant as if it were merely not to compete with such business as previously had been done by the *Hawkes Electric Company*.

Decree for the plaintiffs.

GOOD-WILL, SALE OF—CONTRACT NOT TO COMPETE.

One who sells the good-will of a business may be enjoined from injuring it. A sale of the right to compete in a particular business or calling is valid and enforceable, if the rights of the public are not affected by restraining trade; and a breach of such contract will be restrained by injunction: *Note to Kramer v. Old*, 56 Am. St. Rep. 656. A party to such contract cannot evade its obligation by engaging in, or taking stock in, or assisting in, the organization of a corporation, to carry on the business, which he has agreed not to carry on, and he will be enjoined from so doing: *Kramer v. Old*, 119 N. C. 1; 56 Am. St. Rep. 650.

**CONSOLIDATED HAND-METHOD LASTING MACHINE
COMPANY v. BRADLEY.**

[171 MASSACHUSETTS, 127.]

JUDGMENT—REMEDY OVER, BY DEFENDANT—NOTICE TO DEFEND.—If a party is obliged to defend against the act of another, against whom he has a remedy over, and defends solely and exclusively the act of such other party, and is compelled to defend no misfeasance of his own, he may notify such party of the pendency of the suit and may call upon him to defend it. If he fails to defend, then, if liable over, he is answerable not only

for the amount of damages recovered, but for all reasonable and necessary expenses incurred in such defense; but this principle does not apply to cases where one is defending his own wrong, or his own contract, although another may be responsible to him.

NOTICE TO DEFEND—SUFFICIENCY OF—JUDGMENT—REMEDY OVER BY DEFENDANT.—A notice to come in and defend must be such, in substance, as to give the person notified information that he is called upon to come in and defend the suit, or that he is given an opportunity to do so, and that, if he does not defend it, he will be held answerable for the result. Otherwise, a judgment against the defendant in the action, in case he should be beaten, will not bind the person to whom notice is given.

JUDGMENT—REMEDY OVER BY DEFENDANT LESSEE AGAINST LESSOR—COMMON LAW LIABILITY.—If the lessee of a building, against whom an action is brought, defends against some negligence of his own, or of some person for whom he is made answerable by statute, and damages are assessed, under such statute, with reference to the degree of culpability of himself, or of such person, he has no remedy over against his lessor to recover the amount of the judgment. The latter, if answerable at all to him, is liable at common law for breach of his contract, or of his duty.

Contract to recover the amount of a judgment paid by the plaintiff company in an action brought against it, together with counsel fees and costs of defense. There was a verdict for the plaintiff, and the defendants alleged exceptions.

A. M. Lyman, C. C. Barton, and C. C. Barton, Jr., for the defendants.

A. A. Strout and G. S. Selfridge, for the plaintiff.

¹²⁸ FIELD, C. J. Rose Tierney and John Tierney, the next of kin of John M. Tierney, an employé of the plaintiff in the suit at bar, brought suit against the plaintiff under the statutes of 1887, chapter 270, section 2, in which they alleged in the first count that John M. Tierney was instantly killed from injuries received by reason of a defect in the ways, works, and machinery of the plaintiff, which had not been discovered or remedied, owing to the negligence of a person in the employ of the plaintiff and intrusted with the duty of seeing that the ways, works, and machinery were in proper condition. In the second count, they alleged that said John M. Tierney sustained bodily injuries from which he died without conscious suffering, by reason of the negligence of a person in the service of the plaintiff intrusted with and exercising superintendence, whose sole and principal duty was that of superintendence. The specific cause of the injury which resulted in the death of John M. Tierney was alleged in the first count to be the defective condition of an electric lamp and of an electric current. The next of kin amended their dec-

laration by adding a third count, which, so far as material to the present suit, did not differ from the first count. The present plaintiff, the defendant in that suit, answered by a general denial, and on the trial the jury found for the plaintiffs and assessed damages in the sum of three thousand dollars. The defendant in that suit filed exceptions and a motion for a new trial. A new trial was ordered, unless, the exceptions being waived, the plaintiffs therein would remit fifteen hundred dollars from the amount of the verdict. The plaintiffs remitted that sum, and judgment was entered for fifteen hundred dollars damages, and the costs of suit, which the defendant in that suit paid.

The suit at bar was brought by the defendant in that suit ¹²⁹ against the present defendants, to recover the amount of that judgment and the costs and counsel fees incurred in the defense of that suit. Before the trial of the original suit the present plaintiff gave to the defendants the following notice.

"Boston, Mass., May 31, 1893.

"Messrs. Bradley & Woodruff, 234 Congress St., Boston, Mass.

"Dear Sir: The suit of Tierney v. Consolidated Hand-Method Lasting Machine Company for the death of John Tierney, January 1, 1891, when he was killed, the result of touching or holding the electric light apparatus in the room occupied by the Machine Company, where the electricity was furnished by you, will come on for trial on Monday next, in the second session of the superior court. We hope and expect to be able to win the case and thus relieve the parties from liability. In case, however, we should be beaten, we shall look to you to recompense the Machine Company; and we shall expect you to assist in the conduct of the defense of the case. Yours truly,

"STROUT & COOLIDGE,

"Attorneys for C. H. M. L. Machine Co."

The exceptions in the present case recite: "The defendants were not consulted as to the manner in which the defense [of the original suit] should be conducted, although they were present at the trial." It appears also that the exceptions in the original suit were waived without the knowledge or consent of the present defendants.

The substantial ground of the liability of the present defendants as alleged is, that the defendants agreed with the plaintiff to furnish electricity by suitable appliances for the purpose of lighting the premises occupied by the plaintiff, and to keep the appliances in safe condition; that the electricity was furnished by two currents under the control of the defendants; that the

appliances were out of repair and dangerous, of which the defendants had notice, and that the defendants promised to shut off the stronger of the two currents, which they failed to do, in consequence of which Tierney, one of the plaintiff's employés, was killed by taking hold of an electric lamp. Each count sets out the bringing of the original suit (misdescribing it as a suit by the administrator of the estate of Tierney), the judgment therein, and the costs and expenses which the plaintiff had paid, and alleges notice to the present defendants to come ¹⁸⁰ in and defend the original suit, and that they neglected to do so, whereupon the present plaintiff defended it.

The jury in the present suit rendered a verdict for the plaintiff, and assessed damages to the amount of the judgment in the original suit, and of the sum expended for costs and for counsel fees therein, with interest.

In the trial of the present suit, the defendants made twenty-two requests for instructions, which, with the exception of the fifth and sixth requests, were not given otherwise than as appears in the charge of the presiding justice. The eighteenth and nineteenth requests were as follows: "18. The notice dated May 31, 1893, was given too late, and was insufficient in form and substance to bind these defendants. 19. These defendants are not bound by the amount of the judgment recovered against the plaintiff by Tierney."

Many of the other requests proceed on the ground that the plaintiffs in the original suit, being the next of kin of John M. Tierney, had no cause of action against the present defendants; that they recovered judgment against the present plaintiff on the ground of the negligence of the plaintiff, or of some person in its service intrusted with the duty of seeing that its ways, works, and machinery were in proper condition, or intrusted with and exercising superintendence, and that there can be no contribution between wrongdoers. In the original suit the damages to be recovered by the terms of the statute were to be "not less than five hundred and not more than five thousand dollars, to be assessed with reference to the degree of culpability of the employer herein or the person for whose negligence he is made liable": Stats. 1887, c. 270, sec. 3.

Upon the question of the notice to come in and defend the original suit, the presiding justice charged the jury as follows:

"There is evidence that the defendants were notified of that suit and had an opportunity to come in and defend, and I do not know that any question is made about that notice. If there is, the plaintiffs must satisfy you that that notice was given at a

reasonable time, so that the defendants had a reasonable opportunity to avail themselves of their knowledge, to furnish evidence, and to take part in the trial, and to do whatever was reasonable and lawful to defend their interests. The binding force of the ¹³¹ judgment grows out of the fact that such notice has been given and such opportunity afforded to the defendants. I do not understand that any question is made here about the terms of the notice not being sufficiently particular; I did not hear it read but once and I have not seen it, but it does not strike me that there was any material defect in the form of the notice; whether it was given in time or not, sufficient time, is for you to determine, if there is any question made about it.

"If the notice was seasonably given, and if there is this liability over on the part of the defendants, then that suit settles three things.

"It settles, in the first place, the right of the plaintiff to recover in that action; in other words, that Mr. Tierney was not guilty of any carelessness, that there was nothing in his conduct why he should not recover.

"It settles another proposition, another fact, and that is, that the premises of the present plaintiffs, this room, this lamp in connection with the electricity running it, was in a defective condition.

"And it settles the third thing, and that is the amount of damages which the plaintiff in that action was entitled to.

"So the parties in this suit, if the other steps were properly taken, the defendants in this suit, cannot contest the question of Mr. Tierney's right to recover, nor the question whether the lamp was defective or not, nor the question of the amount of damages."

The exceptions also recite: "At the close of the charge the defendants' counsel specifically excepted to the refusal of the court to give the rulings requested, save rulings 5 and 6, which were given, whereupon the court said to the counsel for the plaintiff: 'Counsel on the other side are excepting to my refusal to give all their requests. . . . Whether you care to look them over and have some of them given, I do not know.' " And the counsel replied that "he would trust the court."

We are of opinion that the notice is not sufficient in form to make the judgment in the original suit conclusive upon the present defendants as to the amount to be recovered, if anything is to be recovered, and that the exceptions to the refusal of the presiding justice to give the eighteenth and nineteenth requests are ¹³² open to the defendants, although the presiding justice, rely-

ing upon the counsel of the plaintiff, seems not to have examined carefully the form of the notice. The notice given implies that the counsel of the defendant in the original suit, the present plaintiff, intended to retain the control of the defense of that suit. The counsel might well doubt whether this suit was one which the present defendants were required to defend. They gave the present defendants notice that they should look to them to recompense the present plaintiff if it should be beaten in that suit, and that they should expect the present defendants to assist in the conduct of the defense, but they did not offer to surrender the control of the defense. Whatever may be the form of such a notice, we think that, under the circumstances in which it is given, it should call upon the person notified to come in and defend the suit, or should offer him an opportunity of doing so. The party notifying cannot insist upon retaining control of the defense, and yet hold the party notified bound by the result of the suit. The decisions of different courts in this country are not uniform upon the requirements of such a notice, but the weight of authority in this commonwealth is that the notice must be such in substance as to give the person notified information that he is called upon to come in and defend the suit, or that he is given an opportunity to do so, and that if he does not defend it he will be held responsible for the result: *Milford v. Holbrook*, 9 Allen, 17; 85 Am. Dec. 735; *Chamberlain v. Preble*, 11 Allen, 370; *Elliott v. Hayden*, 104 Mass. 180; *Gray v. Boston Gas Light Co.*, 114 Mass. 149, 155; 19 Am. Rep. 324; *Boyle v. Edwards*, 114 Mass. 373; *Westfield v. Mayo*, 122 Mass. 100, 109; 23 Am. Rep. 292; *Richmond v. Ames*, 164 Mass. 467, 474; 167 Mass. 265; *Freeman on Judgments*, 3d ed., sec. 181; 7 *Robinson's Practice*, 150-152; *Black on Judgments*, secs. 567 et seq.

Boston v. Worthington, 10 Gray, 496, 71 Am. Dec. 678, is the case in our reports most favorable to the plaintiff, but we think that decision goes to the very verge of the law on the subject, and in the opinion it is said: "The defendants, by the notice given to them of Southwick's action, had an opportunity to defend it, and the case shows that they 'were present at the trial, and testified therein.'" In the present case, we think that the notice on its face shows that it was not the intention that the present defendants should ¹³³ have an opportunity of controlling the defense of the original suit.

We are also of opinion that the original action was such that by any form of notice the present defendants could not necessarily, as matter of law, be held bound by the judgment in that

action. The damages in that action were assessed with reference to the degree of culpability of the defendant therein, or of some person for whose negligence the defendant was made liable by the statutes of 1887, chapter 270. The defendants in the present suit, if they are liable at all to the plaintiff, are liable at common law for the breach of their contract or of their duty. The defendant in the original action was defending against its own negligence or the negligence of persons for whom it was responsible.

In *Westfield v. Mayo*, 122 Mass. 100, 109, 23 Am. Rep. 292, the principle is stated as follows: "It is simply this: If a party is obliged to defend against the act of another, against whom he has a remedy over, and defends solely and exclusively the act of such other party, and is compelled to defend no misfeasance of his own, he may notify such party of the pendency of the suit and may call upon him to defend it; if he fails to defend, then, if liable over, he is liable not only for the amount of damages recovered, but for all reasonable and necessary expenses incurred in such defense." It is also said in the opinion in that case: "In the present case, the plaintiff was not compelled to incur the counsel fees by reason of any misfeasance, or of any contract of its own, but was made immediately liable by reason of the wrongdoing of the defendant. There seems, therefore, to be no ground, in principle, by which it should be precluded from recovering as a part of its damages the expenses reasonably and properly incurred in consequence of the wrongdoing of the defendant. Within this rule a master, who is immediately responsible for the wrongful acts of a servant, though there is no misfeasance on his part, might recover against such servant not only the amount of the judgment recovered against him, but his reasonable expenses, including counsel fees, if notified to defend the suit. It may be said in that case, as in this, that there may be a technical misfeasance, or rather nonfeasance, in not guarding more carefully the conduct of the servant, or in watching for obstructions in the street; but no negligence is necessary to be proved in either case as ¹³⁴ matter of fact; the party is directly liable because of the wrong of another, whatever diligence he may have himself exercised. It does not, however, apply to cases where one is defending his own wrong or his own contract, although another may be responsible to him": See *Gray v. Boston Gas Light Co.*, 114 Mass. 149; 19 Am. Rep. 324; *Lowell v. Boston etc. R. R. Corp.*, 23 Pick. 24; 34 Am. Dec. 33.

The charge of the presiding justice in the case at bar puts the liability of the defendants, if they were liable, upon the facts, if

they were proved, that the defendants undertook with the plaintiff to see to it that the electrical apparatus was kept in proper condition; that it was out of repair, of which the defendants had notice; that the defendants promised to repair it in a proper manner, and meanwhile to keep things safe, and to see to it that the large current of electricity from the works of the city should not be turned on, all of which the defendants failed to do; that, induced by these promises, the plaintiff permitted its employees to continue at work; or that, if the defendants repaired the apparatus, the repairs were negligently and improperly made, and that the lamp which exploded was in a dangerous condition.

The liability of the defendants cannot be put upon the ground that they were liable to the next of kin of Tierney, and that they had been released from this liability by the judgment against the plaintiff and the satisfaction of it, because the defendants were not liable at all to the next of kin of Tierney. If the defendants promised the plaintiff to keep the electrical apparatus in repair and failed to do so, they may be liable to the plaintiff for the breach of this promise; if they undertook to repair it and repaired it negligently, in consequence of which the plaintiff suffered damage, they may be liable for this negligence. If the present plaintiff was held liable in the original suit to the next of kin of Tierney on the ground of some negligence of its own, and if the extent of its liability was determined within certain limits by the degree of culpability of the plaintiff, or of some person for whose negligence it is made liable by the statutes of 187, chapter 270, then it could not be held that necessarily, as matter of law, the present defendants are liable to reimburse the present plaintiff to the extent of the judgment recovered against it in the original suit, even if the present defendants had been properly notified to come in and defend that suit. The reason is, that the ¹²⁵ defendant in the original suit was compelled to defend against some negligence of its own, or of some person for whom it was made liable by the statute, and the damages were assessed with reference to the degree of culpability of itself or of such person. It does not follow from this that the plaintiff is unable to maintain the present suit for breach of contract or for negligence on the part of the defendants whereby it has suffered damage: See *Old Colony Railroad Co. v. Slavens*, 148 Mass. 363; 12 Am. St. Rep. 558; *Toomey v. Donovan*, 158 Mass. 232. But how far, if at all, the defendants can be held liable for the damages which the present plaintiff

was compelled to pay, or did pay, to the next of kin of Tierney, we are not called upon now to determine.

Exceptions sustained.

JUDGMENT—INDEMNITY—NEGLIGENCE—NOTICE.—A person who, without fault on his part, has been compelled, by a judgment of a court having jurisdiction, to pay damages occasioned by the negligence of another, is entitled to indemnity from the latter, whether contractual relations exist between them or not: *Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola*, 134 N. Y. 461; 30 Am. St. Rep. 685. One who is required to protect another from liability is bound by the result of litigation to which such other is a party, provided the former had notice of such litigation, and an opportunity to control its proceedings: *St. Joseph v. Union Ry. Co.*, 116 Mo. 636; 38 Am. St. Rep. 626. If the concurrent negligence of two or more persons results in injury to a third, each is answerable therefor: *Carterville v. Cook*, 129 Ill. 152; 16 Am. St. Rep. 248. As to how far indemnitors are bound by judgments against their principals, see extended note to *Robinson v. Baskins*, 22 Am. St. Rep. 204-207, discussing the subject.

RYDER v. FAXON.

[171 MASSACHUSETTS, 206.]

EVIDENCE—PROOF OF AGREEMENT OUTSIDE OF LEASE—BUILDING AS PERSONAL PROPERTY OF LESSEE—STATUTE OF FRAUDS.—In an action of tort for the conversion of a building on leased land, evidence tending to show an agreement between the lessor and the lessee, outside of the lease, that the building should be and remain the personal property of the lessee, is admissible, for there is nothing which requires such an agreement to be in writing.

EVIDENCE—PROOF OF AGREEMENT OUTSIDE OF LEASE—BUILDING AS PERSONAL PROPERTY OF LESSEE—CONTRADICTING LEASE.—Neither a provision in a lease, following the description, that the land is to be occupied by a building erected thereon by the lessee, nor a covenant that, at the termination of the lease, "the lessee should deliver up the premises in as good order and condition as they then were or should be put into by the lessor," is not inconsistent with an agreement, outside of the lease, that the building to be erected should be the personal property of the lessee. Hence, as such agreement does not contradict the provisions of the written lease, evidence of it is admissible in an action for the conversion of the building.

FIXTURES—LESSOR AND LESSEE—BUILDING—AGREEMENT—INTENTION.—Whether fixtures placed by a lessee upon leased land thereby become part of the realty is not altogether matter of agreement between the lessor and lessee. The intention of the latter has much to do with the question, and if his intention is that the fixture shall remain his personal property, and that intention is made known, and his acts are consistent therewith, the fixture may remain his personal property, although there may be no agreement to that effect between him and the lessor.

FIXTURES—LESSOR AND LESSEE—PROOF OF AGREEMENT THAT A BUILDING IS TO BE THE PERSONAL PROP-

ERTY OF THE LESSEE.—If a lease itself shows the lessor's assent that the lessee may erect a building on the leased land, a finding that there was an agreement that the building should be the personal property of the lessee is justified by evidence that the lessor directed the structure to be so built that it could be moved when the lease expired; that he made no reply when told by the lessee that he would have to mortgage the building to pay for it; and that the lessor told the lessee that he did not want him to put in any wall or anything which would obstruct the place.

Tort, for the conversion of a wooden hotel building. The case was tried without a jury. There was a finding for the plaintiff, and the defendants excepted.

R. O. Harris, for the defendants.

F. M. Bixby, for the plaintiff.

207 BARKER, J. The first lease was made on March 1, 1833, for the term of three years from that date. At the beginning of the term the demised premises were a vacant parcel of land, upon which the lessee thereafter erected a two-story hotel building. On March 1, 1834, the lease was canceled, and a new lease made for the term of five years from that date. On February 26, 1836, the building, which was set on posts, was destroyed by fire. On March 1, 1836, the second lease was canceled, and a new lease made for ten years from that date, after which a new building, upon the old foundations and having no cellar, was erected by the lessee. In 1894 the lessee made a bill of sale of the building to a third person, who in turn made a bill of sale to the present plaintiff, who is the wife of the lessee. Before the third lease expired the lessor died, and on the expiration of the lease his heirs, the present defendants, took possession of the land and building, and refused to allow the plaintiff to remove the building, whereupon she brought this action for conversion of the building, claiming under her bill of sale.

1. At the trial the defendants excepted to the introduction of evidence tending to show an agreement between the lessor and the lessee, outside of the lease, that the building should be and remain the personal property of the lessee. This evidence was rightly admitted. When the lease of 1836 was made, the premises were simply land upon which were certain posts that had served as the foundations of a building which had been destroyed by fire, and which might serve as the foundations of another building. The phrase following the description of the land, "to be occupied by a building erected thereon by said Ryder," is not inconsistent with an agreement that the building should be the personal property of the lessee; nor is the covenant that at the

termination of the lease the lessee should deliver up the premises in as good order and condition as they then were or should be put into by the lessor inconsistent with such an agreement. The removal of personal property from the land would be neither waste nor an alteration, within the meaning of the clauses of the lease which relate to those subjects. So an agreement outside the lease that the building to be erected should be the ~~the~~ personal property of the lessee was not in contradiction of the terms of the written lease, and there is nothing which requires such an agreement to be in writing. Evidence tending to show such an agreement was therefore admissible.

2. The defendants contend that the evidence was not sufficient to establish the agreement. If we assume that this question is open under the request that upon all the evidence the plaintiff could not recover, we think the contention is unsound. Whether fixtures placed by a lessee upon leased land thereby become part of the realty is not altogether matter of agreement between the lessor and lessee. The intention of the latter has much to do with the question, and if his intention is that the fixture shall remain his personal property, and that intention is made known, and his acts are consistent therewith, the fixture may remain his personal property, although there may be no agreement to that effect between him and the lessor: *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 519; 15 Am. St. Rep. 235, and cases cited. In *Madigan v. McCarthy*, 108 Mass. 376, 11 Am. Rep. 371, the building was put upon stone foundations with a cellar, and as and for a permanent dwelling-house, without the consent of the landowner, or any contract with him, express or implied, that the tenant should hold it as personal property. In the present case, the lease itself shows the lessor's assent that the lessee should erect the building, and the evidence that the lessor directed that it should be so built that it could be moved when the lease expired, that he made no reply when told by the lessee that he would have to mortgage the building to pay for it, and that the lessor told the lessee that he did not want him to put in any wall or anything that would obstruct the place, justified a finding that there was an agreement that the building should be the personal property of the lessee.

The exceptions to the refusal to rule that the lessor's surrender of the prior leases took away his right to remove the building, and that the right was at an end because of breaches of the conditions as to the sale of liquor and as to nonpayment of rent, have not been argued, and we do not consider them.

Exceptions overruled.

PAROL EVIDENCE OF CONTEMPORANEOUS CONTRACT.—Parol evidence is admissible to prove a collateral, contemporaneous, or subsequent agreement not inconsistent with a written agreement: See monographic note to *Harris v. Murphy*, 56 Am. St. Rep. 661, on subsequent parol agreement to vary a writing.

FIXTURES—BUILDINGS AS PERSONALTY—AGREEMENT. It is perfectly competent for parties to agree that buildings on another's land shall remain the personal property of him who erects them, and such an agreement may be either express or implied from the circumstances under which the buildings are erected. A building erected upon the land of another by the latter's permission, upon an agreement that it may be removed at the pleasure of the builder, is personal property, if no intervening rights have accrued: *Merchants' Nat. Bank v. Stanton*, 43 Am. St. Rep. 491, 498, note. To determine whether a thing is a fixture or not, we must look at the manner in which it is annexed, the intention of the person who made the annexation, and the purpose for which the premises are used: Note to *Fisfield v. Farmers' Nat. Bank*, 39 Am. St. Rep. 172.

QUINN v. CRIMMINGS.

[171 MASSACHUSETTS, 255.]

NEGLIGENCE—PARTITION FENCE—FALL OF—LIABILITY FOR INJURY.—If the duty to maintain a partition fence is, by private arrangement between two adjoining owners, imposed upon one of them, the other is not answerable to a third person who has been injured by the fence falling upon him.

NEGLIGENCE—PARTITION FENCE—FALL OF—CARE AND LIABILITY FOR INJURY.—The owner of a partition fence is not answerable to a third person who has been injured by its falling upon him, where the owner used the care of a prudent man in maintaining the fence.

Tort, by the administratrix of Peter L. Quinn, for injuries sustained by her intestate from the falling of a division fence. It was alleged that the defendant suffered the fence to remain in an unsafe condition. There was a verdict for the defendant, and the plaintiff alleged exceptions.

S. A. Fuller and C. H. Blood, for the plaintiff.

H. N. Shepard, for the defendant.

²⁵⁵ **HOLMES, J.** This is an action to recover for personal injuries suffered by the plaintiff's intestate, of which he afterward died. The deceased had gone to a drinking place, had drunk one glass of whisky and was leaving the place, when a fence dividing the premises from the defendant's land fell upon him without warning. The testimony was that the deceased was sober, and was ²⁵⁶ doing nothing to cause the fence to fall. The jury found for the defendant, and the case is here on ex-

ceptions to certain rulings and refusals to rule. It is not necessary to set these forth at length, as the questions raised by them and argued may be stated in a few words.

The first question is, whether, if, as between the defendant and the owner of the premises where the intestate was, the duty to maintain the fence was on the latter, the defendant nevertheless could be held by the plaintiff; the argument for the plaintiff being that private arrangements with a neighbor could not affect the liability to him of an owner of the land on which presumably, it is said, the division fence stood in part.

It is true that there are cases where an immediately threatening danger is created upon the defendant's land by his order, and where the intervening control is not that of an occupant, in which the defendant is held to be bound personally to see that proper precautions for safety are taken, although he has given up the control to an independent person, as where he employs an independent contractor: *Woodman v. Metropolitan R. R. Co.*, 149 Mass. 335; 14 Am. St. Rep. 427. So a master has somewhat similar duties to a servant in his employ.

But examples of liability to the public being affected by private arrangements are not unknown. A landlord may shift his responsibility for snow falling from the roof of his house into the street by giving control to a tenant, and will have the right to rely upon the tenant's managing the premises in such a way as to prevent their becoming a nuisance. The fact that action, and not merely abstinence from illegal acts, on the part of the tenant is required to prevent the harm is not conclusive: *Clifford v. Atlantic Cotton Mills*, 146 Mass. 47, 49; 4 Am. St. Rep. 279. Compare *Murphey v. Caralli*, 3 Hurl. & C. 462, 465, 466, judgment of Bramwell, B. So where a tenant has covenanted to repair, and an injury is caused by the premises being allowed to fall out of repair: *Pretty v. Bickmore*, L. R. 8 Com. P. 401; *Gwinnell v. Eamer*, L. R. 10 Com. P. 658. On the other hand, the landlord may be liable if he has covenanted to repair: *Payne v. Rogers*, 2 H. Black. 350. In these cases all that was contemplated at the time of the lease was the continuance of a situation which, by the forces of nature, might become dangerous if the person intrusted did not do his duty.²⁵⁷ If the transfer were absolute, everyone would recognize that the responsibility was changed with the ownership. The same principle is applied when the occupancy and control are transferred for a certain time, and when there is no present nuisance, but the danger is relatively contingent and remote. The tenant unquestionably

owes a duty to the public, and the landlord has a right to assume that he will perform it. The tenant is the wrongdoer nearest to the injury, and the law looks no further back.

The rule which has been applied in the case of landlords and tenants, not without some difference of opinion among the courts of different states, applies with greater force to division fences. The division of the duty of maintaining these is established by statute, and may be insisted on even against an unwilling neighbor: Pub. Stats., c. 36, secs. 1-19. The law makes the party who is bound to maintain the fence responsible to the public so far as they have any concern in the matter. There was no general *delectus personarum* as between him and the other possible defendant, his neighbor, and it would be unjust to add the other as jointly liable for the condition of a structure which he did not maintain and perhaps had no right to touch.

The other question arises with regard to the instructions given and refused concerning the defendant's duty, supposing he was responsible. The only evidence of the defendant's interest or duty was the fact that the fence was a division fence. The defendant had not repaired it for twenty years. He removed it, it is true, after it had fallen, but that was simply clearing away rubbish from his land, and was no evidence. It admits of question whether the plaintiff had sustained the burden of proof. He was allowed to go to the jury, however, and the jury were told that the defendant had not a right to allow the fence to get into such a condition that it was liable to injure a person on the adjoining premises by reason of its want of repair. This imposed an absolute liability for want of repair as effectively as if the judge had used the more amplified and rhetorical expressions of the requests.

After dealing with want of repair, the judge went on: "Of course, you have to take into consideration here the condition of the fence, and whether or not it was that which caused it to fall ²⁵⁸ over; because if there had been any such extraordinary condition of things that it was blown over, and fell from any such cause as that, that might relieve the defendant from any responsibility, because he is not called upon to provide against such extraordinary conditions; but any conditions that he ought to have anticipated he is bound to provide against." A part of this was excepted to upon the refusal to modify it, as was also a refusal to give further rulings. Nothing appears in the exceptions concerning the state of the wind, and it does not appear that there was any need for the judge to deal with it more spe-

cifically, especially when the matter was not brought to his attention until the end of the charge: *McMahon v. O'Connor*, 137 Mass. 216. The fair meaning of what we have quoted, as a whole, is simply that the defendant was not called on to provide against winds which he could not have anticipated. This is consistent with *Cork v. Blossom*, 162 Mass. 330, 332; 44 Am. St. Rep. 362. It is true that everyone has notice of the force of gravitation, and therefore it would be possible logically to make owners absolutely liable if their buildings fall: *Clerk and Lindsell on Torts*, 2d ed., 377, 378; *Rylands v. Fletcher*, L. R. 3 H. L. 330. Compare *Pollock on Torts*, 4th ed., 470. But it is for the public welfare that buildings be put up, and here as elsewhere policy and custom have to draw the line between opposing interests: *Middlesex Co. v. McCue*, 149 Mass. 103, 104; 14 Am. St. Rep. 402. That line is the line between what could have been prevented by proper precautions and accident, meaning by accident that which could not have been foreseen and guarded against otherwise than by not building. For although all accidents could be prevented by not building, yet, as it is desirable that buildings and fences should be put up, the law of this commonwealth does not throw the risk of that act any more than that of other necessary conduct upon the actor, or make every owner of a structure insure against all that may happen, however little to be foreseen: *Cork v. Blossom*, 162 Mass. 330; 44 Am. St. Rep. 362. Then tendency of other American decisions seems to be in the same direction: 2 *Jaggard on Torts*, 839; see, also, *Pollock on Torts*, 4th ed., 470. This being so, the decision as to what precautions are proper naturally may vary with the nature of the particular structure. A boundary fence is not like a tall chimney, such as was in question in *Cork v. Blossom*, 162 Mass. 330; 44 Am. St. Rep. 362. In ²⁵⁹ view of the slight danger threatened by a common fence, we are of opinion that, if the jury are instructed that the owner must use the care of a prudent man in maintaining it, it is not necessary to put the duty in more emphatic terms.

Exceptions overruled.

PARTITION FENCES—LIABILITY FOR CONSTRUCTING.—

The right to build a partition fence carries with it an exemption from liability while maintaining it, provided due care is used in its erection, and it is left in a reasonably safe condition when completed: *Lowe v. Guard*, 11 Ind. App. 472; 54 Am. St. Rep. 511.

SPAULDING v. FORBES LITHOGRAPH MANUFACTURING COMPANY.

[171 MASSACHUSETTS, 271.]

MASTER AND SERVANT—INJURY TO SERVANT—USE OF MACHINERY—COMMON-LAW LIABILITY—OBVIOUS RISK—TRAP.—If a person is employed to remove cards, as printed, from a lithographic press, and to put other cards in their places, on a revolving cylinder, which stops, automatically, after each card is printed, and which is covered by an iron mask, with jaws that open and shut, automatically, just long enough for the change of cards to be made, and the employé is given a seat at the machine upon a board which is likely to tip, and which does tip, causing one of his hands to be caught by the iron mask and severely injured, just at a time when he is directed by the man immediately over him how to sit and to use his hands, and at the very moment when the jaw opens and shuts, the employer is answerable at common law for the injury, where the employé was ignorant of the tendency of the board to tip, and the amount of leverage of the projecting edge of the board could be ascertained only by looking under the seat. It is a clear case of a trap, but the employer is also answerable because such a direction concerns the mode of using the permanent machinery.

MASTER AND SERVANT—INJURY TO SERVANT—ADMISSIBILITY OF PREVIOUS OCCURRENCES SIMILAR TO THAT WHICH CAUSED ACCIDENT.—If an employé is injured while working at a lithographic press for his employer, which injury is caused by the tipping of the seat on which he is placed to work, evidence is admissible, in an action by him against his employer for such personal injuries, that the seat had tipped before, when a boy was working upon it, and that this fact was known to the person deputed to instruct and authorized to order the plaintiff.

Tort for personal injuries sustained by the plaintiff while in the employ of the defendant. There was a verdict for the plaintiff, and the defendant alleged exceptions.

J. Lowell & J. A. Lowell, for the defendant.

P. M. Keating, for the plaintiff.

272 HOLMES, J. This is an action of tort at common law for personal injuries. The plaintiff was employed by the defendant to remove cards as printed from a lithographic press, and to cover them with tissue paper. To do this he sat with his left side toward a revolving cylinder on which the cards were placed, and when the cylinder stopped, as it did automatically after each card was printed, he removed the card, another one was put upon it by another boy, and the cylinder revolved again. The cylinder was covered by an iron mask while revolving, which lifted just long enough for the change of cards and closed again before the new revolution. The plaintiff's hand was caught by

this iron mask as it closed, and he was severely hurt. According to the plaintiff's testimony, he had been using his left hand to remove the cards, that being the nearest to the cylinder, ²⁷³ but one Lehan, the man immediately over him, told him to use his right. This he did, and by doing it necessarily leaned his body more to the left. The seat tipped up, threw him against the machine, and in that way caused the accident. The seat was a board four or five feet long, and was supported by four fixed iron rods fitted loosely into holes on the under side of the board, which rested on them unattached. There was evidence that the rods were three or four inches from the end of the board nearest the cylinder. The distance between the end of the board and the cylinder was twelve or fourteen inches. The plaintiff had a verdict, and the case is here on the defendant's exceptions, the most important of which is to the judge's refusal to take the case from the jury. The others are to the admission of evidence.

We are of opinion that the plaintiff is entitled to retain his verdict. A seat such as we have described in connection with the automatically opening and shutting jaw of the cylinder mask make as clear a case of a trap as can be imagined, especially when the sitter is directed to do an act most likely to cause the seat to tip at the very moment when the jaw opens and shuts. It appears from the plaintiff's testimony that he did not know of the liability of the board to behave as it did, and the risk seems to us far from obvious. The amount of leverage of the projecting edge of the board could be ascertained only by looking under the seat, and there was nothing calling on the plaintiff to do that, unless he knew that the board was unattached. On the other hand, the arrangement of the structure was a matter which at least the jury well might have found that the defendant knew, or ought to have known, even apart from the fact that it was known to the man Lehan, who gave the plaintiff the order or instruction how to sit.

The negligent order of a servant for which the defendant was held not liable in *Kalleck v. Deering*, 161 Mass. 469, 42 Am. St. Rep. 421, was an order to do a transitory act in the use of a contrivance for which the defendant was not responsible. So *Moody v. Hamilton Mfg. Co.*, 159 Mass. 70, 38 Am. St. Rep. 396, was a case of an order to do a transitory act in moving a carboy of vitriol which broke. And in *O'Brien v. Rideout*, 161 Mass. 170, the order set the plaintiff to different work from that for which the defendant hired him. ²⁷⁴ But whether the direc-

tion of Lehan be called an order or an instruction, it concerned the mode of using the permanent machinery for which the defendant was responsible; and if it was an order, the defendant might be held liable for not seeing that the plaintiff was warned in connection with the duty imposed upon him, if it was an instruction, for leading him into a trap. Possibly the plaintiff's injury might be attributed to the defendant's maintaining the trap, even if its responsibility was in no way affected or enlarged by Lehan's words. The defendant might be held answerable, whatever the particular accident which led to the plaintiff's throwing his weight on the end of the board.

An exception was taken to evidence showing that the seat had tipped before, and that Lehan knew it. Lehan was the person deputed to instruct and authorized to order the plaintiff. His knowledge when giving instructions or orders was the knowledge of the defendant, and could be proved, even if superfluous. The fact that the seat had tipped before when a boy was working upon it was admissible, without more special evidence of the circumstances. The jury would have been warranted in presuming that they were similar enough to the present to be instructive as to what happened to the plaintiff, and to show that the accident was one that ought to have been looked out for: *Flaherty v. Powers*, 167 Mass. 61, 63.

Exception was taken to a question put to a witness as to orders given by Lehan, as a means of showing that he had authority by the fact of his exercising it. We perceive no reason for the objection, or for any other objection to the evidence admitted.

Exceptions overruled.

MASTER AND SERVANT—USE OF MACHINERY—INJURY TO SERVANT—ASSUMING RISKS—MASTER'S LIABILITY.—When injury happens to a servant in the course of his employment, the master is answerable if it was occasioned by his negligence; and when a servant is employed on, or in connection with, machinery, in the use of which danger may arise, it is the duty of the master to guard against accident to his employé: *Note to Sawyer v. Rumford Falls Paper Co.*, 60 Am. St. Rep. 285. A servant has a right to assume, without inquiry or examination, that the appliances furnished him are safe and suitable, and he is not chargeable with contributory negligence for so assuming: *Notes to Chicago etc. R. R. Co. v. Maroney*, 62 Am. St. Rep. 400; *Rolseth v. Smith*, 8 Am. St. Rep. 640; *Edward Hines Lumber Co. v. Ligas*, 64 Am. St. Rep. 44; unless the danger is apparent, or his attention has been called to it: *Kehler v. Schwenk*, 151 Pa. St. 505; 31 Am. St. Rep. 777. A master is liable to a servant for an injury caused by the master's negligence, when the defect causing such injury was known to the master, and not to the servant: *Note to Promer v. Milwaukee etc. Ry. Co.*, 48 Am. St. Rep. 910. An employé does not assume the

risk of the safety of machinery unless he knows the danger, or it is so obvious that he will be presumed to know it. He takes the risk of known dangers, and not of others: *Myers v. Hudson Iron Co.*, 150 Mass. 125; 15 Am. St. Rep. 176.

MASTER AND SERVANT—USE OF MACHINERY—INJURY TO SERVANT.—EVIDENCE of former slips in machinery, by which the plaintiffs were injured, brought home to the knowledge of defendant's superintendent, is admissible, as tending to prove that the machinery was insufficient, and that the defendant did not exercise reasonable care in continuing its use: *Myers v. Hudson Iron Co.*, 150 Mass. 125; 15 Am. St. Rep. 176.

FLYNN v. FLYNN.

[171 MASSACHUSETTS, 312.]

DOWER—RIGHT OF, IN LAND TAKEN BY THE RIGHT OF EMINENT DOMAIN.—If the land of a married man is taken by the right of eminent domain during his lifetime, his wife is not entitled, on account of her inchoate right of dower, to have any portion of the money received for the land either paid to her directly, or set aside for her benefit, by a court of equity, on the contingency of her surviving her husband.

Bill in equity, brought by Ellen Flynn against David Flynn and another, which prayed that, by reason of the plaintiff's inchoate right of dower, a portion of the proceeds received from land taken by the right of eminent domain, be set apart for the plaintiff's benefit in the event that she should survive her husband. It was alleged that David Flynn, the husband, had assigned his claim for damages, by reason of the taking, to William J. Flynn, the other defendant. Both defendants demurred to the bill for want of equity. The bill and demurrers were reserved for the consideration of the appellate court.

W. B. F. Whall, for the defendants.

W. A. Buie and J. E. Crowley, for the plaintiff.

³¹² **LATHROP, J.** The land in which the plaintiff had an inchoate right of dower was taken by the city of Boston by right of eminent domain, for the purposes of a schoolhouse, the city acting by virtue of and in accordance with the provisions of the statutes of 1895, chapter 408. This act, in section 2, gives the board of street commissioners of Boston, at the request of the school committee, power to "take by purchase or otherwise such lands for school purposes as said school committee, with the approval of the mayor, shall designate, and to take any lands under the right of eminent domain." The board is also required

to "sign, and cause to be recorded in the registry of deeds for the county of Suffolk, a statement containing a description thereof as certain as is required in a common conveyance of land and stating that the same are taken for school purposes; and upon the recording of any such statement the lands described therein shall be taken in fee for said city." We assume that all the formalities required have been complied with, and that the city now owns the land in fee.

The question then is, whether an inchoate right of dower is such an interest in land that, when the land is taken by the right of eminent domain, the wife may apply to a court of equity to have in some way the benefit of such interest. We are not aware that this right has ever before been asserted in this commonwealth, and this is the first time that the question has been presented for our decision.

It is declared by the Public Statutes, chapter 124, section 3, as follows: "A wife shall be entitled to her dower at common law in the lands of her deceased husband." This chapter makes many provisions in regard to dower, but there is none which relates to the question before us.

As common law, "a woman is entitled to dower out of all the lands whereof her husband was seised in fee simple, at any time during the coverture": 1 Greenleaf's Cruise on Real Property, 175.

There is no doubt that the inchoate right of dower is an encumbrance upon land: *Shearer v. Ranger*, 22 Pick. 447. The release of such a right of dower is a good consideration for a promise: *Bullard v. Briggs*, 7 Pick. 533; 19 Am. Dec. 292; *Holmes v. Winchester*, ³¹⁴ 133 Mass. 140; *Nichols v. Nichols*, 136 Mass. 256. It is a contingent right, which the wife during coverture may have the assistance of the court to establish or protect: *Burns v. Lynde*, 6 Allen, 305; *Davis v. Wetherell*, 13 Allen, 60; 90 Am. Dec. 177; *Madigan v. Walsh*, 22 Wis. 501; *Clifford v. Kampfe*, 147 N. Y. 383; *Buzick v. Buzick*, 44 Iowa, 259; 24 Am. Rep. 740. So, too, a wife having an inchoate right of dower may maintain a bill in equity to redeem land from a mortgage in which she has joined with her husband to release dower: *Davis v. Wetherell*, 13 Allen, 60; 90 Am. Dec. 177; *Lamb v. Montague*, 112 Mass. 352; see Pub. Stats., c. 124, sec. 5. But if the mortgage contains a power of sale, and the wife has joined in the deed with her husband in release of her dower, a sale of the land in pursuance of the power bars all claim and possibility of dower: Pub. Stats., c. 181, sec. 19.

While a wife may, under Public Statutes, chapter 124, section 6, bar her right of dower by releasing the same in a deed executed by her husband, or by a subsequent deed executed either separately or jointly with her husband, yet she cannot convey her inchoate right of dower to a person to whom her husband has not conveyed the land. Such a deed is void: *Mason v. Mason*, 140 Mass. 63. See, also, *Reiff v. Horst*, 55 Md. 42. In *Mason v. Mason*, it was said by Mr. Justice Devens: "While the inchoate right of dower is a vested right of value, dependent on the contingency of survivorship, it is not that separate property which passes by conveyance, but a right which one entitled thereto may, under certain circumstances, release. It is of a peculiar character, and, before assignment, the wife has no seisin." While the word "vested" is used in this case, it would seem that the word "contingent," which was used by Chief Justice Parker in *Bullard v. Briggs*, 7 Pick. 533, 539, 19 Am. Dec. 292, would more accurately describe the nature of the estate. After an assignment of dower is made, the widow acquires no new freehold, her seisin being deemed in contemplation of law a continuation of her husband's seisin: *Windham v. Portland*, 4 Mass. 384, 388.

Even after the death of the husband, a creditor cannot at law attach the right of the widow to have her dower assigned to her, or take the same on execution: *McMahon v. Gray*, 150 Mass. 289; 15 Am. St. Rep. 202. Until dower has been assigned to her, a widow has no estate in the land of her deceased husband: *Smith v. Shaw*, 150 ³¹⁵ Mass. 297; *State v. Wincroft*, 76 N. C. 38. Nor can she object to a partition of the land among the tenants in common: *Motley v. Blake*, 12 Mass. 280; *Ward v. Gardner*, 112 Mass. 42.

There can be no doubt that the inchoate right of the wife is always subject to any encumbrance or infirmity in the husband's title existing at the time he became seised; and we are also of opinion that it is subject to any incident attached to it by law. The land may be sold on a petition for partition, if the husband is a tenant in common: Pub. Stats., c. 178, sec. 65. When this happens, it has been held, in a well-considered case in Indiana, that the wife is not a necessary party to the partition proceedings, and is not entitled to share in the fund derived from the sale: *Haggerty v. Wagner*, 148 Ind. 625.

Land may be sold for taxes, and if there is a surplus it is to be paid to the owner of the estate": Pub. Stats., c. 12, sec. 35; Stats. 1888, c. 390, sec. 40. In a case arising under a New

York statute, which directed that any surplus arising on a tax sale 'shall be held for the use of and paid over to the person legally entitled upon his establishing his right thereto,' it was held that the owner of the land was entitled to the surplus: *People v. Palmer*, 10 N. Y. App. Div. 395. It was also held in this case that the interest which the wife of the owner had in the land by virtue of her inchoate right of dower, although a valuable interest, was not an "estate" in the land which would give her a right to redeem from the tax sale, under a statute giving a right to redeem to "any person or persons having an estate in, or any mortgagee of" any land sold for taxes.

It is also an incident of land that it is liable to be taken by the right of eminent domain, and we are of opinion that when it is so taken in the lifetime of the husband, the wife is not entitled, on account of her inchoate right of dower, to have any portion of the money received for the land either paid to her directly, or set aside for her benefit on the contingency of her surviving her husband. If the land had not been taken, the husband could have done what he pleased with it during his life. He might have sold it for its full value, yet the wife could not interfere, or deprive him of the use of any part of the purchase money. In case the husband survived the wife, the purchaser would have a good title, which the heirs of the wife could not interfere with. ³¹⁶ If the chief value of the estate should consist of a building on the land, which was insured by the husband, and the building should be destroyed by fire, no one would contend that the wife had any interest in the insurance money, or that a court of equity would compel a part of the money to be set aside for her benefit unless the husband would agree to rebuild the house. Again, if a parcel of land should be washed away by the negligent maintaining of a dam, and the owner of the land should recover as damages the full value of the land, would not the money so received be his to do with as he pleased?

The only case in support of the doctrine contended for by the petitioner which has been decided by a court of last resort is that of *Wheeler v. Kirtland*, 27 N. J. Eq. 534, decided in 1875 by the court of errors and appeals in New Jersey. It laid down a new doctrine, which has not since been recognized except by a court of inferior jurisdiction, and which we are of opinion is opposed to sound principles.

The case of *Wheeler v. Kirtland*, 27 N. J. Eq. 534, was partly decided on the ground that the rule laid down in *Moore v. New York*, 8 N. Y. 110, 59 Am. Dec. 473, had been repudiated or

modified in later decisions in that state, citing *In re Central Park Extension*, 16 Abb. Pr. 56, 68, and *Simar v. Canaday*, 53 N. Y. 298; 13 Am. Rep. 523. In *Moore v. New York*, 8 N. Y. 110, 59 Am. Dec. 473, lands in which the wife had an inchoate right of dower were taken by the right of eminent domain. After the husband's death, his wife claimed dower in them. The statute under which the land was taken authorized commissioners to make "a just estimate of the damage to the respective owners, lessees, parties, and persons respectively entitled unto or interested in the lands." It was said by Gardiner, J.: "The question is, whether the possibility of dower accruing to the wife after marriage, but before the death of the husband, is an interest in law, within the purview of this statute. . . . Such a possibility may be released, but it is not, it is believed, the subject of grant or assignment, nor is it in any sense an interest in real estate."

It was held in *In re Central Park Extension*, 16 Abb. Pr. 56, 69, on the authority of *Moore v. New York*, 8 N. Y. 110, 59 Am. Dec. 473, that the inchoate right of dower was not an interest in real estate. Judge Ingraham, however, added, after quoting the remarks of Gardiner, J.: ³¹⁷ "It might have been added to that case, that the right was transferred from the land to the money received for the land by the husband, if the wife survived him."

The case of *Simar v. Canaday*, 53 N. Y. 298, 13 Am. Rep. 523, merely decides that if a husband is induced to part with his land by fraud, his wife has such an interest that she can join with him in an action against the fraudulent purchaser.

The rule laid down in *Moore v. New York*, 8 N. Y. 110, 59 Am. Dec. 473, so far from being repudiated or modified in that state by later decisions, has been recognized and affirmed in the court of appeals in *Witthaus v. Schack*, 105 N. Y. 332, where it is said by Ruger, C. J.: "The settled theory of the law as to the nature of an inchoate right of dower is that it is not an estate or interest in land at all, but is a contingent claim arising not out of contract, but as an institution of law, constituting a mere chose in action incapable of transfer by grant or conveyance, but susceptible only during its inchoate state of extinguishment. By force of the statute, this is effected by the act of the wife in joining with her husband in the execution of a deed of the land. Such deed, so far as the wife is concerned, operates as a release or satisfaction of the interest and not as a conveyance, and removes an encumbrance instead of transfer-

ring an interest": See, also, *Hammond v. Pennock*, 61 N. Y. 145, 158.

The only case which has been brought to our attention that has followed *Wheeler v. Kirtland*, 27 N. J. Eq. 534, is *In re New York etc. Bridge*, 75 Hun, 558; 89 Hun, 219. But the view taken of the nature of the inchoate right of dower in this case does not seem to be in conformity with the cases above cited from the higher courts of New York.

In the cases of *Bonner v. Peterson*, 44 Ill. 253, and *In re Hall's Estate*, L. R. 9 Eq. 179, cited by the plaintiff, the husband had died, and the widow's right of dower was no longer inchoate when the land was taken.

For the reasons before stated, we are of opinion that the bill should be dismissed.

So ordered.

DOWER—EMINENT DOMAIN.—There is no dower in lands given for public uses: *Gynne v. Cincinnati*, 3 Ohio, 24; 17 Am. Dec. 576.

TURNER v. REVERE WATER COMPANY.

[171 MASSACHUSETTS, 329.]

WATER COMPANIES—UNREASONABLE AND VOID RULE AS TO PAYMENT OF WATER RATES.—A rule or regulation of a water company, organized for the purpose of supplying the inhabitants of a town with water, which provides that the water may be shut off from consumers in all cases of nonpayment of water rates, would be unreasonable and void, if so construed as to permit the water to be shut off because a former occupant had not paid his bill for water.

WATER COMPANIES—WATER RATES—NONLIABILITY OF SUBSEQUENT USERS FOR DEBTS OF FORMER OCCUPANT.—One man is not obliged to pay another's debt, and a water rate is not, without authority of a statute, a charge or lien upon the land. Hence, a tenant of premises is not answerable for a debt of the owner, and a water company, incorporated for the purpose of supplying the inhabitants of a town with water, has no right to shut off water from a tenant of premises in such town, until arrears due for water from the owner are paid.

Bill in equity to compel the water company to supply the plaintiff with water, and to restrain it from preventing him from procuring a suitable supply of water. The bill was filed on February 5, 1897, a decree was entered for the complainant, and the defendant appealed.

B. N. Johnson, for the defendant.

C. R. Morse, for the plaintiff.

³³⁰ LATHROP, J. On February 1, 1897, the plaintiff hired a dwelling-house in Winthrop, from Clarissa C. Doane, its owner. Two days later, he applied to the defendant to have water turned on, and tendered the price charged from January 1, 1897, to January 1, 1898. The defendant refused to turn on the water, until the amount due it for water supplied to Mrs. Doane from January 1, 1896, to October 10, 1896, had been paid. In October, 1893, one Emmet Doane, then owner of the house, made an application for water for the house, and paid the bills sent to him on July 1, 1894, and on July 1, 1895. On July 13, 1895, Emmet J. Doane conveyed the house to his mother, Clarissa C. Doane, who since that date has been the owner. The defendant received no notice of this conveyance until June 8, 1896. On July 1, 1896, the defendant sent a bill to Mrs. Doane for water during the year 1896. This bill was not paid, and on July 17, 1896, the defendant sent notice to Mrs. Doane that the water would be cut off unless the bill sent on July 1st should be paid immediately. On October 10, 1896, the water was shut off. The defendant refuses to turn on the water until the plaintiff pays the bills incurred by his landlord, because it has the following rule or regulation:

"The rates for use of water shall be payable on the first day of July in each year. All charges for specific supplies, or for fractional parts of the year, shall be payable in advance before the water is let on. In all cases of nonpayment of rates fifteen days after same are due, the water may be shut off without further notice, and not be again turned on until rates are paid, and one dollar and fifty cents additional for shutting off and letting on."

The superior court entered a decree restraining the defendant from refusing or neglecting to provide the plaintiff with a suitable supply of water, so long as he continues to pay the regular water rates, and complies with all other reasonable and usual regulations of the defendant in the future, except those ³³¹ relating to the payment of the water rates remaining unpaid of previous owners or tenants.

The case is before us on appeal; and the principal question presented is, whether, if the rule applies to a case like this, it is reasonable.

The defendant was incorporated under the statutes of 1882, chapter 142, "for the purpose of furnishing the inhabitants of Revere with water for domestic and other purposes." By section 4, it was given the power to "establish and fix from time to

time rates for the use of such water, and to collect the same."

By the statutes of 1884, chapter 259, it was authorized to contract with the town of Winthrop to supply that town with water "for the extinguishment of fires and for other purposes, as authorized by said act." It was also authorized to "distribute water through said town, and establish and collect rates therefor in like manner as by said act it is authorized to do in the town of Revere." The amendment of its charter by the statutes of 1887, chapter 387, is immaterial to the case.

It is contended that the rule is a reasonable one, because similar rules have been established by ordinances in various cities, and in the statute of Georgia granting a charter to the city of Atlanta; and that it has been decided to be reasonable in Pennsylvania. It is also argued that it is easy for a person hiring or buying a house to ascertain whether the debt of some former owner has been paid.

Of course, it cannot be disputed that, if the legislature gives a lien upon the land to a water or gas company for unpaid dues, or uses words equivalent to giving a lien, it has the right to do so, and there is nothing more to be said.

In *Atlanta v. Burton*, 90 Ga. 486, the charter provided that the board of water commissioners shall have the power to "require the payment in advance for the use or rent of water furnished by them in or upon any building, place, or premises, and in case prompt payments shall not be made, they may shut off the water from such building, place, or premises, and shall not be compelled again to supply said building, place, or premises with water until said arrears, with interest thereon, shall be fully paid." It was held that the commissioners might furnish water on credit; that the charter did not contemplate a ³³² personal credit, because water was not furnished to persons but to buildings. "The charter did not contemplate nor intend that water should be furnished upon individual or personal credit, but that the supply should be made a charge upon the property to which the water was conveyed."

In *Girard etc. Ins. Co. v. Philadelphia*, 88 Pa. St. 393, the words of the ordinance were, that after the water was turned off, it "shall not again be supplied or furnished to the said premises except upon payment of all arrears of water rent, and the sum of two dollars for expenses incurred." The opinion of the court states that the validity of the ordinance was conceded. The only question was, whether, as the defendant had not sooner cut off the water on rates not being paid, the plaintiff was

obliged to pay three years' rates due from a former owner, instead of the rates for one year, if which it had made a tender.

The case of *Commonwealth v. Philadelphia*, 132 Pa. St. 288, a gas case, simply considered the question as settled by the former case, and the opinion does not discuss it.

In *Appeal of Brumm* (Pa. March 5, 1888), 12 Atl. Rep. 855, a water case, the charter expressly provided that the real estate to which the water was furnished should be bound by the water rates.

The argument derived from foreign legislation and ordinances of cities in other states seems to us to be of little consequence in determining the question before us as to the effect of the regulation in this case. It may be noted, however, that in New York it is expressly provided that a gas company cannot refuse to turn on gas because a former occupant of the premises has not paid for the gas consumed by him: N. Y. Stats. 1859, c. 311, secs. 6, 9; 2 N. Y. Rev. Stats. 1896, secs. 1356, 1357.

In England it has been held, under the statute of 10 & 11 Victoria, chapter 17, that if a tenant does not pay water rates, the water company may sever the connection between the house and the main pipes, and that, if a new tenant occupies the house, he has the right to have the water turned on, on reconnecting the pipes; but until he does so, the water company is not liable to a penalty under the act for not supplying him with water. The remarks of Bramwell, L. J., on the point of not compelling the new tenant to pay an old debt, will be cited later: *Sheffield Waterworks Co. v. Wilkinson*, 4 C. P. Div. 410.

³³³ Under the statute of 50 & 51 Victoria, chapter 21, section 4, arrears of water rates where the rent does not exceed 20 pounds may be recovered in a personal action against a purchaser of land, but the water cannot be cut off: *East London Waterworks Co. v. Kellerman* [1892], 2 Q. B. 72.

So far as legislation is concerned in Massachusetts, the case of a gas company is covered. The Public Statutes, chapter 61, section 16, gives the company the right to "stop the gas from entering the premises" of a person neglecting to pay the amount due; and to enter the premises between certain hours and remove the meter, et cetera. Nothing is said about making subsequent users liable for old debts.

The statutes of 1894, chapter 299, makes it unlawful for a gas company to refuse to supply gas for any building or premises "for the reason that a gas bill remains unpaid by any previous occupant of said building or premises; provided the person or

persons applying for gas shall not be in arrears to such corporation for gas previously furnished to or for said building or premises, or to or for any other building or premises."

So far as gas is concerned the question is settled. As to water, there was no general legislation until after this action was brought. The statutes of 1898, chapter 168, makes the same provision as to water that the statutes of 1894, chapter 299, made as to gas. The statute is not retroactive, and the question before us must be decided on general principles. There is much in our special legislation to show that we should not hold that one man is obliged to pay the debt of another, or that a water rate is a charge upon the land. The charter of the defendant is one of the simpler forms. The one which is generally found, and which applies to most of the cities and towns of this commonwealth, after giving the right to regulate the price or rents for the use of the water, contains this provision: "The occupant of any tenement shall be liable for the payment of the price or rent for the use of the water in such tenement; and the owner thereof shall be also liable, if, on being notified of such use, he does not object thereto." This must mean by an action of contract, ³³⁴ for it is simply a liability for rent; and in some charters the words are added, "to be collected in an action of contract in the name of the town."

Our legislature has never authorized the making of an unpaid water rate a lien or charge upon the land. It has authorized holding the owner liable, after notice, in some charters, for the debt of a tenant, but in no instance has a tenant been held liable for the debt of an owner. If the authority to create a lien or charge is to be derived from the right to make rules, there would have been no necessity to insert the words above cited.

In the absence of legislation, can a regulation such as the one in question, if it imposes a lien on land, be considered a reasonable one? We are of opinion that this question must be answered in the negative.

In *Lumbard v. Stearns*, 4 Cush. 60, it was declared by Chief Justice Shaw that a private water company, by accepting its charter, would abuse its franchise if it failed to furnish water, ³³⁵ and that it was its duty to supply all who should apply for water on reasonable terms: See, also, *Young v. Boston*, 104 Mass. 95.

The ordinance of the city of Lowell, which was before the court in *Merrimack River Sav. Bank v. Lowell*, 152 Mass. 556, was much more explicit than the one before us. It provided that, in case the water was cut off for nonpayment of rates, it

should not be let on "either for the present or any subsequent occupant," except upon payment of the amount due. The point decided was, that after the city had received the money for a year's use of the water, it could not cut it off during the year because a former occupant had not paid his bill. There is no intimation in the opinion that a water rate constitutes a charge upon land, and the case goes upon the ground of contract. Indeed, it is said by Mr. Justice Knowlton, speaking of payments of rates: "It seems to be more consistent with the nature of the transactions to consider them as payments of the price of a commodity, sold under a general authority to provide for the public, and to sell upon request, in a reasonable way, to the persons who constitute the public."

It may be desirable that a water company or a gas company should have an easy way of collecting its debts, but we see no reason why it should be enabled by the court to collect a debt from one who is not a party to the contract, when it sells its commodity on credit. The legislature may give such a company a lien, as it has given one to mechanics. We have no doubt that pay may be demanded in advance, as is done in Boston, though whether the owner of the house could not have the water shut off during the year, and recover for what he had not used, may be considered an open question: See *Rockland Water Co. v. Adams*, 84 Me. 472; 30 Am. St. Rep. 368. In this case, the owner of a house had paid bills which contained the words, "one year's rent will be required in all cases." During a subsequent year he used the water for four months only, and was sued for a year's supply. It was held that the regulation was unreasonable and void, and that the plaintiff could not recover unless the defendant expressly assented to the regulation, and that payment of former bills was not such assent: See, also, *Wood v. Auburn*, 87 Me. 287, where there are some strong remarks in favor of the consumer.

²³⁶ We have also no doubt that a water company may demand a deposit, as is required by the *Boston Gas Light Company*, where it does not know the consumer. This was held to be reasonable in the case of a gas company in *Williams v. Mutual Gas Co.*, 52 Mich. 499; 50 Am. Rep. 266. See, also, *Shepard v. Milwaukee Gas Light Co.*, 6 Wis. 539; 70 Am. Dec. 479; 15 Wis. 818; 82 Am. Dec. 679.

The right to shut off water or gas, if a bill is not paid, is undoubted, so far as the consumer is concerned: *People v. Manhattan Gas Light Co.*, 45 Barb. 186; *McDaniel v. Springfield Water-*

works Co., 48 Mo. App. 273; Shepard v. Citizens' Water Co., 90 Cal. 635; Shiras v. Ewing, 48 Kan. 170.

If gas is supplied to the owner of different houses under separate contracts, failure to pay the gas bill on one house does not authorize the cutting off of the gas from the other: Gas Light Co. v. Colliday, 25 Md. 1. See, also, Lloyd v. Washington Gas Light Co., 1 Mackey, 331.

In American Water Works Co. v. State, 46 Neb. 194, 50 Am. St. Rep. 610, where a consumer of water who was in default, after the water was turned off, tendered his arrears due, but refused to pay one dollar, as required by regulation of the company for turning the water on, the court by mandamus compelled the company to turn the water on, holding the regulation to be unreasonable: See, also, Smith v. Birmingham Water Works Co., 104 Ala. 315.

It is difficult to see how a lien or charge upon land can be created, except by the written consent of the owner or by an act of the legislature, when it is provided by the Public Statutes, chapter 120, section 3, "and no estate or interest in land shall be assigned, granted, or surrendered, unless by such writing [i e. an instrument in writing signed by the grantor] or by operation of law."

Water is a necessity, and without it a house cannot at the present time be occupied in our cities. It must be obtained from a water company, and to compel a man to pay another's debt in order to obtain it seems to us a result that ought not to be reached. Water is even a greater necessity than gas, for there are other means of lighting in use; yet in the case of gas there is a decision directly in point.

In New Orleans Gas Light etc. Co. v. Paulding, 12 Rob. (La.) 378, the plaintiff refused to supply the defendant with gas unless he paid an unpaid bill contracted by a former ³³⁷ owner of the building. He promised to do so, in order to obtain the gas. The plaintiff turned on the gas, and afterward sued him on his promise to pay the amount due from the former owner. The court held that the promise was void, and that the plaintiff had no right to require such payment.

In Sheffield Waterworks Co. v. Wilkinson, 4 C. P. Div. 410, 421, 422, it is said by Bramwell, L. J.: "My judgment does not proceed upon this, that the appellants have a right to insist upon the communication with their main remaining severed, until their claim for rates due from the preceding occupier is satisfied. I do not think they have such right. That was, no doubt, the

notion upon which they acted; but in my opinion it is not sustainable. The learned magistrate who has stated this case has argued it extremely well; and I agree with him in thinking that it was not the intention of the legislature that the undertakers should be at liberty to withhold the supply of water from the respondent's premises until the arrears due from some one else are paid. I also agree with him in thinking that ample provision is made for their security by enabling them to demand the rates in advance, without having what may be called something in the nature of a lien upon the property itself for bygone rates."

It is suggested that a lessee or purchaser can easily protect himself, by finding out whether the water has been paid for. The answer to this is obvious. The records of a water company are not public records, to which anyone has access. If inquiry be made, there is no law to compel the company to give a certificate in writing. The answer would be a verbal one. If there should be a controversy as to what it was, it would be a matter to be proved. An answer in the negative would only operate by way of estoppel, and this would have to be proved. Suppose it turned out that there was an old bill, which the clerk who gave the answer supposed had been paid, when in fact it had not been, and the company should show that the clerk had no authority to answer the question. Is the man who proposes to buy a house to be kept from completing the purchase until all these matters are determined by a court of law? See *Wood v. Auburn*, 87 Me. 287, 292. It seems to us that, if an unpaid gas or water bill is made a charge upon the ³³⁸ land without authority of a statute, there are numerous difficulties to be encountered; and that the better rule is, that any such regulation as that before us, if construed as the defendant seeks to construe it in this case, is unreasonable and void.

Decree affirmed.

WATER COMPANIES—RULES AND REGULATIONS—INDEBTEDNESS OF CONSUMER—SHUTTING OFF WATER.—A water company has a right to prescribe all such rules and regulations for its convenience and security as are reasonable and just, and to refuse to furnish water to any person who declines to comply with them: *American Water Works Co. v. State*, 46 Neb. 194; 50 Am. St. Rep. 610; but having given credit to a taker of water, it cannot refuse subsequently to furnish water to the customer, because of his prior indebtedness to the company, where he tenders the customary and regular rates for the water demanded. Payment of the debt cannot be coerced in this way: *Note to Watauga Water Co. v. Wolfe*, 63 Am. St. Rep. 844.

SMITH v. SMITH.

[171 MASSACHUSETTS, 404.]

MARRIAGE—ANNULMENT OF, FOR FRAUD.—On grounds of public policy, the law seeks to make the marriage relation, in every case, as nearly permanent as possible without doing injustice, but a marriage may be annulled for fraud in regard to the bodily condition of the libelee, where the fraud is discovered immediately after the ceremony and before the consummation of the marriage.

MARRIAGE—ANNULMENT OF, ON ACCOUNT OF VENEREAL DISEASE.—Under a statute authorizing either party to a marriage to file a libel for its annulment, when the validity of the marriage is doubted, a woman, who is married to a man afflicted with a venereal disease, called syphilis, is entitled to, and a judge of the superior court has power to enter, a decree annulling the marriage, where it appears that the libelee contracted the marriage without informing the libellant of his condition; that she discovered the fraud on the day of the marriage, soon after the ceremony, and before the consummation of the marriage, that she refused to live with him, and never did live with him; that the disease was constitutional and infectious, and would, in case of cohabitation, be communicated to the libellant and be transmitted to any offspring they might have; and that, while the disease might not be absolutely incurable, the chances of a cure being effected, in the state in which the libelee was, were very remote and doubtful.

Libel to annul a marriage. The trial judge ordered a decree of nullity to be entered, and reported the case for the determination of the appellate court. The main question was the power of the court to enter the decree.

J. C. Burke & W. S. Marshall, and J. F. Corbett, for the libellant.

⁴⁰⁵ KNOWLTON, J. This libel is brought under the Public Statutes, chapter 145, section 11, the first part of which is as follows: "When the validity of a marriage is doubted, either party may file a libel for annulling such marriage, or, when the validity of a marriage is denied or doubted by either party, the other party may file a libel for affirming the same." The omission of the words, "for fraud or other cause," contained in the General Statutes, chapter 107, section 4, and in the statutes of 1855, chapter 27 does not change the meaning of the provision. The statute assumes that there may be marriages which are legal in form but invalid in fact. In terms, it confers jurisdiction upon the court, but in reference to the law of marriage it is merely declaratory.

The facts of the present case are peculiar. On the day of the marriage, soon after the ceremony, the libellant received information that the respondent was afflicted with a venereal dis-

case called syphilis. She communicated the information to her mother, who immediately charged him with being so afflicted. He denied the charge, but consented to an examination by a physician. An examination was made that disclosed the fact, which the presiding justice has found, that he was constitutionally afflicted with syphilis, a contagious disease with which the libelant would become infected in case of cohabitation, "thus seriously impairing her health, and involving consequences of the most grievous character." The judge also found "that the disease would be transmitted to any offspring which they might have; that, while it was not absolutely incurable, the chances of a cure being effected in the state in which the respondent was were very remote and doubtful." The libelant, on learning the libelee's condition, refused to live with him as his wife, and there has been no consummation of the marriage. The libelee, knowing his diseased condition, induced the libelant to contract the marriage without informing her in regard to it. She supposed him to be a man in good health and of good habits, and if she had known that he was suffering from such a disease she would not have contracted the marriage.

The statute to which we have referred has several times been ⁴⁰⁶ considered by this court: *Reynolds v. Reynolds*, 3 Allen, 605; *Donovan v. Donovan*, 9 Allen, 140; *Foss v. Foss*, 12 Allen, 26; *Crehore v. Crehore*, 97 Mass. 330; 93 Am. Dec. 98. The fullest discussion of the law applicable to a case like this, of which we have knowledge, is in *Reynolds v. Reynolds*, 3 Allen, 605. In that case a marriage was declared void into which a man was induced to enter by confiding in the representations of the woman whom he took for his wife that she was chaste, when in fact she was with child by another man. It has since been held that, to maintain a petition in such a case, it is not necessary to introduce evidence of express representations, and that a petition cannot be granted if it appears that the petitioner had himself been guilty of criminal intercourse with the woman before the marriage. The precise point decided in *Reynolds v. Reynolds*, 3 Allen, 605, has been adjudicated in other states, and in this country seems to be generally accepted law: *Baker v. Baker*, 13 Cal. 87; *Carris v. Carris*, 24 N. J. Eq. 516. See, also, *Morris v. Morris*, Wright, 630; *Ritter v. Ritter*, 5 Blackf. 81; *Scott v. Shufeldt*, 5 Paige, 43. The law in England is held otherwise: *Moss v. Moss* [1897], P. D. 264.

The opinion of the learned chief justice to which we have referred treats of the law in reference to ordinary contracts pro-

cured by fraud, and points out the distinction between contracts to marry, or executory contracts of marriage, and executed contracts of marriage. There is no reason why executory contracts of marriage should not be treated, in reference to the fraud of either party, like any other contracts. We think it is well settled that fraud of such a kind in its essential elements as would invalidate an ordinary contract, is a good defense to an action upon a contract to marry: *Van Houten v. Morse*, 162 Mass. 414; 44 Am. St. Rep. 373. But after a contract to marry has ripened into a marriage, different considerations affect the case. On grounds of public policy, the law seeks to make the marriage relation in every case as nearly permanent as possible without doing injustice. The difference between the relations of a man and woman affianced, and their relations after marriage, is more than the difference between those who have made an ordinary executory contract and the same persons after the contract is executed. At marriage there ⁴⁰⁷ is a change of status, which affects them and their posterity and the whole community. It is a change which, for important reasons, the law recognizes, and it inaugurates conditions and relations which the law takes under its protection. It is of such a nature that it cannot lightly be disregarded. The contracting parties take each other for better or for worse, and agree to abide the consequences of misinformation or mistake in regard to each other. Says Chief Justice Bigelow, in *Reynolds v. Reynolds*, 3 Allen, 605: "In the absence of force or duress, and where there is no mistake as to the identity of the person, any error or misapprehension as to personal traits or attributes, or concerning the position or circumstances in life of a party, is deemed wholly immaterial, and furnishes no good cause for divorce. Therefore no misconception as to the character, fortune, health, or temper, however brought about, will support an allegation of fraud on which a dissolution of the marriage contract, when once executed, can be obtained in a court of justice. These are accidental qualities, which do not constitute the essential and material elements on which the marriage relation rests." The decree of nullity was entered in that case, not merely because the libelant was deceived in regard to the supposed chastity of the libelee—for it is generally accepted law that unchastity of either party before marriage will not warrant a decree of divorce or nullity—but because, besides the unchastity, the woman was in such a condition that she could not properly assume the duties of wifehood. More than that, she was in a condition to introduce into the

husband's family spurious offspring, of which he would be presumed in law, if not in fact, to be the father. The deception, viewed in its different aspects, was in regard to facts essential to the very existence of the marriage relation. Her condition in reference to the objects of marriage was somewhat analogous to impotence, which, without reference to fraud, is always held to be a ground for a decree of nullity.

So far as we are aware, this is the only particular in which mistake or fraud in regard to the condition, character, or experience of one of the parties to a marriage has been held to be a ground for a decree of nullity or of divorce in favor of the other in this commonwealth. Most courts in other jurisdictions ⁴⁰⁸ have gone no further in favor of libelants. But in *Cumington v. Belchertown*, 149 Mass. 223, it appeared that a marriage was set aside for fraud by a court in New York, on the ground that the libelee had been afflicted with insanity before the marriage and had concealed the fact, and not long afterward had again become insane. It was held by this court that the marriage could not have been declared invalid for this cause in this commonwealth.

The case at bar rests solely upon fraud in regard to the bodily condition of the libelee. As we have already seen, the previous unchastity of the libelee is not enough to entitle the libelant to relief. Indeed, we are not quite certain from the report that the libelee might not have been constitutionally affected with the disease from his birth. But on the findings of the judge, his concealed disease was such as would leave him no foundation on which the marriage relation could properly rest. It had advanced to such a stage as probably to be incurable. The libelant could not live with him as his wife without making herself a victim for life, and giving to her offspring, if she had any, an inheritance of disease and suffering. While this case lacks the element of introducing a bastard child into the husband's family, which existed in *Reynolds v. Reynolds*, 3 Allen, 605, it has the element of a loathsome incurable contagious disease to be communicated to the wife, which the other had not. Few, if any, would be bold enough to say that it was the duty of the libelant, on discovery of the fraud before consummation of the marriage, to give herself up as a sacrifice, and to become a party to the transmission of such a disease to her posterity.

It may be said that this cause for a decree of nullity is not different in kind, but only in degree, from other bodily or mental conditions which the law does not recognize as a good ground for

a separation. There are many peculiarities of body or mind, natural or acquired, or contracted, which may render one, in a broad sense, unfit for matrimony, and of which, if concealed until after marriage, the law can take no cognizance in a suit for a separation. In proceedings in court it is more difficult to deal with conditions like these in the case before us than with that in *Reynolds v. Reynolds*, 3 Allen, 605, because they are ⁴⁰⁰ obscure, and it is hard to ascertain the truth. For this reason there is more danger in opening the door to libelants in such cases. Yet there may be circumstances in which justice requires that relief should be given.

In *Reynolds v. Reynolds*, 3 Allen, 605, much stress was laid upon the difference between an executory and an executed contract of marriage. But for fraud in procuring ordinary contracts, the law gives a remedy as well after the contract is executed as before. The learned chief justice did not say exactly at what stage a contract of marriage should be deemed to be executed. Clearly it is executory up to the time of the ceremony. Viewed in its legal aspect, it becomes a binding marriage as soon as the ceremony is performed; but the full execution of the contract contemplated by the parties in their original agreement is then just beginning, and is to continue during their joint lives. Their status up to the time of the ceremony is that of parties to an executory contract. Their status as soon as the ceremony is performed is that of persons legally married, who, with the sanction and under the forms of the law, have assumed new relations to each other and to the state. But these new relations are then rather inchoate than complete, and they do not assume their perfected form so as to have their full possible effect upon the parties and the community until consummation of the marriage. There are, therefore, reasons why a fraud like that in the present case, discovered before consummation of the marriage and at once made a ground for separation, should move the court more strongly in favor of the libelant than if the discovery had come later: 1 Bishop on Marriage, Divorce, and Separation, secs. 456, 461, 462. The reluctance of the court to recognize such frauds as a ground for legal proceedings is founded on considerations of public policy. These considerations are much less weighty in a case like the present than if the parties had cohabited for a considerable time before the proceedings were commenced. Although in many cases the distinction between consummated and unconsummated marriages in proceedings for separation has been overlooked, it is distinctly recognized in

Lyndon v. Lyndon, 69 Ill. 43, and Robertson v. Cole, 12 Tex. 356, in each of which cases a decree of nullity was entered when the court said that the ground ⁴¹⁰ would have been insufficient if the marriage had been consummated.

We do not intimate that the concealed existence of venereal disease in one of the parties to a marriage will ordinarily be a sufficient ground for a decree of nullity. In most cases, presumably, the disease is curable. But, confining our decision to the facts before us, we are of opinion that it was in the power of the judge of the superior court to enter a decree for the libellant.

Decree for the libellant.

MARRIAGE — ANNULMENT — SYPHILIS — FRAUD.—A marriage may be annulled on the ground of physical incapacity for any cause rendering sexual intercourse dangerous to health or life, as for pre-existing incurable syphilis; and unreasonable delay is not chargeable against a husband who, after living with his wife until she bears him a child, seeks the annulment of the marriage because of the wife's having incurable syphilis, if he ceased to cohabit with her as soon as he was informed of her real condition, and that it was incurable: *Ryder v. Ryder*, 66 Vt. 158; 44 Am. St. Rep. 833.

BELCHER v. SHEEHAN.

[171 MASSACHUSETTS, 512.]

CONSTABLES—NEGLECT TO ARREST ON EXECUTION—ACTION—DEFENSE.—In an action against a constable to recover damages for his neglect to arrest a person on execution, the defendant may prove, if he can, that the judgment and execution were, in fact, absolutely void.

Turt, against a constable, to recover damages for his neglect to arrest one Curtis on an execution. The trial court held that the officer could not impeach the judgment, and that it was conclusive until reversed. There was a finding for the plaintiff, and the defendant excepted.

J. L. Powers and C. W. Cushing, for the defendant.

C. E. Allen, for the plaintiff.

⁵¹² FIELD, C. J. As Curtis, when the plaintiff brought the action against him, was a resident of the state of New York, and had no place of business or last and usual place of abode in this commonwealth, and was not served with process and did not appear in the action, and as no attachment was made upon his property within the commonwealth, the judgment rendered

against him is void, and Curtis, if sued on the judgment, could avoid it by plea and proof: *Needham v. Thayer*, 147 Mass. 536; ⁵¹⁴ *Rand v. Hanson*, 154 Mass. 87; 26 Am. St. Rep. 210; *Kimball v. Sweet*, 168 Mass. 105. As Curtis was described in the writ as "of Everett in the county of Middlesex, having his usual place of business in said Boston," it may be that the execution delivered to the defendant appeared to be regular and valid on its face. A copy of the execution is not before us. The extent to which an officer is protected in the service of process which is regular and valid on its face has been recently considered in this court in *Tellefsen v. Fee*, 168 Mass. 188; 60 Am. St. Rep. 379. It is, however, unnecessary to determine whether, if the defendant had arrested Curtis on the execution, the process would have protected him. The defendant neglected to arrest him, and in an action to recover damages for such neglect it is open to the defendant to prove that the judgment and execution were in fact absolutely void: *Albee v. Ward*, 8 Mass. 79, 86; *Hitchcock v. Baker*, 2 Allen, 431; *Freeman on Executions*, 2d ed., sec. 103.

Exceptions sustained.

OFFICERS—VOID PROCESS.—An officer is not bound to execute void process and no action lies against him for refusing to do so: *Newburg v. Munshower*, 29 Ohio St. 617; 23 Am. Rep. 769. As to execution against the person, generally, see note to *Hormann v. Sherin*, 59 Am. St. Rep. 746.

SHEPARD & MORSE LUMBER COMPANY v. ELDRIDGE.

[171 MASSACHUSETTS, 516.]

CHECKS, UNINDORSED — FORGED INDORSEMENT — CARE REQUIRED OF PAYEE TO PREVENT—RIGHT OF ACTION AGAINST DRAWER.—The holder of an unindorsed check, payable to his own order, is under no legal obligation to the drawer to exercise care as to how the check shall be kept, or to whom he shall commit its custody, or to see to it that the check shall not be put in circulation by the forgery of his indorsement, so long as he acts honestly without collusion. Hence, he is not deprived of his remedy against the drawer by his mere negligence in intrusting such a check to a clerk who, due care would have told him, was dishonest, thus giving the clerk an opportunity to commit crime.

CHECKS, UNINDORSED—FORGED INDORSEMENT—OBIGATION OF PAYEE TO PREVENT.—The holder of an unindorsed negotiable check, payable to his own order, is under no other legal obligations with reference to it than those which rest upon any holder of commercial paper, completed and put in circulation by the maker. He is not, therefore, under any legal obligation, either to the drawer of the check, or to the public, to see to it that the check is not put in circulation with a forged indorsement.

CHECKS, UNINDORSED—PAYMENT OF, UPON FORGED INDORSEMENT—LOSS FALLS WHERE.—The circumstance that a check has been taken by the payee in absolute extinguishment of the drawer's debt to him does not relieve the drawer from his legal obligations as such. The fact, therefore, that the check has been stolen from the payee, and collected upon a forged indorsement, is not a sufficient reason why the loss should fall upon the payee rather than upon the drawer.

CHECKS — PAYMENT BY — DUTY IMPOSED UPON PAYEE.—The fact that the drawer of a check has bought goods of the payee for many years, and made payment by checks, does not impose any liability upon the latter as to the methods in which he shall conduct his own business, or as to what clerks he shall employ.

CHECKS, UNINDORSED—THEFT AND COLLECTION OF, UPON FORGED INDORSEMENT—IMPUTED KNOWLEDGE.—The payee of a check is not chargeable with knowledge that it has been stolen or embezzled, and collected upon forged indorsements made by his clerk, either because his clerk has that knowledge, or because the means of knowledge existed in his books of account, so that he could have made the discovery if his monthly trial balances had been made by an honest clerk.

CHECKS, UNINDORSED — COLLECTION OF, UPON FORGED INDORSEMENT—DUTY OF PAYEE AS TO GIVING NOTICE.—One who has become the holder of a check, which his clerk steals and collects upon forged indorsements, is under no duty to give notice to the drawer and the drawee, or to the public, of the theft and forgery, where he is honestly ignorant of such facts, and incorrectly, but honestly, assumes that it has been collected in the regular course of his business. There is no duty to anyone connected with the check in such a case, which requires the holder to examine his books of account, or to make trial balances, or to discover, by any means, what has become of the check, and, since he owes no duty to others, he is not to be charged with knowledge which he does not in fact have.

CHECKS, UNINDORSED — COLLECTION OF, UPON FORGED INDORSEMENT—IMPUTED KNOWLEDGE.—If a clerk defrauds his employer by forging the latter's indorsement and collecting his checks, for the clerk's own use, the clerk's knowledge of the fraud, acquired in its perpetration, is not imputable to the employer.

AGENCY — EXAMINATION OF BOOKS — IMPUTED KNOWLEDGE.—If, in making trial balances, an employer's set of books is, to some extent, examined, the knowledge of the agent who makes such examination is not imputable to the employer, where such examination is not made in the performance of a duty owed by the employer to any other party, nor is the employer to be charged with information, which his means of knowledge may disclose, where he is not willfully ignorant, and has not purposely neglected to use the means of knowledge within his power.

CHECKS, UNINDORSED — COLLECTION OF, UPON FORGED INDORSEMENTS—RATIFICATION.—The act of a clerk in indorsing checks with his employer's name, or in collecting them upon forged indorsements, is not actually or impliedly ratified by the act of the employer, who, after being informed that his clerk has been depositing, to his own credit, in a certain bank, checks payable to the employer, asks and receives from the clerk a check on such bank for the amount of a bill due to the employer from him, which check is paid by the bank, and who further consents that another check drawn by the clerk upon the bank named may be paid and charged to the clerk's account therein.

CHECKS, UNINDORSED — COLLECTION OF, UPON FORGED INDORSEMENT — PAYEE'S ACTION AGAINST DRAWER—ESTOPPEL.—Although a seller of goods receipts subsequent bills without informing the buyer that a previous debt for which checks were given had not been extinguished, this will not estop the seller, in an action to recover the amount of the checks, from showing that they had been stolen by his clerk and collected upon forged indorsements, where the seller's failure to mention the previous checks was not due to any intent to mislead the buyer. Such an act on the part of the seller could not justify an inference on the part of the buyer that the checks had been collected by the seller, so as to estop the latter from showing the truth.

CHECKS, UNINDORSED — COLLECTION OF, UPON FORGED INDORSEMENT — PAYEE CANNOT RECOVER AFTER MISLEADING DRAWER.—If a check is stolen from the payee, is put into circulation by forgery, and paid by the drawee, the payee is estopped from maintaining an action against the drawer upon the check, where he has misled the drawer to his prejudice, and thereby placed him in a worse position than he would otherwise have been in with reference to the assertion or protection of his rights resulting from what has been done with the check.

APPEAL—SPECIAL FINDING MAY BE DISREGARDED FOR WRONGFUL EXCLUSION OF EVIDENCE.—A special finding of fact by a judge sitting without a jury, that a defendant's position has not been changed to his prejudice, must be disregarded, if evidence relevant and material to the question was wrongly excluded, although the finding may be correct upon the evidence admitted.

CHECKS, UNINDORSED — COLLECTION OF, UPON FORGED INDORSEMENT—EVIDENCE ADMISSIBLE IN ACTION BY PAYEE AGAINST DRAWER.—If a check has been stolen by the payee's clerk, who forges indorsements thereon and puts the check into circulation, and it is paid by the bank upon which it is drawn, but is returned to the drawer, from whom the payee, who has been informed of the forgery, afterward obtains it, evidence of what was done by the payee after he learned of the forgery is admissible in an action brought by him against the drawer of the check.

Contract, to recover the amount of two checks payable to the plaintiff company and signed by the defendant. The case was tried without a jury, and there was a finding for the plaintiff. The defendant excepted.

L. S. Dabney, for the defendant.

W. C. Loring, for the plaintiff.

⁵¹⁷ **BARKER, J.** The plaintiff sues upon two checks drawn by the defendant upon his banker, one for four hundred and forty-six dollars and twenty-four cents, dated January 25, 1895, the other for five hundred and sixty-one dollars and ninety-seven cents, dated July 20, 1895. Both were written to the plaintiff's order, and were mailed by the defendant to the plaintiff in payment of bills for goods bought by the defendant of the

plaintiff. Each check was duly received by the plaintiff, and the bills for which the checks were sent in payment were duly receipted by the plaintiff, and returned to the defendant, one on January 26, 1895, and the other on July ⁵¹⁸ 24, 1895. The check for January 25, 1895, was presented at the bank on which it was drawn on January 30, 1895. It then purported to bear the indorsement of the plaintiff, and other indorsements, one of which was that of the cashier of the Merchants' National Bank of New Bedford, by whom it was presented, and on that day the amount of the check was paid by the National Bank of Wareham, on which it was drawn, to the Merchants' National Bank of New Bedford, and the same amount was charged to the defendant's account by the National Bank of Wareham. This check was returned to the defendant by his bank on June 25, 1895, and remained in his possession until January 30, 1896.

The check of July 20, 1895, was drawn upon the National Bank of Wareham, and was presented to that bank on July 29, 1895, purporting to bear the plaintiff's indorsement and other indorsements, one of which was that of the cashier of the Merchants' National Bank of New Bedford, and on that day the amount of the check was paid by the National Bank of Wareham to the Merchants' National Bank of New Bedford, and was charged to the defendant's account by the National Bank of Wareham, and this check was returned by that bank to the defendant on November 29, 1895, and remained in his possession until January 30, 1896.

The evidence tended to show that the indorsements upon these checks purporting to be those of the plaintiff when they were paid by the Wareham National Bank were forgeries made by a clerk in the employment of the plaintiff, which clerk had feloniously converted the checks to his own use, had forged upon them the plaintiff's indorsements, and had deposited the checks with the forged indorsements to his own credit in the Old Colony Trust Company, by which they were collected of the Wareham National Bank through the Merchants' National Bank of New Bedford. It appeared that the plaintiff, on January 29, 1896, was informed of these forgeries, and of the misappropriation by its clerk of these checks. Thereupon the plaintiff sent one Gray to the defendant to procure the checks, and the defendant handed them to Gray on January 30, 1896, under circumstances which the defendant offered to show, but evidence of which was excluded. On the same day, or the next day, the ⁵¹⁹ plaintiff notified the indorsers of the checks that the plaintiff's indorse-

ments upon them were forgeries. The plaintiff gave no such notice to the National Bank of Wareham, and no other notice, except the oral statements of Gray made in obtaining the checks from the defendant on January 30, 1896, was given by the plaintiff to the defendant until February 10, 1896, when the plaintiff wrote to the defendant a letter which stated that the checks bore forged indorsements of the plaintiff.

On February 12, 1896, the plaintiff indorsed the checks upon allonges, and forwarded them to its bankers for collection from the Wareham National Bank. Payment was refused by that bank, and the checks were protested by a notary public for non-payment on February 14, 1896, after which this suit was brought upon them by the plaintiff, the payee, against the defendant, the drawer of the checks. The National Bank of Wareham is solvent.

The case was tried by a judge of the superior court, without a jury, and after a finding for the plaintiff, the defendant's exceptions are before us for consideration. It appears from the bill of exceptions that at the trial much evidence was admitted de bene, which was afterward stricken out at the plaintiff's request, and also that much evidence offered by the defendant was excluded. Two findings of specific facts were made in connection with the refusal of the court to give rulings asked by the defendant at the close of the evidence. The questions for decision will be better understood after a statement of the facts which the evidence introduced or offered tended to prove in addition to those already recited.

The plaintiff is a dealer in lumber, with its place of business in Boston. The defendant is a dealer in lumber, with his place of business in Bourne. The defendant had been dealing with the plaintiff for some ten years, buying lumber of the plaintiff once in three or four months. When he bought lumber the plaintiff sent him a bill, and he usually paid it by mailing back the bill with a check for the amount. A receipted bill was then returned to him, in which payment was usually acknowledged for the plaintiff by Harry M. Fowle, who had authority so to do, and who was the clerk who forged the plaintiff's indorsements upon the checks in suit, and converted them to his own use. ⁵²⁰ Fowle entered the plaintiff's employment in January, 1889, at the age of seventeen or eighteen, in answer to an advertisement, and was first set to do office boy's work. In 1893, when twenty-one years old, he became the ledger clerk, and so continued until his arrest in January, 1896. There were ten or

more persons in the plaintiff's office, including its president, treasurer, and directors. Its treasurer was H. B. Shepard, and its cashier was H. S. Shepard, who took care of the money, kept the cash account, and made entries on the cash-books. Fowle's duties were to receive and open letters, look over checks, statements, and settlements of accounts as they came in, and see that they were proper and in accordance with the ledger, to receipt and return to customers their paid bills, to post to the ledger, and to take off trial balances. Accounts of the plaintiff's business were kept in the ledgers, cash-book, bill-books, journals, and check-books, and a trial balance was taken by Fowle each month of the business of the last preceding month. The treasurer had his desk in the office, and at his pleasure had access to all the books, and he occasionally examined the books and the trial balances.

The letters received were often opened by Fowle, and when not opened by him those which contained checks in payment for merchandise were placed with the bills upon his desk for him to examine the bills and the ledger with the checks, and see if the proper settlement had been made, and to receipt the bills and return them receipted to the customer. It was Fowle's duty after the examination to pass the checks to the cashier, and at the close of the day to give him a list of the payments, and this course of business was known to the treasurer, and was pursued with the authority and consent of the plaintiff.

The checks sued upon, with the accompanying bills, were received by mail at the office, each within a day or two after its date, and, in the usual course of business, were placed upon Fowle's desk, and intrusted to him for the usual examination, and to be thereafter handed to the cashier as usual. A receipted bill for the payment by each of these checks was sent to the defendant, the acknowledgment of payment being stamped upon the bill with a stamp furnished for that purpose by the plaintiff, and which Fowle had authority to use in receipting bills.

521 The plaintiff's name, as it appears in the forged indorsements, was stamped upon the backs of the checks with a stamp which the plaintiff provided to be used in making indorsements, and which was kept with other stamps in the office in the cashier's desk. The words, "H. B. Shepard, Treas.," following the plaintiff's name in the indorsements, were written by Fowle. He also sometimes stamped the checks which were to be deposited by the plaintiff with another stamp provided by the plaintiff, and to which Fowle had access, and which stamped on them the

words, "For deposit only to the credit of Shepard & Morse Lumber Co."

After the receipt by the plaintiff of the check of January 25, 1895, and the return to the defendant of the receipted bill acknowledging payment, and before the giving of the check of July 20, 1895, the defendant bought of the plaintiff two other invoices of lumber, and paid for them in the same way, with his checks mailed to the plaintiff with the bills which had been sent out by the plaintiff, and neither of these bills contained any reference to any other unpaid bill, and he received in due course receipts acknowledging the payment of both of the intervening bills.

The two bills for which the checks sued upon were given appeared, by the plaintiff's ledger, to have been paid, and in each instance the amount of the check was credited to the defendant in the ledger account in Fowle's handwriting, with a reference in each instance to a page which should have been a page of the cash-book, but the cash-book had no corresponding items. An examination of the books after the credit of the check of January 25, 1895, to the defendant's account in the ledger, would have shown that no such payment appeared upon the cash-book. The trial balance made by Fowle at the end of January, 1895, was forced by him, by omitting from the entry of sundries credited to merchandise on January 31, a sum equal to the amount of the check. If this trial balance had been made up by an honest clerk, the loss of the check of January 25, 1895, would have been then discovered, and, in like manner, if the plaintiff's trial balance for July, 1895, had been made up by an honest clerk, the loss of the check of July 20, 1895, would have been discovered in August, 1895.

Fowle had been defrauding the plaintiff for two or three years before January, 1896, by taking checks sent in by its customers ⁵²² in payment, falsely indorsing them as he indorsed the checks in suit, collecting them for his own benefit, and concealing these frauds by crediting the checks upon the ledger to the persons who sent them in payment, deducting the amounts from the monthly credits to merchandise, and forcing the trial balances, so that if the monthly trial balances made before January, 1895, had been made by an honest clerk, the stealings of Fowle would have been discovered before that time. During the same period he had defrauded the plaintiff in other ways. The whole amount which he had taken from the plaintiff by misappropriating about one hundred checks of customers was more than forty thousand

dollars. He kept a complete list of all the checks and money which he had taken. From some time in 1893 he had a deposit account with the Old Colony Trust Company, and he deposited to his credit in that account the checks in suit, also most of the other checks belonging to the plaintiff and payable to its order, on which he forged its indorsement, and which he converted to his own use in a similar way. He also deposited to his own credit in the same account, from time to time, other funds, and from time to time he drew checks upon the Old Colony Trust Company against this account. Throught February and March and August and September, 1895, he had money to his credit on deposit in the Old Colony Trust Company, and also in January, 1896.

In December, 1895, and two or three times before that, the plaintiff's treasurer had his attention called to the fact that Fowle was spending more than his salary, and in consequence the treasurer, in December, 1895, looked over the journal and the ledger to some extent, but he made no other examination of the books, and had no one else make any examination. On January 27, 1896, the plaintiff's treasurer was told by one of the plaintiff's clerks that Fowle had deposited to his own credit in the Old Colony Trust Company checks payable to the plaintiff's order. The treasurer thereupon ascertained from the trust company that Fowle had deposited with it such checks, and requested the trust company to have the banks upon which the checks were drawn return them, so that he could see the indorsements. He then consulted an attorney. Fowle owed the plaintiff a bill for lumber, and on January 28, 1896, the plaintiff, through its treasurer, took from Fowle a check for one hundred and ninety-three dollars and twenty cents, ⁵²³ upon the Old Colony Trust Company, in payment of the lumber bill, which was for lumber used in building a house of Fowle's in Clifton. This check was paid by the trust company on January 29, 1896. On that day Fowle was arrested at the instance of the plaintiff, and upon that day he gave to the plaintiff's treasurer a complete list of all the plaintiff's checks which he had misappropriated by forgery, including the checks now in suit. On the same day the plaintiff brought suit against Fowle in an action of tort or contract, in which the damages were laid at ten thousand dollars, and on the writ real estate belonging to Fowle was attached. The declaration was for money obtained by false representations, or wrongfully taken or embezzled, but did not include the checks now in suit. A judgment for the

plaintiff has been entered in the suit, upon which execution has issued. Before Fowle's arrest, and after the plaintiff's treasurer knew that checks payable to the plaintiff's order had been deposited by Fowle to his own credit in the Old Colony Trust Company, another check, drawn for one hundred and forty dollars by Fowle upon that company, was, on January 29, 1896, with the consent of the plaintiff, paid by the Old Colony Trust Company, and charged against Fowle's deposit.

On the same day, after obtaining from Fowle the full list of misappropriated checks, including the checks in suit, the plaintiff sent one Gray to the defendant to obtain the checks in suit. Gray got them, and brought them to the plaintiff's treasurer on January 30th or 31st. To obtain the checks, Gray told the defendant that the plaintiff wanted the two checks to see whether the indorsements were forgeries. The defendant, after finding the checks among the vouchers returned from his bank, said he did not think they were forgeries; that the signatures looked like Shepard's; and the defendant got out some letters with Shepard's signature and compared them, and thought the indorsements were not forgeries, and so stated. Gray asked to have the checks, telling the defendant that the purpose for which he wanted them was for a prosecution for forgery, and that if they turned out to be forged no harm should come to the defendant in letting them go out of his possession. On the faith of these assurances, and on the further statement of Gray that the checks should be returned to the defendant when the prosecution for ⁵²⁴ forgery should be finished, and on the faith of a written receipt, the defendant allowed Gray to take the checks. The receipt was of the following tenor:

"Bourne, Mass., Jan. 30, 1896.

"Received of A. R. Eldridge, Paid Checks, no number, dated Jan. 25th and July 20, 1895, amounting to \$446.24 and \$561.97, respectively. To be returned when the case is finished.

"SHEPARD & MORSE L. CO.,
per Geo. F. Gray."

When the plaintiff's treasurer, on January 30th or 31st, got these checks from Gray, he immediately saw that the indorsements of his signatures thereon were forgeries, and he immediately gave notice to all the indorsers, except Fowle, that those indorsements were forgeries, but he gave no notice at that time to the National Bank of Wareham, and he gave no notice to the defendant until February 10, 1896, when he sent a letter of the following tenor:

"Boston, February 10, 1896.

"Mr. A. R. Eldridge, Bourne, Mass.

"Dear Sir: The Shepard & Morse Lumber Company desires to acknowledge the receipt from your concern of the following checks drawn by you on the National Bank of Wareham, Mass., payable to the order of the Shepard & Morse Lumber Company, and all bearing forged indorsements, Shepard & Morse Lumber Company, H. B. Shepard, Treas.

"Date Jan. 25, 1895, amount \$446.24; date July 20, 1895, amount \$561.97.

"SHEPARD & MORSE LUMBER CO.

"By H. B. Shepard, Treas."

The first notice of the forgeries which is shown to have been given to the Wareham National Bank is that which was contained in the plaintiff's indorsements upon the allonges, stating that the checks were for the first time indorsed by the Shepard and Morse Lumber Company by those indorsements dated February 12, 1896, and that no prior indorsements were recognized, which allonges, annexed to the checks, were presented to the Wareham Bank on February 14, 1896, when payment of the checks was demanded and refused.

Besides his pay from the plaintiff, which was twenty dollars a week, and his deposits in the Old Colony Trust Company, Fowle had other property. Soon after he became the ledger clerk he told the plaintiff's treasurer that he had inherited considerable property from his father, who had been a partner in Fowle, Torrey & Co., carpet dealers in Boston, and that he was not obliged to work. In December, 1895, the treasurer, after hearing that Fowle was spending more than his salary, inquired of a gentleman who might be supposed to know how much Fowle had inherited from his father. The reply was, that Fowle did inherit, but that the gentleman did not know how much; that he judged from his style of living that he had inherited considerable property, but did not know, or have means of knowing, how much, and the treasurer made no further inquiry. On February 10, 1896, Fowle was absolutely insolvent, and has been so ever since.

The evidence offered by the defendant to prove many of the facts above recited was excluded at the trial, and, at the close of the evidence so much of it as had been admitted de bene, and tended to prove lavish expenditures on the part of Fowle, and to show the extent of the plaintiff's losses by Fowle's depredations, was stricken out.

The defendant's requests for rulings, however, were framed as if all the evidence were in, and, in refusing them, the judge made two special findings of fact, which were, in substance, that the defendant's position had not been changed to his prejudice after the misappropriation of the checks by Fowle, and that Fowle was not permitted by the plaintiff's negligence to obtain payment of either check.

The requests for rulings were, in substance, that the plaintiff could not maintain the action; that the plaintiff's neglect after the discovery of the forgery of the indorsements to give notice of the same to the defendant until February 10th was an unreasonable delay, which of itself discharged the defendant; that it was an unreasonable delay which discharged the defendant if his position had in the mean time been changed to his prejudice; that the assurances given by the plaintiff through Gray on January 30, 1896, to induce the defendant to give up the checks then in his possession, and the receipt then given by Gray are an adoption and ratification of the indorsements and of the payment ⁵²⁸ of the checks thereon, so that the defendant cannot be held liable on the checks; also, that those assurances and the receipt estop the plaintiff from maintaining the action if the defendant's position was changed to his prejudice by giving up the checks, and that his position was so changed.

There were also requests with reference to the trial balances for February and July, 1896, to the effect that, if the examination of the books for making up the trial balances would have disclosed to an honest clerk the loss of the checks, and brought to the plaintiff's knowledge facts which, by the exercise of due care and diligence, would have disclosed the forgeries, the plaintiff cannot escape the knowledge to be thereby imputed to it because the examinations and trial balances were made by Fowle; that the plaintiff must be deemed to have had knowledge of the first forgery in February, 1895, and of the second in August, 1895, and cannot recover, because it did not give notice of the forgeries to the defendant at those times, and because of unreasonable delay after those dates in giving notice to the defendant, and because of the delay since those dates, if the defendant's position has been changed to his prejudice. There were also requests to the effect that, if Fowle was permitted by the negligence of the plaintiff to get possession of the checks, and to obtain payment on them, the plaintiff could not recover, and that, if, in the month after each check were given, the plaintiff had means of knowledge that the check had been taken from

it and collected by Fowle, and remained ignorant of those facts by reason of its want of ordinary care, the plaintiff could not recover on the check, and that in those circumstances it could not recover on the check if in the meantime the defendant's position had been altered to his prejudice.

There was also a request to the effect that, if the plaintiff knew that the defendant was its regular customer, and that he had been buying lumber of it for years, paying for it with his checks sent to the plaintiff by mail, and that Fowle on the receipt of such checks was in the habit of receipting the bills and returning them to the defendant as paid, and that he was authorized so to do, and if the plaintiff knew, or had reason to believe, that the defendant relied upon the return of the receipts as evidence that his checks had been duly received by the plaintiff ³²⁷ and had been duly honored, and had been collected by it, it was the plaintiff's duty to take reasonable care of such checks, and to use ordinary care in availing itself of the means of information in its possession to ascertain whether such checks were duly collected for its account, and it was bound to the defendant to know at any time when, by the use of ordinary care, it had the means of knowledge in its possession that it had lost without receiving payment any check so received from the defendant, and at once to inform the defendant thereof, and that a failure so to inform itself and to notify the defendant would discharge him.

There were further requests to the effect that the plaintiff's action in asking for and taking from Fowle the check given by him to the plaintiff on January 28, 1896, after the plaintiff knew that Fowle had deposited to his own credit checks payable to the plaintiff, was a ratification by it of Fowle's appropriation to his own use of the checks, and that the plaintiff's action in requesting the Old Colony Trust Company to pay checks of Fowle's after the plaintiff had such knowledge was such a ratification.

One question for decision is, whether the plaintiff can recover if, by its own negligence in the conduct of its business, Fowle was in its employ and intrusted with the possession of the checks, when ordinary care would have shown the plaintiff that Fowle was dishonest, and had already stolen from it and collected by forging the plaintiff's indorsement many checks previously sent to it by its customers.

The finding of fact that Fowle was not permitted by the negligence of the plaintiff to obtain payment of either check does not render this question immaterial, because, if the plaintiff's negligence in this regard was a material consideration,

much evidence relevant to it was stricken out or excluded, and the finding made without considering that evidence has no weight. It is apparent that the judge below considered such negligence on the part of the plaintiff wholly immaterial. If it was so, the exclusion of evidence tending to establish it did the defendant no harm; but the finding of fact must be laid one side, and, notwithstanding that finding, we must inquire whether the plaintiff's negligence, if it could be found from the evidence offered, was a defense.

The doctrine of contributory negligence as a defense to actions ⁵²⁸ of tort is now of most frequent application, but we have been referred to no instance in which it has been held applicable to actions upon commercial paper, or even when the holder of such paper sues in tort for its conversion one who has innocently taken it upon a forged indorsement. Nothing could more completely unsettle commercial dealings than to extend that doctrine to suits brought by holders of negotiable paper against other parties thereto. If any change is to be made in the law looking to the discouragement of negligence on the part of holders of such paper, and to the protection of parties who may be defrauded by the forgery of indorsements, it should be made by the legislature, as in the case of the English statutes as to indorsements of checks and bills upon bankers: See Stats. 16 & 17 Victoria, c. 59, sec. 19; 45 & 46 Victoria, c. 61, sec. 60.

We are of opinion that the holder of an unindorsed check, payable to his own order, is under no legal obligation to the drawer to exercise care as to how the check shall be kept, or to whom he shall commit its custody, or to see to it that the check shall not be put in circulation by the forgery of his indorsement, so long as he acts honestly without collusion. Such a holder is not deprived of his remedy against the drawer by merely negligently intrusting such a check to a clerk who, due care would have told him, was dishonest, and thus giving the clerk an opportunity to commit crime. He has the right to assume that his clerk will not commit a crime, and to rest upon the presumption that he has not stolen or forged, and will not do so, and he is under no legal obligation, either to the drawer of the check or to the public, to see to it that the check is not put in circulation with a forged indorsement: *Combs v. Scott*, 12 Allen, 493, 497; *Belknap v. National Bank of North America*, 100 Mass. 376; 97 Am. Dec. 105; *Greenfield Sav. Bank v. Stowell*, 123 Mass. 196; 25 Am. Rep. 67; *Mackintosh v. Eliot Nat. Bank*, 123 Mass. 393, 395; *Mount Morris Bank v. Gorham*, 169 Mass. 519, 521; *Patent*

Safety Gun Cotton Co. v. Wilson, 49 L. J. Q. B., N. S., 713; *Société Générale v. Metropolitan Bank*, 27 L. T., N. S., 849, 858; *Scholfield v. Loundesborough* [1896], App. Cas. 514; *Bank of Ireland v. Evans Charities*, H. L. Cas. 389; *Ogden v. Benas*, L. R. 9 Com. P. 513; *Fine Art Soc. v. Union Bank*, 17 Q. B. Div. 705; *Swan v. North British Australasian Co.*, 2 Hurl. & C. 175, 189; *Arnold v. Cheque Bank*, 1 C. P. Div. 578, 588.

§ 529 Such a holder of a negotiable check is under no other legal obligations with reference to it than those which rest upon any holder of commercial paper completed and put in circulation by the maker. If the check is stolen from him and put in circulation by means of the forgery of his indorsement, he is not answerable as is one who intrusts to another his signature or indorsement in blank with authority to use it in making or giving currency to negotiable paper. The doctrine of *Putnam v. Sullivan*, 4 Mass. 45, 3 Am. Dec. 206, and of *Young v. Grote*, 4 Bing. 253, does not apply, and it cannot properly be extended to the case of a completed check already in circulation and intrusted by the holder to a clerk for purposes which neither give nor imply any authority to pass it on to another holder, nor give the clerk any power to do so, without the commission of a crime.

It is not necessary now to determine whether the debts for which the checks were given were extinguished. If the checks were taken by the plaintiff in absolute extinguishment of the debts, that circumstance could not relieve the drawer from his legal obligations as drawer. While the drawer has done his duty, and it is through no fault of his that the payee does not get his money, if the check is stolen from him and collected upon a forged indorsement, that does not furnish a sufficient reason why the loss should remain upon the payee rather than fall upon the drawer. The check was received in payment and the debt extinguished only in consideration of the drawer's legal obligation as drawer and of the payee's rights as holder, which included the right of recourse to the drawer if upon proper indorsement and due demand the check should not be paid by the drawee. Although there are intimations in support of the theory that cases like the present are instances in which as to two innocent parties losses are to be left where they fall, we think the rights of the present parties must be worked out by considering the usual rights of the drawer and drawee of a check given in a commercial transaction: See *Thomson v. Bank of British North America*, 82 N. Y. 1, 8; *Morse on Banks and Banking*, sec. 395.

The fact that the defendant had been in the habit of buying goods of the plaintiff for ten years, and of making payment by checks, imposed no liability upon the plaintiff as to the methods ⁵³⁰ in which its own business should be conducted, or as to what clerks it should employ. So far as these checks are concerned, its obligations to the defendant were merely those defined by the law of negotiable paper, and did not include the duty of taking care that the checks should not be stolen or its indorsement forged.

Nor do we think that the plaintiff is to be charged with the knowledge that the checks had been stolen or embezzled, and collected upon its forged indorsements, either because Fowle, its clerk, had that knowledge, or because the means of knowledge existed in the plaintiff's books of account, so that the plaintiff would have made the discovery if its monthly trial balances had been made by an honest clerk. The loss of the checks to the plaintiff was not, in fact, known to it until Fowle's arrest on January 29, 1896, and, as to all other parties to the checks, they were never lost checks. One was paid in four days, and the other in nine days after its date; and they were thenceforth in the custody of the drawee or drawer. Assuming that the owner of a check which he knows to be lost is under a duty to give to the public and to the parties to the check immediate notice of the loss, we see no reason for holding that one who has become the holder of a check is under a duty to give notice to the drawer and the drawee, or to the public, as of a lost check, if the check is in fact stolen and collected upon a forged indorsement, and he remains honestly ignorant of those facts, and incorrectly, but honestly, assumes that it has been collected in the regular course of his business.

Unless the plaintiff was under a duty to give notice as of a lost check, there was no duty to anyone connected with the checks which required the plaintiff to examine its books of account, or to make trial balances, or to discover by any means what had become of the checks. Assuming that, if such a duty toward other parties had rested upon the plaintiff, it would be chargeable with the knowledge which Fowle had, or which would have been acquired by the making of the trial balances by an honest clerk, or by an examination of the plaintiff's books by its officers, as the depositor was chargeable with the knowledge of his dishonest clerk to whom he intrusted the examination of returned checks in *Dana v. National Bank of Republic*, ⁵³¹ 132 Mass. 156, since no such duty to others rested upon the

plaintiff, it is not to be charged with knowledge which it did not in fact have. Fowle was himself defrauding the plaintiff in forging the plaintiff's indorsement and collecting the checks for his own use, and therefore his own knowledge of the fraud acquired in its perpetration is not to be imputed to the plaintiff: *Indian Head Nat. Bank v. Clark*, 166 Mass. 27, and cases cited. Nor is this contended. And as the examinations of the books in making the trial balances were not made in the performance of a duty owed by the plaintiff to any other party, the knowledge of the agent who made those examinations is not to be imputed to the plaintiff, nor is it to be charged with the information which its means of knowledge disclosed, it not being willfully ignorant, nor having purposely neglected to use the means of knowledge within its power: *Combs v. Scott*, 12 Allen, 493, 497.

As the plaintiff cannot properly be charged with imputed knowledge that Fowle was indorsing with its name these checks, or any of the other checks which he stole or embezzled and collected by forging its indorsement, we find nothing in what occurred until the plaintiff obtained actual knowledge of the frauds to work an actual or implied adoption or ratification of Fowle's acts in indorsing the checks with the plaintiff's name or in collecting them. The want of actual knowledge is fatal: *Combs v. Scott*, 12 Allen, 493; *Murray v. Nelson Lumber Co.*, 143 Mass. 250; *Dole Brothers Co. v. Cosmopolitan Preserving Co.*, 167 Mass. 481; 57 Am. St. Rep. 477. The receipting of subsequent bills by the plaintiff without informing the defendant that the debts for which these checks were given had not been extinguished was not an act intended or designed to convey to the defendant any representation as to what had become of the checks in suit, and could not justify the defendant in his inference that the checks had been collected by the plaintiff so as to estop the plaintiff from showing the truth. The receipting of subsequent bills without mention of the previous checks was not done with the intent to mislead the defendant, nor with any expectation or reason to believe that the defendant would in consequence of it do or omit to do anything with reference to the checks now in suit: *Stiff v. Ashton*, 155 Mass. 130; *Lincoln v. Gay*, 164 Mass. 537; 49 Am. St. Rep. 480; *Traders' Nat. Bank v. Rogers*, 167 Mass. 315, 321; 57 Am. St. Rep. 458.

⁵³² The remaining question is, whether what occurred after the actual discovery of the frauds requires us to sustain the defendant's exceptions. It is not necessary to consider whether the payee of a check, which has been stolen from him, put in cir-

ulation by forgery, and paid by the drawee, upon ascertaining those facts, should give notice to the maker, and to those who have taken the check as rightfully in circulation, of such facts within the payee's knowledge as are material to the rights and obligations of such persons, growing out of their transactions with the check. A majority of the court is of the opinion that a payee who, under such circumstances, misleads the drawer to his prejudice, and thereby places him in a worse position than he would otherwise be in with reference to the assertion or protection of his rights resulting from what has been done with the check, is thereby estopped from maintaining an action against the drawer upon the check, and that, for this reason, the exceptions should be sustained, and the finding for the plaintiff should be set aside.

It is true that it was found specially that the defendant's position had not been changed to his prejudice. But this finding must be disregarded, because evidence relevant and material to the question was offered by the defendant and wrongly excluded, even if the finding was correct upon the evidence admitted, which we do not decide. The evidence offered and excluded to show upon what footing and by what representations and assurances the plaintiff through Gray got the checks from the defendant was material upon the questions whether the plaintiff was estopped by its own acts done after its discovery of the forgeries from collecting the checks of the defendant; and whether the plaintiff had adopted as to him the forged indorsements. So, also, the evidence of the plaintiff's acts between its discovery of Fowle's frauds and its demand for payment of the checks from the drawee on February 14th was material in determining whether the defendant had been prejudiced in his rights to recover against the drawee.

To say nothing of the plaintiff's omission to notify the defendant of its own purpose to treat the checks as unpaid checks and to collect them of the defendant, the plaintiff's act in getting the checks from the defendant on January 30th as paid ⁵³³ checks was intended by the plaintiff to change the defendant's position, and did change it by depriving him of the possession of the checks. They had come to the defendant's hands honestly, and as vouchers for charges made against him by the drawee. Even if they had been demanded of him by the plaintiff as its property, the defendant could honestly refuse to give them up, and could honestly at once return them to the drawee with notice of the facts, and thus save himself from loss by per-

fecting his right to recover from the drawee the amount of the unauthorized payments which the drawee had charged against him in account: See *Northampton Nat. Bank v. Smith*, 169 Mass. 281; 61 Am. St. Rep. 283.

The enforcement of the defendant's rights against the drawee was not so plain and easy for him without as with the possession of the checks, and the loss of possession itself might have been found a change in his position to his prejudice. Besides this, the plaintiff's act in getting the checks from the defendant as paid checks, without notifying him that the plaintiff claimed them as its own property, and intended to collect them, while at the same time giving the defendant information that the plaintiff's indorsements were forged, would naturally induce the defendant to omit to give information of the forgery to the drawee, and it does not appear that any information was given to the drawee until the checks were again demanded of it on February 14th. The fact that the drawee has always been solvent, and remains solvent, is not the only factor in determining whether the defendant has lost his rights against the drawee: See *Dana v. National Bank of Republic*, 132 Mass. 156; *Leather Manufacturers' Bank v. Morgan*, 117 U. S. 96; *Leather Manufacturers' Bank v. Merchants' Bank*, 128 U. S. 26.

Without discussing that question, we think the evidence as to what was done by the plaintiff after it knew of the forgeries should have been admitted, and that if it appeared that the plaintiff got the checks from the defendant as paid checks, to be returned to him, and did not properly notify the defendant that the plaintiff claimed the checks as unpaid and as its own property, and that it intended to assert that ownership and collect the checks, a finding for the defendant would be warranted.

Exceptions sustained.

CHECKS—PAYMENT OF, UPON FORGED INDORSEMENT—RIGHTS OF PAYEE AND LIABILITY OF MAKER.—It is well understood that no title to an instrument passes by a forged indorsement: *Buckley v. Second Nat. Bank*, 35 N. J. L. 400; 10 Am. Rep. 249. A drawee is bound to know the signature of his drawer; and, if a check is drawn payable to the order of an existing person, and the indorsement of such person is forged, and thereafter payment is made by the bank, such payment will be no acquittance to it: See monographic note to *People's Bank v. Franklin Bank*, 17 Am. St. Rep. 890, 898, on the rights and remedies of the several parties when a forged check has been paid. The payment of forged checks by a bank is made at its peril: *First Nat. Bank v. First Nat. Bank*, 58 Ohio St. 207; 65 Am. St. Rep. 748, and note. A bank paying a check upon a forged indorsement and charging the amount thereof to the account of the drawer is liable to him:

German Sav. Bank v. Citizens' Nat. Bank, 101 Iowa, 530; 63 Am. St. Rep. 899. So the loser of a note, with a forged indorsement, may recover it from any hand; and a maker, acceptor, or other promisor who has already paid it, is liable again for the amount to its proper owner. Hence, where the plaintiff's agent forged his indorsement upon a check payable to the plaintiff's order, and transferred it for value to the defendant, who collected the amount of it from the drawee, it was held that the plaintiff could recover the amount of the check from the defendants: *Buckley v. Second Nat. Bank*, 85 N. J. L. 400; 10 Am. Rep. 249. But the rule which charges a bank with the amount paid on a forged instrument, applies only where the drawer has himself been free from blame; for if he has so acted as to mislead or deceive the drawee, or to throw him off his guard, or to prevent his inquiries as to the validity of the instrument, then the loss must lie on the drawer: See monographic note to *Laborde v. Consolidated Assn.*, 39 Am. Dec. 520, on the effect of the payment of a forged check on the rights of the party defrauded.

AGENCY—NOTICE TO AGENT AS NOTICE TO PRINCIPAL.

A notice to an agent to be notice to a principal must be given to him while acting in the course of his employment: *Weisser v. Denison*, 10 N. Y. 68; 61 Am. Dec. 731. A principal is chargeable with knowledge of such facts as his agent, whether honest or dishonest, acquires while acting within the scope of his business: *First Nat. Bank v. Allen*, 100 Ala. 476; 46 Am. St. Rep. 80; but notice to an agent is not imputed to his principal when the agent is engaged in the commission of an independent fraudulent act on his own account, and the facts to be imputed relate to this fraudulent act: *Note to Gunster v. Scranton Illuminating etc. Co.*, 59 Am. St. Rep. 658.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

HUDSON v. SAGINAW CIRCUIT COURT.

[114 MICHIGAN, 116.]

GARNISHMENT AGAINST EXECUTORS OR ADMINISTRATORS.—Funds in the hands of an executor or administrator are not subject to garnishment by the creditor of the decedent, before final distribution of the estate has been ordered by the court, although the rights of the parties have become fixed by judgment, and the executor or administrator admits having funds on hand with which to pay the debt.

Petition for a writ of mandamus to compel the judge of the Saginaw county circuit court to vacate an order quashing a writ of garnishment. Petition denied.

De F. Paine, for the relator.

W. G. Gage, for the respondent.

¹¹⁶ **HOOKEE, J.** Nolan brought an action against Aaron C. Fisher in his lifetime, which culminated in a judgment against his executors, the same being affirmed by this court in *Nolan v. Swift*, 111 Mich. 56. Thereupon the relator garnished the executors, but the circuit court dismissed the proceedings, after disclosure, upon the ground that garnishment would not lie against executors.

It is a general rule that property in custody of the law is not subject to attachment or garnishment. The law ¹¹⁷ does not permit one court to assume control over the representative of another court, or the property confided to his charge. By this

it is not meant that personal remedies against the individual may not be sought, but that any proceeding in the nature of an action in rem, whereby it is sought to reach the property which another court has taken possession of, is forbidden. Thus replevin from an officer holding under order of the court of chancery is punishable as a contempt. Even suits against a receiver in his representative capacity are forbidden, though the court appointing the receiver may, on cause shown, permit them. The probate court has not even this power respecting its officers, who can only be sued in the manner pointed out by statute, and a garnishee proceeding is not included among statutory proceedings against executors and administrators in Michigan, though it is in some states. That administrators and executors are exempt from this process is the general rule. In *Rood on Garnishment*, section 27, it is said: "When property or money is in custodia legis, the officer holding it is the mere hand of the court. His possession is the possession of the court. To interfere with his possession is to invade the jurisdiction of the court itself. And an officer so situated is bound by the orders and judgments of the court, whose mere agent he is, and he can make no disposition of it without the consent of his own court, express or implied": *In re Cunningham*, 9 Cent. L. J. 208; *Fed. Cas. No. 3478*. These principles have been applied in numerous cases to various classes of legal custodians, and in accordance with them it has been held that clerks of courts, trial justices, registers in chancery, masters in chancery, receivers, trustees appointed by a court of chancery, assignees in bankruptcy, trustees for creditors under a general assignment pursuant to insolvent laws, other trustees appointed to dispose of property and apply the avails according to the orders of the court, sheriffs, constables, and other ministerial officers, and their bailees and assistants, justices of the peace, executors, administrators, and guardians, cannot be charged as garnishees by reason of any property or money which they hold or any debts which they owe merely as such officers."

¹¹³ In his next section the author says that: "In a few of the states, while these principles are recognized as sound, they have been considered inapplicable to certain of the cases above mentioned, either generally or in view of the peculiar provisions of the statute governing the conduct of the particular officer. Among these may be mentioned sheriffs and constables, clerks in chancery courts, justices of the peace, administrators, and executors."

Among the cases cited by the author is *Hardesty v. Campbell*, 29 Md. 533, where the decision rests upon the code. In the Alabama cases the question is not raised, and, though the jurisdiction over an administrator seems conceded, it rests upon a statute, which is not quoted. Against the few states, the author cites to the contrary cases involving administrators, from Massachusetts, Maine, Arkansas, West Virginia, Rhode Island, Delaware, Vermont, Indiana, and Missouri, to say nothing of a cloud of analogous cases relating to other officers.

Mr. Shinn, in his treatise on Attachment and Garnishment, section 510, says: "In the absence of special statute, it was an undisputed rule of law that an executor or administrator could not, in his official capacity, be held liable as a garnishee at suit of a creditor of the decedent, or of one who was a legatee or distributee or other creditor of the estate. He is not then considered to be a 'debtor.' Neither is he an agent, factor, attorney, or trustee of such creditor, because he derives his authority from the law, and is obliged to execute it according to law. And it was said that to subject executors and administrators to the process of garnishment might destroy the whole operation and intention of our law of administrators."

He admits, however, that in many states this rule has been changed by statute, and a long list of cases is given. It goes without saying that decisions based upon a statutory right of garnishment are not to be considered as authority for changing the general rule, unless by analogy a similar construction should be indulged. The author says of the administrator's liability, where he may be garnished, that: ¹¹⁹ "In states permitting an executor or administrator to be made a garnishee, he may be held as such whenever the person to whom he is to pay the legacy or distributive share may maintain an action at law against such executor or administrator. After a court has decreed a distribution of the proceeds in the hands of the administrator, such administrator may be held as garnishee. Some statutes permit an executor or administrator to be made a garnishee during the pendency of the settlement of the estate, but no judgment can be rendered against him until a settlement is made, unless he assent to the legacy or admits assets to pay the amount claimed out of the distributive share. Until the distributive shares are ascertained, they cannot be secured by garnishment. In other words, when it is uncertain whether the administrator will have a surplus in his hands or not, he cannot be held as garnishee": 2 Shinn on Attachment, sec. 511, and cases cited.

In 8 American and English Encyclopedia of Law, 1139, a paragraph denying the liability concludes as follows, after citing *Brooks v. Cook*, 8 Mass. 246: "The court held that, as the administrator derived his authority from the law, . . . he was not liable to process of this kind, and such has been the almost uniform current of authority, including cases as to executors as well."

The language of Mr. Rood, who is quoted in support of the doctrine that "the great preponderance of modern authorities . . . holds that, when the purposes of the court have been fully accomplished in respect to the particular funds, by a final decree or order for payment of the same to the defendant by such officer, or his becoming directly and absolutely accountable to the defendant therefor without such order, such property or credit may be reached by garnishing such officer" (Rood on Garnishment, sec. 32), if approved, should not be applied to this case, for the probate court is not shown to have made a decree or order for payment, nor have the executors become directly and absolutely accountable to the principal defendant. Such liability becomes fixed when distribution is ordered under sections 5925 to 5931 of 2 Howell's Annotated Statutes. It does not rest in the authority of other ¹²⁰ tribunals to determine the status of a fund in the custody of the probate court.

It is said that in *Cohnen v. Sweeney*, 105 Mich. 643, this court held that a receiver might be garnished with permission of the court that appointed him. The exercise of discretion by a court of chancery having jurisdiction of the fund is a very different thing from the power of other courts to determine what shall be done with it. That case does not rule this. I am unable to see the propriety of holding that the liability or nonliability of an executor becomes a question of fact, dependent upon the quantity of assets and ability of the executor to pay, to be tried by jury or otherwise in as many courts as there are garnishing creditors, to the embarrassment of the settlement of estates, and the overthrow of one of the best settled rules of general application known to the law.

The writ is denied, with costs.

Montgomery and Moore, JJ., concurred with Hooker, J.

MR. JUSTICE GRANT AND MR. CHIEF JUSTICE LONG dissented, and maintained that funds in the hands of an executor or administrator are subject to garnishment by the creditor of the decedent as soon as the rights of all the parties become fixed by

judgment or otherwise, and before any order is made by the probate court for the payment of the debts of the deceased, or for the final distribution of his estate.

ATTACHMENT—WHAT MAY BE GARNISHED—FUNDS HELD BY PERSONAL REPRESENTATIVE.—An administrator may be garnished for a sum in his hands, which, on settlement, he has been adjudged to pay over: *Richards v. Griggs*, 16 Mo. 416; 57 Am. Dec. 240. Funds in the hands of a trustee appointed to sell property and account with the court cannot be attached; but this rule does not apply when the fund has been distributed by an auditor, and his account finally ratified by an order or decree directing the trustee, with funds in his hands not brought into court to apply the same accordingly: *Cockey v. Leister*, 12 Md. 124; 71 Am. Dec. 588.

THUM v. TLOCZYNSKI

[114 MICHIGAN, 149.]

TRADE SECRETS—INJUNCTION AGAINST DISCLOSURE OF.—An employé upon the termination of his employment, cannot make use of trade or manufacturer's secrets confided to him by his employer and necessary to be confided to him in the conduct of the business, if it is understood and agreed, expressly or impliedly, that he shall not make use of the secret knowledge so imparted to him to the detriment of his employer. If he attempts to do so, he may be restrained by injunction.

TRADE SECRETS—INJUNCTION AGAINST DISCLOSURE OF.—If one invents or discovers and keeps secret a process of manufacture, he has such a property right therein as will enable him to protect it by injunction against one who, in violation of confidence and contract, undertakes to apply it to his own use, or to disclose it to third persons.

TRADE SECRETS—RESTRAINT OF TRADE.—An agreement between a manufacturer and his employé as a condition of employment, that the former is not to disclose any of the secrets of the business or machinery about which he is employed, is not an agreement in restraint of trade.

C. L. Fitch and F. W. Stevens, for the appellant.

Earle & Hyde and Butterfield & Keeney, for the appellee.

¹⁵⁰ **MOORE, J.** The complainant is the successor of the firm of O. & W. Thum, who were manufacturers of sticky fly paper. It filed a bill of complaint to restrain defendant from communicating to others the secret processes and methods, and the knowledge of secret machinery, which were learned by him while in the employ of O. & W. Thum. The court below granted an injunction, as prayed in the bill of complaint. Defendant appeals.

The testimony is voluminous, and very conflicting. We are satisfied, however, that it establishes, by a very clear preponder-

ance, the following facts: The defendant entered the employ of O. & W. Thum in 1887. They at that time were manufacturing sticky fly paper by machinery and from formulae known only to themselves. They at that time had but one man and one boy in their employ. The business was carried on in the attic of the house, and in a small building in the back yard. The processes and machinery, that were regarded as secret, and of great value to the firm, were used only by the members of the firm. As the business grew, it became necessary to employ more persons, and among others employed was the defendant. Because of the increase in the business and the employment of more persons, other precautions were taken, as the necessity grew for taking them. The public were excluded from the premises. The employes at one machine were not allowed to inspect other machines used in the manufacture, and were not allowed to visit all portions of the premises. Very rigid and careful requirements were made and enforced to guard the formulae, the processes of manufacture, and knowledge of the machinery used, so that no one could learn them, or either of them, to the detriment of the firm. The business of the firm steadily grew in magnitude, so that when defendant left ¹⁵¹ its employ, in 1892, about one hundred thousand dollars was invested in the business, and a large number of persons were given employment. Shortly before this bill was filed, complainant received the following letter:

“Grand Rapids, Mich., Jan. 7, 1893.

“The O. & W. Thum Co., City.

“Mr. Wm. Thum—Dear Sir: It is about 15 months since I left your shops, and during that time have been more or less troubled by outside people in regards to fly paper and its manipulations at your works; not so much so until lately, when there were representatives from two large firms, one from Ohio, which was represented by the president and their attorney, which I looked up in R. G. Dun's, who quote them at \$500,000, who were here for one week, and were directed by some people here in the city to me. They told me that they had sufficient artillery to put the paper on the market, but were a little short on cavalry in its workings; also told me that they were ready at any time to make arrangements—that is, as soon as I say yes. I can show letters from the above firm and others. I have not said a single word of its manufacture since I left you, but do not think it's my place to keep mum unless you desire it. Awaiting your early reply, I remain, “Yours truly,

A. A. TLOCZYNSKI.”

It very soon became evident that defendant was negotiating with others to engage in the manufacture of the same product the complainant was making, and this bill was filed.

The terms of employment were not reduced to writing, and there is a sharp conflict of testimony between the defendant and O. and W. Thum as to the terms of his employment, so that it becomes necessary to consider carefully all the testimony in the case to arrive at the truth. One cannot read all the testimony, in the light of the facts and circumstances surrounding the condition of the business at the commencement of the defendant's employment, and its subsequent development and growth, without coming to the conclusion that the defendant and his employers regarded his relation to them as a confidential ¹³² one, and contemplated that he should not disclose or make improper use of the secrets of the business. The conclusion is irresistible that defendant would not have been employed, and that information which was imparted to him would not have been conveyed, if it had been understood that he might sever his relations with his employers at any time, and sell the valuable information which had been imparted to him whenever he could find a market. The inception, growth, and development of the business; the manner in which it was conducted; the care taken to exclude the public from means of obtaining knowledge of the processes; the fact that, when new machinery was to be constructed, part of it was got at one place, and part at another, so that no person, outside of the members of the firm and their immediate employés, should see a completed machine in operation; the fact that employés in one department of the manufactory were not allowed in other departments; and the care which was taken to prevent employés from obtaining knowledge of any branch of the business except that in which the employé was immediately engaged, of all of which the defendant had knowledge—all indicate conclusively that the business and processes were secret, and that no one knew that fact better than the defendant. We think it clearly established by the testimony that the employment was upon the agreement that defendant would not use the information imparted to him to the harm of his employers.

In our view, the only important question involved in the case is whether an employé, when his employment terminates, may make use of secrets confided to him by his employer, necessary to be confided to him in the conduct of the business, when it is understood and agreed that he shall not make use of the se-

cret knowledge so imparted to the detriment of the employer, and, if he attempts so to do, may he be restrained by writ of injunction?

It is said by counsel that the remedy by injunction will not be granted in such a case as this, where, from the nature of the subject, there could be no decree for a specific ¹⁵³ performance: Citing *Newbery v. James*, 2 Meriv. 446; *Williams v. Williams*, 3 Meriv. 157; *Kimberley v. Jennings*, 6 Sim. 340. It is also said that a decree for a specific performance will not be granted where the court has not the means of seeing that its decree shall be carried out: Citing *Voorhies v. Frisbie*, 25 Mich. 482; 12 Am. Rep. 291; *Blanchard v. Detroit etc. R. R. Co.*, 31 Mich. 43; 18 Am. Rep. 142; *Bumpus v. Bumpus*, 53 Mich. 346. An examination of the Michigan cases cited shows that in those cases the court was asked to decree the performance of an affirmative act, where the agreement was of an indefinite and uncertain character, instead of being asked to enforce a definite agreement not to do an act. As to the other cases, if they tend to sustain the contention of the defendant, they are contrary to the great weight of authority. Is it not true that, if one discovers a process of manufacture or an invention which is of use to individuals and the community, he has a property right in it, and that an agreement which must be respected may be made in relation to keeping the process of manufacture or the invention a secret between the discoverer or owner and an employé, which agreement is made one of the conditions of the employment? It has been said by a very able justice: "If one invents or discovers and keeps secret a process of manufacture, whether a proper subject for a patent or not, he has not, indeed, an exclusive right to it as against the public, or against those who, in good faith, acquire knowledge of it; but he has a property in it which a court of chancery will protect against one who, in violation of contract and breach of confidence, undertakes to apply it to his own use, or to disclose it to third persons": *Peabody v. Norfolk*, 98 Mass. 452; 96 Am. Dec. 664.

And, again, Mr. Justice Gray, who delivers the opinion, says: "In this court, it is settled that a secret art is a legal subject of property, and that a bond for a conveyance of the exclusive right to it is not open to the objection of being in restraint of trade, but may be enforced by action ¹⁵⁴ at law, and requires the obligor not to divulge the secret to any other person: *Vickery v. Welch*, 19 Pick. 523; *Taylor v. Blanchard*, 13 Allen, 373, 374; 90 Am. Dec. 203. In *Jarvis v. Peck*, 10 Paige, 118, such a bond was held valid in equity."

In *Salomon v. Hertz*, 40 N. J. Eq. 400, the court adopts the language of Justice Gray, and holds that there is a property in a secret process of manufacture: See, also, *Simmons Hardware Co. v. Waibel*, 1 S. Dak. 488; 36 Am. St. Rep. 755.

A recent and instructive case is that of *Eastman Kodak Co. v. Reichenbach*, 79 Hun, 183, from which we quote:

"To briefly summarize, then, the established facts of this case, it appears that the plaintiff is the owner of valuable trade secrets, which were either discovered by one or more of the defendants, or necessarily disclosed to them, while occupying a confidential relation toward the plaintiff; that, as to such trade secrets as were discovered by either Reichenbach or Passavant, they have undertaken and agreed to give plaintiff the exclusive property in and control over the same; and that, in violation of this agreement, they are now proposing to make use of them, or some of them, in such a manner as to materially injure the plaintiff's business. With these facts established, the application of the legal principles which must govern the disposition of the case does not appear to be a very formidable undertaking. It may be safely assumed at the outset, I think, that whatever remedy plaintiff may have does not reside in a court of law. The very nature of the case, the peculiar character of the injury liable to be inflicted, and the incalculable damages which may possibly result, all show most conclusively that legal relief is totally inadequate for plaintiff's protection, and that its only resort must be to a court of equity. The learned counsel for defendants has contended, with all the adroitness and skill at his command, which is but another way of saying that such contention has been put forth with all possible adroitness and skill, that this case is not one of which a court of equity can take jurisdiction; and several authorities of both English and American courts are cited in support of this claim. I am constrained, however, to hold that the weight of authority is opposed to his view of the law. The question presented is an interesting ¹⁸³ one, and would justify a somewhat analytical review of the cases which bear upon either aspect of it did time permit; but, for the purposes of this adjudication, it will be necessary to advert to such only as are deemed conclusive upon this court.

"In *Morison v. Moat*, 9 Hare, 241, which is an English case, it was held that an injunction would issue to restrain the use of a secret in the compounding of a medicine not being the subject of a patent, and to restrain the sale of such medicine by a party who acquired knowledge of the secret in violation of the

contract of the party by whom it was communicated, and in breach of trust and confidence. An appeal was taken from the decision of the vice-chancellor, and in 1852 the case was affirmed by the court of chancery, and it was there held that 'there is no doubt whatever that where a party who has a secret in a trade employs persons under contract, express or implied, or under duty, express or implied, those persons cannot gain the knowledge of that secret, and then set it up against their employer': *Morison v. Moat*, 21 L. J. Ch., N. S., 248.

"In 1868 the supreme court of Massachusetts recognized and followed the authority of *Morison v. Moat*, 21 L. J. Ch., N. S., 248, and in the opinion of Gray, J., the law is thus stated: If a party 'invents or discovers and keeps secret a process of manufacture, whether a proper subject for a patent or not, he has not, indeed, an exclusive right to it as against the public, or against those who, in good faith, acquire a knowledge of it; but he has a property in it which a court of chancery will protect against one who, in violation of contract and breach of confidence, undertakes to apply it to his own use, or to disclose it to third persons. The jurisdiction in equity to interfere by injunction to prevent such a breach of trust when the injury would be irreparable, and the remedy at law inadequate, is well established by authority': *Peabody v. Norfolk*, 98 Mass. 452; 96 Am. Dec. 664. The language above quoted was cited with approval in *Salomon v. Hertz*, 40 N. J. Eq. 400, and it is almost identical with that employed by elementary writers of recognized standing in discussing the same question. Judge Story says: 'Courts of equity will restrain a party from making a disclosure of secrets communicated to him in the course of a confidential employment, and it matters not in such cases whether the secrets be secrets of trade, or secrets of title, or any other ¹⁵⁶ secrets of the party important to his interests': 2 Story's Equity Jurisprudence, sec. 952. See, also, 1 High on Injunctions, 2d ed., 15.

"The same doctrine has obtained in this state for at least half a century, and it has been enunciated by a line of decisions which, with a single exception, is unbroken: *Jarvis v. Peck*, 10 Paige, 118; *Hammer v. Barnes*, 26 How. Pr. 174; *Champlin v. Stoddart*, 80 Hun, 300; *Tabor v. Hoffman*, 118 N. Y. 30; 16 Am. St. Rep. 740. The *Champlin* case was decided by the general term of this department, Smith, P. J., writing the opinion, in the course of which he takes occasion to say that 'a secret of trade is fully recognized in equity as property, the disclosure of which will be restrained by injunction.' By a careful reading

of the various decisions upon this subject, it will be seen that some are made to depend upon a breach of an express contract between the parties, while others proceed upon the theory that, where a confidential relation exists between two or more parties engaged in a business venture, the law raises an implied contract between them that the employé will not divulge any trade secrets imparted to him or discovered by him in the course of his employment, and that a disclosure of such secrets, thus acquired, is a breach of trust and a violation of good morals, to prevent which a court of equity should intervene. It may also be observed in this connection that the word 'property,' as applied to trade secrets and inventions, has its limitation; for it is undoubtedly true that when an article manufactured by some secret process, which is not the subject of a patent, is thrown upon the market, the whole world is at liberty to discover, if it can, by any fair means, what that process is, and, when discovery is thus made, to employ it in the manufacture of similar articles. In such case, the manufacturer's or inventor's property in his process is gone. But the authorities all hold that, while knowledge obtained in this manner is perfectly legitimate, that which is obtained by any breach of condition cannot be sanctioned; and this distinction is quite forcibly presented in a recent decision of the court of appeals, to which the attention of this court has been directed by the supplemental brief of defendants. Judge Landon, in his opinion, speaking of the plaintiff's claim, says: 'His case is unlike those in which the injunctive process of the court is sought to restrain the disclosure of a secret or the publication of a letter which may prove injurious to business or character': ¹⁵⁷ *Bristol v. Equitable Life Assur. Soc.*, 132 N. Y. 264, 267; 28 Am. St. Rep. 568.

"But, without multiplying citations or prolonging consideration of the legal aspect of this case, it may be said, by way of conclusion, that the principle contended for by the plaintiff is not only abundantly supported by authority, but is likewise founded on good common sense, and is peculiarly applicable to the case in hand. Here is a party which, by the expenditure of vast sums of money and the exercise of much skill and ingenuity, has built up a large and prosperous business, the capital of which consists largely in certain inventions and discoveries made by its officers, servants, and agents. The world at large knows nothing of these inventions and discoveries, because they are locked within the brain of those who conceived them. The defendants, who have been largely instrumental in perfecting

them, while under both an express and implied contract to give the plaintiff the benefit of their inventive genius, propose now to disregard their legal and moral obligations by creating a new establishment, where these inventions and discoveries may be employment to plaintiff's serious injury. This is not legitimate competition, which it is always the policy of the law to foster and encourage, but it is *contra bonos mores* and constitutes a breach of trust, which a court of law, and much less a court of equity, should not tolerate": See, also, *Fralich v. Despar*, 165 Pa. St. 24.

It is argued in this case that there is no express contract shown, and that an implied contract is not such a one as will be enforced. We think the testimony discloses very clearly an express agreement between the employer and the employed; but, if it may be stated that the only agreement is an implied one, growing out of oral statements taken in connection with the facts and circumstances surrounding the business, the parties, and their acts, still, if it is clearly established by all that was said and done that the secrets confided to the defendant were not to be disclosed by him to others, and were not to be used by him except when he was in the employment of those who imparted to him the secret, or their legal representatives, and that was one of the conditions of his employment, we do not think it would make any difference ¹⁵⁸ in the principle involved. The knowledge came to him in the course of a confidential employment, relying upon his using the knowledge only for the benefit of the employer. It is said by an eminent writer: "On the whole, the doctrine may be generally stated that wherever confidence is reposed, and one party has it in his power, in a secret manner, for his own advantage, to sacrifice those interests which he is bound to protect, he will not be permitted to hold any such advantage": 1 Story's Equity Jurisprudence, sec. 323.

The same authority, when discussing the subject of what cases injunction will be issued in, says: "Upon similar grounds of irreparable mischief, courts of equity will restrain a party from making a disclosure of secrets communicated to him in the course of a confidential employment; and it matters not, in such cases, whether the secrets be secrets of trade, or secrets of title, or any other secrets of the party important to his interests. Thus a party has been restrained from using the secret of compounding a medicine not protected by patent, when it appeared that the secret was imparted to him, to his own knowledge, in breach

of faith or contract on the part of the person so communicating it": 2 Story's Equity Jurisprudence, sec. 952, and many cases there cited; 10 Am. & Eng. Ency. of Law, 949; High on Injunctions, sec. 19; Davies v. Clough, 8 Sim. 262; Williams v. Prince of Wales etc. Assur. Co., 23 Beav. 338; Morison v. Moat, 9 Hare, 241; Yovatt v. Winyard, 1 Jac. & W. 394; Tipping v. Clarke, 2 Hare, 393; Peabody v. Norfolk, 98 Mass. 452; 96 Am. Dec. 664; Champlin v. Stoddart, 30 Hun, 300; Salomon v. Hertz, 40 N. J. Eq. 400.

The case of *Little v. Gallus*, 4 N. Y. App. Div. 569, 38 N. Y. Supp. 487, is against the contention of the defendant. In that case the plaintiff was a maker of typewriter ribbons by secret processes and formulae. The defendants entered his employ when they were minors. The court says: "It seems, therefore, too plain for controversy that the plaintiff was the owner of a process or invention which possessed great value, and which he had secured at the cost of much time, trouble and expense; that the defendants, Gallus and Bostwick, occupying a confidential relation toward the plaintiff, gained a knowledge of the ¹⁵⁹ processes and formulae employed by him in conducting his business; that they well understood the nature of the business, their relations to it, and the care which was used to keep the same secret; and that, notwithstanding the knowledge thus obtained, and in violation of the faith and confidence reposed in them, they surreptitiously made memoranda of these formulae, and are now using the same, as well as all the other knowledge obtained while in the plaintiff's service, to start and operate a rival establishment. The only question, therefore, to be determined upon this state of facts, is whether or not they shall be permitted to carry out their intentions. It is contended by the plaintiff that his case is brought directly within the rule laid down in that of *Eastman Kodak Co. v. Reichenbach*, 79 Hun, 183, recently decided by the general term in the fifth department; and the defendants, while conceding that the law of the case is there correctly stated, insist that the facts do not warrant its application here. We find ourselves unable to concur in the view thus taken, and which was carefully elaborated upon the argument by the learned counsel for the defendants. The facts of this case differ somewhat from those of the *Reichenbach* case, in that there was no written agreement entered into between these parties by which the employes undertook to give to their employers exclusive right in or control over any inventions discovered by or disclosed to the former; but we are unable to see how this

strengthens the defendants' contention. In the case cited there happens to be an express contract, but, nevertheless, it is asserted in the opinion of the court, and such is unquestionably the correct rule, that the law raises an implied contract that an employé who occupies a confidential relation toward his employer will not divulge any trade secrets imparted to him or discovered by him in the course of his employment; and we do not see why the defendants, Gallus and Bostwick, are not under just as strong an obligation to observe and keep sacred the trust reposed in them as they would be had they reduced the contract which the law implies to writing. Nor does the fact that they entered the plaintiff's service while minors, and at first performed duties comparatively unimportant in their character, relieve them from a faithful observance of their obligation. Gallus, at least, was ultimately advanced to a position of great responsibility, and both of them had attained their majority before attempting to take improper advantage of the knowledge imparted to them while in ¹⁸⁶⁰ the plaintiff's employ, and their present experiments are not in the direction of legitimate competition, but involve a breach of trust which we think the court should prevent": *Tabor v. Hoffman*, 118 N. Y. 30; 16 Am. St. Rep. 740; *Tuck v. Priest*, L. R. 19 Q. B. Div. 629; *Pollard v. Photographic Co.*, L. R. 40 Ch. Div. 345.

It is the contention of the defendant that the contract sought to be enforced is void as against public policy, because it is in restraint of trade: Citing *Richardson v. Buhl*, 77 Mich. 632; *Western Wooden-Ware Assn. v. Starkey*, 84 Mich. 76; 22 Am. St. Rep. 686. These cases are not in point. They are cases where the purpose of the contract was to create a monopoly, by providing by contract that established industries should cease to do business, which, of course, is unlawful; but that is not the purpose of the contract under consideration. Here processes and machinery have been invented which the owners believe would be of great value to them if they could be used upon a large scale. To use them upon a large scale requires the employment of a number of persons, to some of whom some of the secrets of the business and the machinery must be disclosed. If these secrets were disclosed to others, who might use them to establish a business of like character, they would cease to be valuable to the owner. Is there anything unreasonable in enforcing an agreement that such secrets shall not be disclosed by the employé? It has been repeatedly held that contracts for the exclusive use of a secret art are not in restraint of trade, for the

public has no right to the secret: See *Taylor v. Blanchard*, 13 Allen, 373; 90 Am. Dec. 203, and cases cited; *Leather Cloth Co. v. Lorsche*, L. R. 9 Eq. 345. We cannot see how it can be against public interest to allow an employer to make such conditions of employment with his employes as will give him the fullest protection to his property right in his process or invention, and at the same time enable him to employ a great many employes in its production. To enable one to do this would be a benefit to the public in ¹⁸¹ many ways. It would secure employment to more persons than would otherwise be employed, and a larger output would be made of a useful article. The evidence discloses that it does not require a man of special skill to do the work done by defendant when in the employ of the predecessors in business of the complainant. To restrain him from making use of what he has not discovered is not an injustice to him, and does not abridge his right to work along those lines which would not be harmful to those to whom he has sustained a position of confidence. It is to the advantage of both parties that such a contract should be employed. By means of it the defendant secured employment which he could not have secured without it, and at the same time his employers were secured against competition which might be ruinous: *Beal v. Chase*, 31 Mich. 490, 531.

The decree of the court below is affirmed, with costs.

The other justices concurred.

TRADE SECRETS—INJUNCTION TO PREVENT DISCLOSURE.—The inventor or discoverer of a secret process of manufacture, whether patentable or not, has a property therein which equity will protect against one who, in violation of contract, and breach of confidence, undertakes to apply it to his own use, or to disclose it to third persons, and as against third persons having notice of such relations, although he may not have an exclusive right to it as against the public, or against those who in good faith acquire knowledge of it: *Peabody v. Norfolk*, 98 Mass. 452; 96 Am. Dec. 664, and note.

CONTRACTS—RESTRAINT OF TRADE—CONCEALMENT OF TRADE SECRETS.—An unlimited restriction as to the use of a trade secret is not within the principle that contracts in general restraint of trade are void: See monographic note to *Angier v. Webber*, 92 Am. Dec. 763; note to *Peabody v. Norfolk*, 96 Am. Dec. 670; *Tode v. Gross*, 127 N. Y. 480; 24 Am. St. Rep. 475.

UP RIVER ICE COMPANY v. DENLER.

[114 MICHIGAN, 296.]

CONTRACTS—RESTRAINT OF TRADE—CONSIDERATION.—If a stockholder sells his stock in a corporation and receives his own price therefor, upon an agreement not to again engage in that vicinity in the same business that is carried on by such corporation, there is sufficient legal consideration to support the agreement.

CONTRACTS—RESTRAINT OF TRADE—CONSTRUCTION. An agreement by one who sells his stock in a corporation doing an ice business in a city, not to again engage in such business in that city or "adjacent thereto," sufficiently defines the limit of prohibited territory, and is valid, as it means that he will not thereafter do an ice business in that city or vicinity which would come in competition with such corporation.

CONTRACTS—RESTRAINT OF TRADE—LIMITATION AS TO TIME.—An agreement, based on a sufficient consideration, not to engage in a certain business within designated territory, is valid, though unlimited as to time.

CONTRACTS—RESTRAINT OF TRADE—ASSIGNABILITY. The right to enforce a valid agreement not to engage in a certain business within specified territory may be passed by assignment.

CONTRACTS—RESTRAINT OF TRADE—BUSINESS IN WIFE'S NAME.—A husband, who has made a valid contract not to engage in a certain business in specified territory, either as principal, agent, or employé, cannot legally build up and carry on such business in his own interest, but in his wife's name, on the ground that it belongs to her, and he may be restrained by injunction from so doing.

Atkinson & Wolcott, for the appellant.

Avery Brothers and Walsh, for the appellees.

²⁹⁷ LONG, C. J. The complainant is a corporation doing an ice business at Port Huron. On June 26, 1889, defendant George Denler owned one hundred and forty shares of its capital stock, of the face value of three thousand five hundred dollars. He was the general manager of the company. On that day he sold out all of his interest to Albert D. Bennett under the following contract:

²⁹⁸ "This agreement, made and entered into between George Denler of the first part, and Albert D. Bennett, of the second part, witnesseth:

"In consideration of the purchase made this day by the party of the second part of stock to the amount of \$3,500 in the Up River Ice Company, the said party of the second part agrees to assume the payment of a note made by George Denler, and payable to the Up River Ice Company, for \$200, and dated March 1, 1889, and due on demand, and also one-half of two notes

made by John G. O'Neill and George Denler, payable to Jacob Denler, for \$300 each, due and payable on August 1, 1889, and on December 1, 1889.

"In consideration of the purchase and sale aforesaid, the said George Denler agrees and binds himself in the penal sum of \$1,000 that he will not engage in the ice business in Port Huron, or adjacent thereto, at any time, either as principal, agent, or employé."

It is claimed by the bill that, at the time this agreement was made, Denler also agreed with the complainant orally that he would not engage in the ice business in Port Huron, or adjacent thereto, at any time, either as principal, agent, or employé. Thereafter Bennett assigned to John Hayes all his rights under that contract, as follows: "I hereby assign to John Hayes all my rights under the within agreement, and any right of action accruing thereunder; any action that he may commence thereunder to be in his own name, and at his own cost and expense."

On April 13, 1896, Hayes assigned in writing to the Up River Ice Company, the complainant, all his right of action against Denler, including the right to restrain his engaging in the ice business at Port Huron, and authorizing the complainant to enforce all rights that belonged to him directly or indirectly against Denler growing out of his agreement with Bennett and with the company. On the same day Bennett assigned to the complainant as follows:

"Whereas, the purchase by the undersigned of \$3,500 of stock in the Up River Ice Company, a corporation, was largely induced by the agreement of George Denler not to ²⁰⁰ engage in the ice business, which agreement was made in the office of the Up River Ice Company, and for its benefit, as well as for the benefit of the undersigned; and, further, in consideration of the premises I hereby sell and assign to the Up River Ice Company all rights of action to enforce the agreement with Denler, or to restrain him from engaging in the ice business in violation thereof, authorizing the company to enforce it in its own name."

It appears that, at the time Denler was a member of the company, John G. O'Neill owned two hundred and forty shares of the capital stock, Peter J. O'Neill twenty shares, and the balance of one hundred and forty shares was owned by Denler. John G. O'Neill was president of the company, and Denler was its superintendent. The complainant continued business after Denler went out, and, it is claimed, Denler thereafter bought out the Crystal Ice Company in that city, and again engaged in the

ice business, contrary to his agreement, that while the company was carried on in the name of the Crystal Ice Company, Denler's name appeared as manager, and on the ice tickets which were sold appeared his name as proprietor; and, though he claimed the business was purchased by his wife, Alice Denler, the other defendant, yet in fact it was his business, and carried on for his interest and benefit. This bill was filed to perpetually restrain the defendants from carrying on the ice business in the city of Port Huron, and to restrain defendant George Denler from engaging in the ice business, either as principal, agent, or employé, in accordance with the agreement heretofore set out. On the hearing below the court dismissed complainant's bill. From that decree the complainant appeals.

It is contended on the part of the defendants: 1. That the contract on the part of Denler not to engage in the ice business is void, as being unlimited in time, and because given without consideration; 2. That the contract is a personal one in its nature, and enforceable only by the person in whose interest it was made; 3. That contracts of this character are enforceable only when connected with the goodwill of some business to ³⁰⁰ which they attach; that in this case the subject matter was the stock transferred, and the agreement at most could but attach to this stock, which is now owned by Mr. Hayes, and not by the complainant; 4. That a court of equity must have the actual parties in interest before it to determine rights; that Mr. Hayes is the only man who could maintain this action, if anybody can, he being the owner of the stock; 5. That the manner in which the parties treated this matter immediately after its execution constituted an abandonment, and, being once abandoned, it could not be reinstated except by the joint action of the covenantor and the cantee; that in this the defendants mean the employment of Denler by the complainant company for nearly a year after the execution of the agreement in the prohibited business; and that, therefore, there was a license on the part of Bennett, while the owner of the stock, that Denler might engage in the ice business; 6. That there is no showing that the complainant has suffered damage to the extent of one hundred dollars, and that is not sufficient to call for the interference of a court of equity; 7. That no relief can be granted against Alice Denler, as the proofs show that it is her property, and she was not a party to the agreement.

There is one other claim made, and that is that the public has some interest in the matter, as the evidence shows that the en-

ture ice on hand in all the icehouses in Port Huron, when this evidence was taken, would be needed for the use of the people.

On the hearing John G. O'Neill was called as a witness, and testified to the arrangement made between Denler and Bennett; that he (the witness) was president of the company. He says: "Mr. Bennett came into the store either the day or the second day before the 26th of June, and asked me how I would like him for a partner. He said he was talking of making a trade with Denler for some stock in the ice company. . . . I said, before he made any trade he wanted to get an agreement from Denler that he would not engage in the ice business again. A day or two afterward Bennett came in with Denler, and the matter was then spoken of by both Bennett and myself, and I drew the agreement."

³⁰¹ The witness was asked: "Independent of the writing, if anything, what was said in reference to that—as to his not engaging in the ice business? A. I, personally, as the representative of the ice company, asked Mr. Denler if he was willing not to engage in the ice business if he got the transfer of the stock, and he said he was; that he had had enough of it."

The witness further testified that at that time Denler was indebted to the complainant; that the complainant had loaned him two hundred dollars in March, 1889, and that amount was still owing; that he was indebted on two other notes of three hundred dollars each, which were to be paid from the earnings of the ice company. It appeared that there was a company called the City Ice Company, prior to 1888, that was owned by George and Jake Denler. A consolidation was had between that company and the complainant. In the arrangement, O'Neill and George Denler bought out the interest of Jake Denler. O'Neill was asked on the witness stand to state whether the subject of Jake Denler's not engaging in the ice business was discussed at the time he went out of the business, and the witness testified that it was discussed between himself and George and Jake Denler, and that an agreement was made by Jake Denler with them that he would not engage in the ice business. It appears that the plant owned by the complainant at the time Denler sold his stock was worth about eight thousand dollars. Some additions were made to the business thereafter, so that, at the time of the filing of this bill, complainant had eleven icehouses, containing about eight thousand tons of ice, five wagons delivering ice, and many customers. At the time the proceedings were commenced, the Crystal Ice Company, operated by George

Denler, had four wagons delivering ice, and a large number of customers; and it is claimed by the complainant, and we think, sustained by the testimony, that the business conducted by Denler was in direct competition with complainant's business.

The court below, so far as shown by this record, made ³⁰² no findings, and gave no reasons for dismissing complainant's bill, except, as stated in the decree itself, that "the bill of complaint filed herein is on the part of the complainant entirely wanting in equity, and the same is therefore dismissed."

The rule is, that contracts of this nature will be enforced in equity where the restraint is only partial, being limited as to time and place, and where reasonable grounds exist for the restraint, and where it is founded on a good consideration: 2 High on Injunctions, sec. 1167. In Hubbard v. Miller, 27 Mich. 15, 15 Am. Rep. 153, a contract was entered into by which Hubbard purchased all the stock of Miller & Co., and a contract was entered into as follows: "In consideration of the above sale, we agree not to keep well-drivers' tools or fixtures, and not to engage in the business of well-driving, after this date."

It was objected that there was no sufficient consideration for the contract, and that the restraint imposed upon Miller & Co. by the contract was void, because general and unlimited as to place. The contract was held valid, and a perpetual injunction issued. The court found that there was a sufficient consideration. As to the contract itself it was said: "And there is no reason for holding that, without the restraint contracted for, complainant would have been willing to purchase for the price he gave; nor can we say that the vendors could have sold at that price without such stipulation." As to the place within which the restraint was to be held effective, it was held that it should include Grand Haven and such limits about that city as the business there located would naturally and reasonably embrace, and not to be construed as such a general and unlimited restraint of trade as to be void; that the contract was fair, reasonable, and valid.

In Beal v. Chase, 31 Mich. 490, the contract was for the purchase of Dr. Chase's receipt books, with the goodwill of the business of printing and publishing, and also ³⁰³ the right to the use of the name of Dr. Chase in connection with said books. It was there agreed as follows: "The said party of the first part also agrees that, while said Beal remains in said business of printing and publishing in Ann Arbor, he will not, either directly or indirectly, engage in the business of printing and publishing in

the state of Michigan." This contract was held valid, and the injunction issued.

The rule was stated by the vice-chancellor in *Leather Cloth Co. v. Lorsche*, L. R. 9 Eq. 353, with great clearness. It was said: "All the cases, when they come to be examined, seem to establish this principle: That all restraints upon trade are bad, as being in violation of public policy, unless they are natural, and not unreasonable for the protection of the parties in dealing legally with some subject matter of contract. The principle is this: Public policy requires that every man shall be at liberty to work for himself, and shall not be at liberty to deprive himself or the state of his labor, skill, or talent by any contract that he enters into. On the other hand, public policy requires that when a man has by skill, or by any other means, obtained something which he wants to sell, he should be at liberty to sell it in the most advantageous way in the market; and, in order to enable him to sell it advantageously in the market, it is necessary that he should be able to preclude himself from entering into competition with the purchaser. In such a case, the same public policy that enables him to do that does not restrain him from alienating that which he wants to alienate, and therefore enables him to enter into any stipulation, however restrictive it is, provided that restriction, in the judgment of the court, is not unreasonable, having regard to the subject matter of the contract." This case was cited with approval by this court in *Beal v. Chase*, 31 Mich. 490.

We think there was a consideration for the contract in the present case. We are not to inquire into the adequacy of the consideration, but whether there was a legal consideration to support it. Denler received his price for the ³⁰⁴ stock in the company, and upon the agreement not to enter into the ice business in Port Huron or adjacent thereto.

That the contract is not unreasonable in its terms we are also satisfied. The limit of territory is set out in the contract with sufficient clearness. It means within the city, and in any territory adjacent which might reasonably be reached for delivery of ice by the Up River Ice Company with its teams and wagons. It is evident from the terms of the written contract and the testimony of O'Neill that there was a full and fair understanding between Denler, Bennett, and O'Neill that the contract did not have reference simply to Bennett's individual interest in the ice company by reason of the stock held by him, but had reference to the business then being done and to be done by the

company, and that Denler was not thereafter to do an ice business in Port Huron and vicinity which would come in competition with the company. The contract was brought about by O'Neill. He insisted that it should be made if Bennett purchased the Denler stock and Denler went out of that company, and he testifies that Denler agreed not to again engage in the ice business. The sale to Bennett carried the goodwill of the business, so far as Denler had an interest therein and could convey it. While there was no limit of time, the contract was not void for that reason: *Jacoby v. Whitmore*, 49 L. T., N. S., 335, and cases there cited. This case is reported in 28 Alb. L. J. 510. The contract in *Hubbard v. Miller*, 27 Mich. 15, 15 Am. Rep. 153, had no fixed limit of time, and yet was held valid.

But it is said that the complainant could take no interest in the contract as assignee. We have proceeded so far upon the assumption that the contract to which O'Neill testified was made in the interest of the company, and was supported by some consideration. But, even if this were not the fact yet the written contract made with Bennett came to the company by assignment; and we think the complainant acquired all the rights of Bennett by these assignments. That very question was considered ²⁰⁵ in *Jacoby v. Whitmore*, 49 L. T., N. S., 335. The original contract was made between Whitmore and one Martin Cheek. Thereafter Cheek assigned to plaintiff all his beneficial interest and good will in the business, et cetera, and it was held that plaintiff took by this assignment all the rights and interests which Cheek had under the contract. In the present case, the complainant company was directly interested in protecting itself from the competition of Denler. The company was composed of the two O'Neills and Hayes. Hayes had taken an assignment of the Denler contract, and turned such rights over to the company by assignment, and we are of the opinion that the company had the right to the enforcement of the contract.

It is said that the business sought to be restrained is not that of Denler, but belongs to his wife. We think the proofs show that it was a business started and built up by Denler, and carried on in his interest. The question is ruled by *Thompson v. Andrus*, 73 Mich. 551.

The other questions raised are not, in our judgment, of importance, and will not be discussed. The court below was in error in dismissing complainant's bill. That decree will be reversed, and a decree entered here in favor of the complainant

in accordance with the prayer of its bill, with costs of both courts.

The other justices concurred.

CONTRACTS—RESTRAINT OF TRADE—VALIDITY OF.—All agreements in general restraint of trade are against public policy and void, but agreements that only impose a partial restraint, made in connection with the purchase of a business, that are reasonably necessary to make available the goodwill purchased with the business, and are reasonable and not oppressive, may be enforced: *Lufkin Rule Co. v. Fringell*, 57 Ohio St. 596; 63 Am. St. Rep. 736, and note. Concerning the geographical bounds within which such agreements may be operative, each case should be dependent upon the surrounding circumstances showing the extent as to time and territory of the protection needed: *Cowan v. Fairbrother*, 118 N. C. 406; 54 Am. St. Rep. 733, and note. See monographic note to *Angier v. Webber*, 92 Am. Dec. 751, on the general subject.

CONTRACTS—RESTRAINT OF TRADE—INDEFINITENESS AS TO TIME.—Contracts in restraint of trade are not necessarily void by universality of time and place: Note to *Cowan v. Fairbrother*, 54 Am. St. Rep. 740; *Bowser v. Bliss*, 7 Blackf. 344; 43 Am. Dec. 93. If the restriction in the contract is unlimited in point of time, and is otherwise reasonable, it continues during the life of the promisor: *Kramer v. Old*, 119 N. C. 1; 56 Am. St. Rep. 650, and note.

CONTRACTS IN RESTRAINT OF TRADE—TRANSFER OF RIGHTS UNDER.—The purchaser of a right to compete for popularity as an editor may lawfully sell and transfer to a third party the right to occupy a field vacated by a dangerous rival, and the buyer will be protected by injunction: *Cowan v. Fairbrother*, 118 N. C. 406; 54 Am. St. Rep. 733.

FERRY v. HOME SAVINGS BANK.

[114 MICHIGAN, 321.]

GARNISHMENT—KNOWLEDGE OF OWNERSHIP OF FUND.—If a draft comes to a bank indorsed by one of its directors as secretary and treasurer of the defendant in attachment, a corporation, and is forwarded for collection, and, upon collection, one-half of the proceeds are used to pay an overdraft due the bank from such defendant, while the balance is credited to the teller of the bank as agent of the indorser at the time when the bank is served with process of garnishment in the attachment proceeding, and is subsequently turned over to the corporation whose stock is held by the bank as security, and it also has possession of the corporation's books, it is for the jury to determine whether the bank had such knowledge of the ownership of the fund at the time of the service of the garnishment as to make it liable as garnishee.

GARNISHMENT—KNOWLEDGE OF OWNERSHIP OF FUND—PAYMENT AFTER SERVICE OF PROCESS.—If a bank, at the time of the service of garnishment upon it, knows that a fund in its hands belongs to the defendant in attachment, it is liable as garnishee for such fund subsequently paid over, although the deposit stands in the name of a third person.

GARNISHMENT—PAYMENT OF INDIVIDUAL DEBT OUT OF CORPORATE FUNDS.—If moneys belonging to the defendant in attachment, a corporation, are paid to, and received by, a bank, without authority, as interest upon the individual debt of such defendant's president, with knowledge that they are corporate funds, they can be reached by the creditors of the defendant by garnishment or otherwise, as the bank is liable therefor.

GARNISHMENT—BONA FIDE CREDITOR—EVIDENCE.—If a judgment against the principal defendant in attachment is attacked by the garnishee on the ground that it is based upon a note received by the plaintiff in attachment after maturity, without consideration, and after the payments sought to be reached by garnishment were made, evidence is admissible on behalf of such plaintiff to show that such note was given for a bona fide indebtedness existing prior to the payments of the garnishee.

E. E. Kane, for the appellant.

G. W. Radford, for the appellee.

³²² MOORE, J. April 8, 1895, plaintiff, who had commenced suit against the S. H. Davis Company, a corporation, caused garnishee process to be served on the Home Savings Bank to reach funds in its hands which plaintiff claimed belonged to the S. H. Davis Company. The bank made a disclosure denying that it was indebted to or had anything belonging to the S. H. Davis Company. An issue was afterward framed, and a trial entered upon before a jury, who were directed by the circuit judge to render a verdict in favor of the garnishee defendant. Plaintiff appeals, and seeks to reach by the process of garnishment one item of eleven hundred and five dollars for insurance money collected upon a draft which passed through defendant bank, and thirteen hundred and twenty-three dollars for interest received by defendant bank, which the plaintiff claims the creditors of the S. H. Davis Company are entitled to have paid to them. The plaintiff also claims the court erred in excluding testimony as to the consideration which entered into the note which was the basis of the judgment obtained by the plaintiff.

The plaintiff introduced testimony which tended to show that the S. H. Davis Company carried an insurance upon its property; that a loss occurred, which was paid by one of the companies by delivering a draft of nineteen hundred and thirty-two dollars to the S. H. Davis Company, which was indorsed by George W. Radford, secretary and treasurer of the company, and delivered to the bank April 6, 1895, for collection. The bank received this amount, and, instead of crediting it to ³²³ the S. H. Davis Company, or to Mr. Radford, its secretary and treasurer, eight hundred and twenty-seven dollars of

it was used to pay an overdraft due the bank from the S. H. Davis Company, and the balance was credited to McClenahan as agent, and was afterward checked out by him. A check of five hundred and nineteen dollars was given by McClenahan, agent, to Radford, secretary and treasurer, May 17, 1895. There is no dispute but that this money belonged to the S. H. Davis Company, and that, if the cashier had knowledge it was in the bank when process was served in this case, the bank would be liable to the amount of it as garnishee defendant; but it is claimed the officers of the bank had no knowledge that the fund belonged to the S. H. Davis Company and therefore the bank was not liable; and this was the view taken by the learned circuit judge.

We cannot agree that there was no testimony tending to show that the bank had knowledge that this fund belonged to the principal defendant. The draft came to the bank indorsed by the secretary and treasurer of the principal defendant, and was forwarded for collection. Upon its collection nearly one-half of the proceeds were used to pay an overdraft due the bank from the principal defendant. Mr. McClenahan, though he was agent for Mr. Radford, secretary and treasurer of the principal defendant, was also paying teller of the bank. Mr. Radford, secretary and treasurer of the principal defendant, was also a director in the bank. The bank at this time held as security all of the stock representing the S. H. Davis Company corporation except three shares, and the books of the corporation were then at the bank. We think it was a question for the jury to determine from all the evidence, under proper instructions, whether the bank had such knowledge of the ownership of the fund as would make it liable. If the fund belonged to the principal defendant, and the bank had knowledge of that fact, it would be liable to garnishment, even though the fund stood in the name of McClenahan, agent: *Connor v. Third Nat. Bank*, 90 Mich. 328; *Bills v. National Park Bank*, 89 N. Y. 343; *Gibson v. National Park Bank*, 98 N. Y. 87; *Drake on Attachments*, sec. 482.

When the S. H. Davis Company was organized, Mr. S. H. Davis was indebted to the bank in the sum of twenty thousand dollars. The testimony of the plaintiff tends to show that upward of thirteen hundred dollars of money belonging to the S. H. Davis Company was wrongfully received by the bank in payment of interest due from Mr. Davis as an individual. This is denied by the bank, it contending that the payments which were made as interest were made by Mr. Davis, the presi-

dent and general manager; that they were made voluntarily; that the bank discounted the paper of the S. H. Davis Company upon the agreement that this interest should be paid; and that the company was perfectly solvent at this time, and that the creditors have no right to complain. The plaintiff denies that the discounting of the company paper was upon the condition that the interest due from Mr. Davis should be paid. He also claims that some of these payments were made by the book-keeper without authority, and without the knowledge of the general manager or the board of directors; and we think there is testimony tending to show the truth of this contention. If payments of the individual debts of Mr. Davis were made with the corporate funds, and these payments were unauthorized by the corporation, and were made to the bank with knowledge that they were corporate funds, we have no doubt funds so paid could be reached by the creditors of the corporation: 3 Howell's Statutes, sec. 8059; McLellan v. Detroit File Works, 56 Mich. 579; Merchants' Nat. Bank v. Detroit Knitting etc. Works, 68 Mich. 620; 2 Morawetz on Private Corporations, sec. 789. See, also, Johnson v. Hersey, 70 Me. 74; 35 Am. Rep. 303; 73 Me. 291. Giving the most favorable construction to the testimony possible, in favor of the bank, we think it should have been submitted to the jury whether these payments had been authorized or not, and whether they were required to be made before the bank would discount the paper of the corporation.

³²⁵ The bank was allowed to show that the note which was the basis of the judgment of Mr. Ferry was received by him without consideration, after maturity; and it was the claim of the defendant that Mr. Ferry was not a creditor entitled to the benefit of the garnishee statute. The trial judge, in his disposition of the case, said: "The note on which the plaintiff obtained judgment in the principal case is dated March 2, 1895, and due in thirty days after date. The note was protested April 4, 1895, and was subsequently, after its maturity, indorsed to the plaintiff in this case. The evidence shows, moreover, that Ferry paid no consideration for the note; in other words, that he is a merely nominal plaintiff. Under these circumstances, if these payments of interest could be attacked at all, I do not believe a merely nominal indorser of dishonored paper, who became such eight months after the alleged interest was paid, is such a bona fide creditor of the corporation as the statute contemplates."

To meet this feature of the case, the plaintiff sought to introduce testimony to show that the note was given for a bona

file indebtedness, which existed prior to the time when the payments of interest were made. Testimony offered for that purpose was rejected. If the ownership of the note and its consideration were to be inquired into at all, we think this testimony was competent. While Mr. Ferry did not obtain the note until after maturity, the rule would be that he took it subject to any defenses that could be made against the person from whom he obtained it. If there was no defense to the note, the owner of it was a creditor, and entitled to such rights as the statute gave him.

Judgment is reversed, and a new trial ordered.

The other justices concurred.

GARNISHMENT—LIABILITIES OF GARNISHEE.—Garnishment process relates only to the time of service; and if there is no indebtedness at that time from the garnishee to the defendant in attachment, plaintiff will not be entitled to judgment, although it may appear that between the time of service and answer, the garnishee became indebted and paid the debt to the defendant: *Roby v. Labuzan*, 21 Ala. 60; 56 Am. Dec. 237. Under a statute providing that the service of the summons upon the garnishee shall attach and bind all property belonging to the defendant in his hands at the date of such service, the garnishee cannot be held for property coming to his hands after the time of the service of the summons in the proceedings against him, although it comes into his possession or control on the same day as the service: *McLean v. Sworts*, 69 Minn. 128; 65 Am. St. Rep. 556, and note. Compare *First Nat. Bank v. Jagers*, 81 Md. 38; 100 Am. Dec. 53.

COLE v. BROWN.

[114 MICHIGAN, 396.]

FRAUDULENT CONVEYANCES—JUDGMENT LIEN.—A judgment based upon indebtedness contracted partly prior and partly subsequent to a fraudulent conveyance, and recovered subsequent thereto, is a lien upon the property of the judgment debtor only to the extent of such prior indebtedness. Such voluntary conveyance is void as to that part of the judgment incurred before the conveyance and valid as to the part incurred subsequently.

FRAUDULENT CONVEYANCES—EVIDENCE OF FRAUDULENT INTENT—EXISTING AND SUBSEQUENT CREDITORS. While no fraudulent intent is necessary to set aside voluntary conveyances as to existing creditors, it must be established in order to set them aside as to subsequent creditors.

Bill in aid of execution.

On January 9, 1895, C. Cole recovered a judgment against Henry Brown. This judgment was based upon five notes, one of which was executed October 1, 1889, and the remaining four

were executed subsequent to March 8, 1892, at which time Brown conveyed part of his property, known as the "Oxford property," to his wife, Caroline Brown, for an expressed consideration of four thousand five hundred dollars, and the deed was recorded the following September. On April 8, 1893, Brown conveyed part of his remaining property to his son Frank, and the remainder to one Denison. Cole, being unable to collect his judgment, filed this bill to avoid these conveyances as void against creditors. Mrs. Brown and Denison answered, admitting the transfers, alleging a valid consideration, and denying fraud. Judgment in favor of Denison, and against Mrs. Brown. Mrs. Brown appealed.

A. and S. H. Perry, for the appellant.

G. O. Kinsman and F. E. Jenkins, for the appellee.

SEE GRANT, J. 1. It is urged that complainant's rights must be determined upon the basis that he is a subsequent creditor, because four of the items of indebtedness upon which the judgment was rendered were incurred after the deed to Mrs. Brown was made and recorded. In Maine and Illinois it is so held: *Reed v. Woodman*, 4 Greenl. 400; *Usher v. Hazeltine*, 5 Greenl. 471; 17 Am. Dec. 253; *Moritz v. Hoffman*, 35 Ill. 558. The contrary rule prevails in Pennsylvania and it is there held that the conveyance is void as to that part of the judgment incurred before the conveyance, and valid as to the part incurred subsequently: *Henderson v. Henderson*, 133 Pa. St. 399; 19 Am. St. Rep. 650. We think the latter rule the more just and equitable, and therefore adopt it.

2. The court found, and incorporated the finding in its decree, that the deeds from Brown to his wife and son "were made for the express purpose of avoiding the payment of the said Henry Brown's debts, and for the purpose of defrauding his, the said Henry Brown's, creditors, and that his wife, the said defendant Caroline Brown, and his son, the said defendant Frank Brown, were possessed of full knowledge of what these deeds were made for, and that the court did not believe the testimony of the defendants as to what the consideration was, passing from Caroline Brown to Henry Brown and from Frank Brown to Henry Brown, for said deeds, and that the income from the rent of the Oxford property received by Mrs. Brown was more than the amount of the mortgage thereon at the date of the deed, and which said mortgage was paid out of the rents received therefrom."

The decree ordered a sale of the property, and ordered that fifteen hundred dollars, the amount of the homestead exemption, be paid from the proceeds of the sale to Mr. Brown.

We entirely agree with the court as to the deed made ^{see} by Mr. Brown to his son. There was direct and positive evidence to show that this deed was made with the intent to defraud his creditors, among whom were Mr. Beebe and his assignors. This matter is not before us, as the son has not appealed.

We cannot concur in the conclusion reached by the court below as to the deed to Mrs. Brown. It is unnecessary to determine upon this record whether the deed to her was void as to Mr. Brown's then existing creditors. He did not at that time dispose of all his property, and there is evidence that the amount retained by him equaled the amount of his debts. We find no evidence of any intent to defraud any subsequent creditors. There is no testimony from which it can be inferred that either he executed this deed, or that she received it, with any intent on his part to incur future indebtedness, and to deed this property to her with that purpose in view. If existing creditors could attack it, it is alone because the conveyance was voluntary. There were very good reasons why he should convey it to her. It was their homestead. She had been a hard-working woman, had taken boarders, and had evidently contributed as much as, if not more than, he toward accumulating the property. It was entirely proper and laudable that, as old age was coming on, she should desire to secure a home for herself, and something to live upon, to which, in justice, she was entitled. Her husband had become somewhat addicted to drink and gambling. The mere fact that Mr. Brown afterward borrowed some money is not of itself sufficient to base a finding upon that they intended at the time to defraud his future creditors, or that it was contemplated that he should borrow money in the future. The deed was on record at the time that the various sums of money upon which the judgment is based, except the first note of one hundred dollars, were borrowed. There is no testimony that these loans were made on any representations as to the title made by either Mr. or Mrs. Brown. The record of the deed was notice to the world that this land did not form ⁴⁰⁰ a part of his assets: *Strauss v. Parshall*, 91 Mich. 475. There are cases where conveyances are fraudulent as to subsequent creditors when it is proven that that was the purpose of the conveyance. Such a case is *Savage v. Murphy*, 34 N. Y. 508; 90 Am. Dec. 733. In *Baker v. Gilman*, 52 Barb. 26, it was held that where a creditor

knew of the conveyance, and then trusted the debtor, he could not recover. This is based upon sound sense and reason. The former decisions of this court, we think, rule this case against complainant: *Page v. Kendrick*, 10 Mich. 300; *Keeler v. Ullrich*, 32 Mich. 88; *Gale v. Gould*, 40 Mich. 515; *Strauss v. Parshall*, 91 Mich. 475.

While no fraudulent intent is necessary to set aside voluntary conveyances as to existing creditors, it must be established in order to set them aside as to subsequent creditors. In other words, actual fraud must be shown, and as well the specific intent to defraud the individual subsequent creditor complaining, or subsequent creditors generally: *Waite on Fraudulent Conveyances*, secs. 96, 202; *Simmons v. Ingram*, 60 Miss. 898; *Florence Sewing Machine Co. v. Zeigler*, 58 Ala. 224. In the case of *Howe v. Ward*, 4 Greenl. 195, an exhaustive examination of this subject was made, and many authorities cited and discussed. The conclusion reached in that case is thus stated: "If the party for whose benefit the proof is introduced was not a creditor at the time the alleged fraudulent conveyance was made, such proof cannot avail him, unless found sufficient to convince the jury that the conveyance was made for the purpose of defrauding him in particular, or subsequent creditors generally, as well as those who were creditors at the time, if there were any such."

It must be remembered that we are dealing with a case where there was no actual intent to defraud any creditor, existing or subsequent, but where the law sets the conveyance aside as to existing creditors, regardless of the intent. We are not called upon to determine whether a subsequent creditor can successfully attack a conveyance by the sole proof of an actual intent to defraud existing creditors. ⁴⁰¹ Upon this question the authorities do not seem to be in harmony: See *Bump on Fraudulent Conveyances*, c. 13.

Decree modified according to this opinion, with costs of this court to defendant Caroline Brown.

Long, C. J., *Montgomery and Moore, JJ.*, concurred. *Hooker, J.*, did not sit.

FRAUDULENT CONVEYANCES—JUDGMENT AS EVIDENCE OF DEBT.—If a judgment creditor brings an action to set aside, as fraudulent as to creditors, a conveyance of real estate made by the debtor prior to the judgment, he must show that the debt for which the judgment was rendered existed at the time of the conveyance: *Bloom v. Moy*, 43 Minn. 397; 19 Am. St. Rep. 243; *Yeend v. Weeks*, 104 Ala. 331; 53 Am. St. Rep. 50, and note.

FRAUDULENT CONVEYANCES—RIGHTS OF SUBSEQUENT

CREDITORS.—A voluntary conveyance, made with intent to hinder, delay, and defraud creditors, is void as against subsequent as well as prior creditors, though the grantee did not know of, nor participate in, the fraudulent intent of the grantor: *Gilliland v. Jones*, 144 Ind. 662; 55 Am. St. Rep. 210, and note. Subsequent creditors, in order to successfully assail a voluntary conveyance, must prove actual or intentional fraud: *Note to Brundage v. Cheneworth*, 63 Am. St. Rep. 383.

PERKINS v. CHENEY.

[114 MICHIGAN, 567.]

GUARDIAN AND WARD—DISCHARGE OF GUARDIAN—LIABILITY OF SURETIES—STATUTE OF LIMITATIONS.—A guardian is "discharged," within the meaning of a statute providing that no action shall be maintained against the sureties on his bond unless commenced within four years from the time the guardian is discharged, whenever the guardianship is effectually determined and brought to a close, either by the removal, resignation, or death of the guardian, the marriage of a female guardian, the arrival of a minor ward at the age of twenty-one years, or otherwise.

GUARDIAN AND WARD—ACCOUNTING—LIABILITY OF SURETY.—A surety on a guardian's bond, who voluntarily becomes a party to a proceeding upon an accounting to determine the amount due from the guardian to his ward, does not thereby conclusively admit his liability on the bond.

GUARDIAN AND WARD—SURETY'S LIABILITY—RES JUDICATA.—An order of court granting leave to sue on a guardian's bond, is not res judicata of the surety's liability.

GUARDIAN AND WARD—LIABILITY OF SURETIES—STATUTE OF LIMITATIONS—ESTOPPEL.—If, on the application of the sureties of a guardian to perfect an appeal from the guardian's accounting, the court makes an order denying the request of the ward that the appellants be required to give bond to pay any sum found due the estate, as action on the bond might be barred by limitation, and such denial of the request is placed "on the ground that, in the opinion of the court, the action would not be barred, and that such bond is not required in the interest of justice, nor for the protection of the estate, such order does not estop the sureties from pleading the statute of limitations on their bond, if the bar was complete before such appeal.

SURETYSHIP—STATUTE OF LIMITATIONS—NEW PROMISE.—The duty of a surety to see that his principal performs the contract guaranteed subsists as a moral obligation after the statute of limitation has run against the legal right to enforce it, and it is sufficient consideration to support a new promise that the pre-existing obligation of the principal will be fulfilled.

SURETYSHIP—STATUTE OF LIMITATIONS—NEW PROMISE.—A verbal acknowledgment or new promise by a surety is sufficient to revive his liability barred by the statute of limitations.

SURETYSHIP—STATUTE OF LIMITATIONS—NEW PROMISE.—A verbal acknowledgment or new promise by a surety on a guardian's bond, that he will pay whatever is found to be due from his principal, is sufficient to revive his liability barred by the statute of limitations.

G. A. Wolf, G. Fitz Gerald, and W. W. Hyde, for the appellant.

M. H. Walker and L. E. Knappen, for the appellee.

⁵⁸⁸ MONTGOMERY, J. This is an action on a guardian's bond. Nehemiah E. Cheney died, intestate, on March 7, 1880, leaving a widow and two children—May Cheney, since married, and referred to in this record as May Cheney Hinman, and Elsbey Cheney, then aged three years. Amherst B. Cheney was appointed administrator of the estate of Nehemiah, and on October 8, 1880, on petition of the widow, Mrs. Nettie Cheney, Amherst B. Cheney was appointed guardian of the minors, and gave the bond in suit, with his brother Zerah V. Cheney and Edwin Bradford as sureties. In the fall of 1893, Amherst B. Cheney failed in business, and was at the time largely ⁵⁸⁹ indebted to the minors. Up to this time no account had been filed by Amherst B. Cheney as guardian or as administrator. On May 26, 1894, May Cheney Hinman filed a petition in the probate court, praying that the guardian be required to render an account. A citation was issued on this petition, but no account appears to have been filed in response to the petition. A second citation was issued, returnable October 3, 1894. On October 31, 1894, the guardian filed his account. At the same time, he voluntarily filed his account as administrator. Objections and surcharges were filed to both accounts, and the hearing was had on them together, on the 18th of December, 1894. On April 11, 1895, the judge of probate rendered his decision, finding nothing due from Cheney as administrator, but finding that there was due to his wards the sum of thirteen hundred and eighty-nine dollars and eighty cents.

Steps were taken to appeal from this determination, but, the appeal not having been perfected within the thirty days required by the statute, the minors filed a petition for leave to sue the bond. A citation was issued on this petition, and on the eighteenth day of July, 1895, an application was made to the circuit court for leave to perfect the appeal from the order determining the amount due the wards on the accounting. This application was in the name of Amherst B. Cheney, but on such application Zerah V. Cheney presented his own affidavit and the affidavit of his attorney, M. H. Walker, from which it appears that Zerah V. Cheney had employed Mr. Walker to prosecute the appeal; and A. B. Cheney, in his own petition, swears that said petition was in fact being prosecuted by Zerah V. Cheney, his bondsman, at his own expense, and that the proceedings were

under his control, and under the control of Walker, his attorney. On the hearing of this application, leave was granted to perfect the appeal. The appeal was thereupon taken, and upon the 2d of May, 1896, the decision of the circuit judge was entered on this appeal, but the findings were not finally settled until the 15th of May. On the 28th of May, 1896, ⁵⁷⁰ the amended findings were certified to the probate court. On the 29th of May, 1896, the wards filed a petition for the removal of A. B. Cheney as guardian. On the hearing of the petition, Mr. A. B. Cheney filed his resignation. On the sixth of June, 1896, the wards filed a petition for leave to sue the bond. A citation was served upon Zerah V. Cheney, who appeared by counsel, and opposed the granting of an order for leave to sue the bond; but, notwithstanding the opposition, the leave was granted, and this suit instituted. On June 20th the present action was commenced. The defendant subsequently paid the amount decreed as due to the ward Elsby, and the case has proceeded in the interest of May Cheney Hinman. The defendant Zerah V. Cheney interposed the plea of the statute of limitations to this claim, and, at the conclusion of the testimony, the circuit judge directed a verdict in his favor. As no defense was interposed by A. B. Cheney, judgment was directed against him.

The statute upon which this action of the circuit judge was based is section 6332 of 2 Howell's Statutes, which provides that no action shall be maintained against the sureties on any bond given by a guardian, unless it be commenced within four years from the time when the guardian shall have been discharged. This is subject to exceptions not material to be noted here. Three reasons are urged against the ruling of the circuit judge: 1. That, under the circumstances of the case, the statute had not run when the suit was brought; 2. That the surety, having become a party to the accounting proceedings, is bound by the orders and final decree therein, and is concluded by the decision of the probate judge, who directed that an action might be brought upon the bond, in the face of the contention that the statute of limitations had run; 3. That there was a new and sufficient acknowledgment and promise by the surety to revive and retain his liability.

1. The first proposition depends upon the construction which under the authorities must be given to the statute, ⁵⁷¹ and this is not an open question in this state. The statute was borrowed from Massachusetts, and in *Loring v. Alline*, 9 Cush. 70, it was held that by the term "discharged," in this statute, is

intended any mode by which the guardianship is effectually determined and brought to a close, either by the removal, resignation, or death of the guardian, the marriage of a female guardian, the arrival of a minor ward at the age of twenty-one, or otherwise. The same construction has been given in our state: See *Cheever v. Congdon*, 34 Mich. 296; 24 Am. Rep. 552; *Ottawa Probate Judge v. Stevenson*, 55 Mich. 320. See, also, *Paine v. Jones*, 93 Wis. 70.

2. It is claimed that Zerah V. Cheney voluntarily became a party to the accounting proceedings, submitted himself to the jurisdiction of the court, and that he cannot now be permitted to escape liability under the decree, which, it is contended, was rendered as much against him as against the guardian. We think this contention cannot be allowed. The proceeding on the accounting was one to determine the amount due from the guardian to his wards. Whether liability existed upon the bond was not determined in that proceeding. The bare fact that the surety took part in that proceeding could not be taken as a conclusive admission of liability upon the bond, particularly as he was admittedly liable for so much as was found to be due to Elaby Cheney, who was still a minor. The question of whether the statute of limitations had run in favor of the bondsmen was not one which the court had the opportunity to pass upon in that proceeding: See 2 Black on Judgments, sec. 589.

It is further contended that the order of the probate court granting leave to sue the bond is *res judicata* of the defendant's liability. But this court has held otherwise: See *Hilton v. Briggs*, 54 Mich. 266; *Landon v. Comet*, 62 Mich. 83; *Schlee v. Darrow*, 65 Mich. 362; *Welch v. Van Auken*, 76 Mich. 467. It may be added that the order of the probate judge simply determined ⁵⁷² that the petitioners were "entitled to bring suit upon the bond."

3. It is further contended that the defendant is estopped by the decision of Judge Adair on the application for leave to appeal from the accounting. On the presentation of the application for leave to appeal, and during the hearing, counsel for Mrs. Hinman stated, as one reason why an appeal ought not to be allowed, that the statute of limitations had run out, and that he thought, as a condition to permitting the appeal, a new bond should be required. Mr. Walker, who represented Zerah V. Cheney, said that he did not understand that the statute of limitations would run until the expiration of ten years, the bond being a sealed instrument. Mr. Wolf, who appeared for Mrs.

Hinman, then called attention to the statute (section 6332); and it was stated by Mr. Walker, as appears by plaintiff's testimony, that it did not make any difference, that they (defendants) did not intend to plead the statute of limitations, and that they would pay whatever the court found was due. The court made an order permitting an appeal, in which was the following: "And it is further ordered that the request of appellees that, as a condition of allowing this appeal, appellant be required to give bond to pay any sum found due said estate, as an action on the guardian's bond may be barred, be, and the same is hereby, denied, on the grounds that, in the opinion of the court, the action would not be barred, and also, in his opinion and judgment, it is not required in the interest of justice, nor for the protection of the estate."

The most that can be said is, that the judge proceeded upon a mistaken view of the law. This order does not indicate that the judge would have refused leave to appeal had he entertained the opinion that the action was barred, but that he might have ordered an additional bond. Nor does it appear that, as to the statute of limitations, Mrs. Hinman was in a worse situation after the order allowing an appeal than before, as, in the absence of any new promise, the statute of limitations had run at the time the ⁵⁷³ order was made. We think it cannot be said that there was any estoppel upon this question.

4. A question of more difficulty is whether a new promise was shown to have been made by the defendant Zerah V. Cheney. The circuit judge seemed to be of the opinion that a new consideration must be shown in order to support a new promise. It is conceded by counsel that, as to one liable upon an obligation as principal, the original consideration may support a promise which revives the action. But it is contended that the consideration for this new promise rests upon the moral obligation of the principal to pay the debt, and it is said that no moral obligation rests upon the surety to discharge the obligation—that he is entitled to stand upon his strict legal rights. It may be said with truth that there is no breach of morals involved in a surety's insisting upon his strict legal rights, and refusing to pay except upon such conditions as the law affixes to his undertaking for his benefit. But we cannot give our assent to so broad a proposition as that the surety is under no moral obligation to see that his principal fulfills a contract which the surety has guaranteed. Both principal and surety may, after the lapse of six years, be legally discharged. Both have been under the

moral obligation to make payment of the indebtedness, and either alike may, we think, renew such obligation after it has become barred, upon the consideration of the pre-existing legal obligation, which the law recognizes as a still subsisting moral obligation. No authority is cited which sustains the holding of the learned circuit judge. In the analogous case of a waiver of conditions upon which the liability of a surety depends, it has been repeatedly held that such waiver may occur after a failure to comply with the conditions, and that such waiver or new promise requires no new consideration to support it: *Porter v. Hodenpuyl*, 9 Mich. 11; *Parsons v. Dickinson*, 23 Mich. 56; *Tebbetts v. Dowd*, 23 Wend. 379; 2 *Randolph on Commercial Paper*, sec. 953. We think the court was in error on this point.

⁵⁷⁴ But it is contended by defendant's counsel that there was no evidence which, fairly construed, tends to show such a new promise or acknowledgment as will operate to take the case out of the statute. It is to be borne in mind that this is a statute by itself, and that the acknowledgment which shall take the case out of the statute is such a one as is required under the common-law rule, and there is no limitation upon that rule by statute. The general statute (2 *Howell's Statutes*, section 8725), which excludes from the saving provisions any verbal agreement, applies only to those cases within the provisions of chapter 302. At the common law, a verbal acknowledgment is sufficient to revive a liability barred by the statute: *Brandt on Suretyship and Guaranty*, sec. 65; *Browne on the Statute of Frauds*, sec. 137.

Mrs. Nettie Cheney testifies that in January, 1894, she sent for defendant to come to her house, and that defendant said "that he would pay us what there was coming from the estate, from A. B." *Elsby Cheney* testifies that on one occasion *Zerah V. Cheney* told him that, "when we found out whatever there was in the estate, he stood ready to pay it." Other promises were testified to, but they were, according to the testimony of the witnesses, conditional upon the parties waiting the result of certain embezzlement cases pending against A. B. Cheney—a condition which was not complied with. Such promises were not sufficient to remove the bar of the statute, unless the conditions named were complied with; but the promises claimed to have been made to Mrs. Nettie Cheney in January, and to *Elsby*, were, if the jury should find them to have been made, sufficient to take the case out of the statute. The force of this testimony was very much weakened in each case on cross-examination, but

we are not prepared to say that the testimony of each witness, taken as a whole, did not authorize the finding of a promise. This question should have been submitted to the jury.

Judgment reversed, and a new trial ordered.

Long, C. J., Hooker and Moore, JJ., concurred.

Grant, J., did not sit.

GUARDIAN AND WARD—DISCHARGE OF GUARDIAN.—Within the meaning of a statute of limitations providing that no action can be maintained on any guardian's bond unless commenced within three years from his discharge or removal, the death of the ward must be treated as the discharge of the guardian: *Berkin v. Marsh*, 18 Mont. 152; 56 Am. St. Rep. 565. The office of guardian may be terminated by the arrival of the ward at the age of majority: *Jones v. Hays*, 3 Ired. Eq. 502; 44 Am. Dec. 78; *Overton v. Beavers*, 19 Ark. 623; 70 Am. Dec. 610; or the marriage of a female ward: *Sallee v. Arnold*, 32 Mo. 532; 82 Am. Dec. 144.

GUARDIAN AND WARD—LIABILITY OF SURETIES ON GUARDIAN'S BOND.—The judgment of a court having original jurisdiction in matters of guardianship is, until reversed, modified, or impeached, conclusive, not only against the guardian himself, but also against the sureties on his official bond: *Deegan v. Deegan*, 22 Nev. 185; 58 Am. St. Rep. 742; in the absence of fraud or mistake: *Gillett v. Wiley*, 126 Ill. 310; 9 Am. St. Rep. 587.

LIMITATIONS OF ACTIONS—NEW PROMISE—WHAT SUFFICIENT.—An acknowledgment of indebtedness to take a case out of the operation of the statute of limitations must be clear and unambiguous, and must recognize and be directed to the debt with sufficient clearness to amount to an unqualified admission that it remains due and unpaid: *Macrum v. Marshall*, 129 Pa. St. 506; 15 Am. St. Rep. 730; note to *State v. Finn*, 14 Am. St. Rep. 600. A new promise by a surety, after discharge, with knowledge of the facts discharging him, is binding without any new consideration: *New Hampshire Sav. Bank v. Colcord*, 15 N. H. 119; 41 Am. Dec. 685.

FLOOD v. BUTZBACH.

[114 MICHIGAN, 618.]

CHATTEL MORTGAGES—RIGHT OF MORTGAGEE TO RECOVER PURCHASE PRICE.—A mortgagee of chattels may recover the purchase price thereof from a purchaser from the mortgagor, under the common counts in assumpsit, if the mortgage, while it authorized a sale of the goods by the mortgagor, expressly provided that the sale shall be in the name of the mortgagee, and that his lien shall follow the property.

G. W. Bridgman, for the appellants.

J. O'Hara, for the appellees.

⁶¹⁸ MOORE, J. September 21, 1895, Daniel Cook gave plaintiffs a chattel mortgage upon a quantity of staves and other

property. This mortgage was duly filed. It contained, in addition to the usual conditions of a chattel mortgage, the following clause: "With the understanding that the said heading and staves, as they are finished, shall be shipped and sold in the best market that can be procured by the said Daniel Cook; but all such shipping, sale, and returns shall be in the name of James H. and Thomas P. Flood, and this lien shall be on all such heading and staves in or as above described."

Cook sold to defendants staves worth thirty-four dollars and fifty cents. After they were sold, and before payment was made, defendants were garnished. Plaintiffs asked defendants to pay them \$14 for the staves. Defendants declining to do so, plaintiffs sued defendants, declaring on all the common counts in assumpsit. Defendants requested the trial judge to direct a verdict in their favor. He declined to do so, and directed a verdict in favor of plaintiffs. Defendants appeal, and insist plaintiffs could not recover under the declaration as framed: Citing *Randall v. Higbee*, 37 Mich. 40; *Carpenter v. Graham*, 42 Mich. 191; *Warner v. Beebe*, 47 Mich. 435; *Tate v. Torcott*, 100 Mich. 308.

It is undoubtedly true that a mortgagee cannot recover, under the common counts in assumpsit, for mortgaged goods sold, where the chattel mortgage contains only the usual conditions; but this mortgage, while it authorized a sale of the goods by the mortgagor, expressly provided that the sale should be in the name of the mortgagees, and that their lien should follow the property. Under such circumstances, we think it can well be said that the mortgagor was acting as the agent of his principal, the mortgagees, in making the sale, and that they confirmed the sale, and were entitled to recover under the common counts in assumpsit: See *Fuller v. Rhodes*, 78 Mich. 36.

Judgment is affirmed.

The other justices concurred.

CHATTEL MORTGAGES—PROVISION ALLOWING MORTGAGOR TO RETAIN AND SELL PROPERTY.—Earlier in this series we considered the much controverted question as to the validity and effect of a chattel mortgage containing a provision authorizing the mortgagor to retain and sell the property, and concluded that, by the weight of reason and authority, such a mortgage should be conclusively presumed fraudulent and void: See monographic note to *Peabody v. Landon*, 15 Am. St. Rep. 912; *Richardson v. Jones*, 56 Kan. 501; 54 Am. St. Rep. 594, and note.

POPPE v. POPPE.

[114 MICHIGAN, 649.]

FRAUDULENT CONVEYANCES—RECONVEYANCE.—If one person conveys his property to another for the purpose of avoiding anticipated claims against him, he cannot invoke the aid of equity to obtain a reconveyance.

STATUTE OF FRAUDS.—A PAROL PROMISE by a grantee of land to reconvey it is void under the statute of frauds.

STATUTE OF FRAUDS—PAROL PROMISE—ADMISSION OF TRUST.—If a grantee, in his answer in proceedings to compel a reconveyance of land, admits a parol promise to reconvey, this will not entitle the complainant to a reconveyance, when the original conveyance was made for the avowed purpose of defrauding creditors, present or prospective.

Action to set aside deeds and compel a reconveyance. The complainant, Poppe, being threatened with an action for damages, and in danger that a judgment would be rendered against him, conveyed the property in question to a Mrs. Grevy, who, in turn, conveyed it to Mrs. Poppe, under a parol agreement between them that the property should be reconveyed to the original grantor, when the threatened trouble has disappeared. Upon Poppe's demand, his wife refused to reconvey, and he brought this suit, in which judgment was rendered against him, and he appealed.

Jones & Kennedy, for the appellant.

Macdonald & Marr, for the appellees.

⁶⁵⁰ GRANT, J. 1. Mrs. Poppe was not a party to the alleged conspiracy, and knew only what her husband told her about it. She was guilty of no false or fraudulent representations. The conveyance was his own voluntary act. Her promise to reconvey, if made, rested in parol, and was void, under the statute of frauds. ⁶⁵¹ The case of Pierson v. Conley, 95 Mich. 519, is similar in its facts, and rules this case against the complainant. When one conveys his property to another for the purpose of avoiding anticipated claims against him, he is not in position to invoke the aid of a court of equity to obtain a reconveyance. He does not come into court with clean hands, and equity leaves him to lie in the bed of his own making.

2. It is, however, insisted that defendant Poppe, in her answer, admitted that she promised to reconvey, and that this takes the case out of the statute. It is true that an answer in chancery admitting the trust is a sufficient compliance with the statute: Patton v. Chamberlain, 44 Mich. 5, and cases there cited.

But this rule applies to cases not tainted with fraud, and where the conveyance is made for an honest and legitimate purpose. That case is a good illustration. C.'s wife had conveyed to him land on an oral promise to hold it for their infant daughter. C. became embarrassed, and exchanged this land for other land, the latter being conveyed to J. on an oral promise to hold it for the daughter. In a suit by C.'s creditors against J., she answered, avowing the trust. This was held to answer the requirements of the statute. A similar case is *McVay v. McVay*, 43 N. J. Eq. 47. But no case is cited holding that equity will assist one who has voluntarily conveyed his property for the avowed purpose of placing it beyond the reach of creditors, either present or prospective. It is therefore unnecessary to determine whether the answer admits a contemporaneous promise which would satisfy the statute, and bind the conscience of the court in a clean and honest transaction.

The decree is affirmed, with costs.

The other justices concurred.

FRAUDULENT CONVEYANCES—RIGHTS AS BETWEEN THE PARTIES.—A conveyance of property in fraud of creditors of the grantor is binding as between the parties to it; and neither courts of law nor of equity will aid a fraudulent grantor in recovering the property, or in enforcing the trust upon which the conveyance was made: *Springfield Homestead Assn. v. Roll*, 137 Ill. 205; 31 Am. St. Rep. 358. It is a general rule that a fraudulent grantor cannot, for his own benefit, undo the transfer he has made: Note to *Harper v. Harper*, 7 Am. St. Rep. 588. See monographic note to *Whitworth v. Thomas*, 3 Am. St. Rep. 727, discussing recriminatory fraud. Neither at law nor in equity can the grantee be compelled to reconvey: *Chapin v. Pease*, 10 Conn. 69; 25 Am. Dec. 56; *Freeman v. Sedwick*, 6 Gill. 28; 46 Am. Dec. 650. See note to *Sickman v. Lapsley*, 15 Am. Dec. 590.

BLODGETT v. FOSTER.

[114 MICHIGAN, 688.]

ACCOUNTS—EQUITY JURISDICTION—COMPLICATIONS—INADEQUACY OF LEGAL RELIEF.—A suit in equity for an accounting may be maintained, although the accounts are all on one side, if there are circumstances of great complication or difficulty in the way of adequate relief by an action at law.

Fitz Gerald & Barry and F. A. Stace, for the appellants.

Crane, Norris & Stevens, for the appellees.

688 LONG, C. J. This is an appeal from an order of the

Kent circuit court in chancery overruling the demurrer of the defendants to the complainants' bill for want of equity. The bill is filed for an accounting. We shall state only the substantial averments of it, or such parts of ⁶⁸⁹ those averments as are necessary to a consideration of the questions involved.

The accounting prayed involves transactions under three contracts for the manufacture and sale of lumber. Copies of these contracts are made a part of the bill. It appears that on May 1, 1891, Clyde C. Chittenden, George E. Herrick, and William F. Chittenden, comprising the firm of Chittenden, Herrick & Co., agreed in writing with the defendants to sell them all the white pine cut from specified lands from the date of the agreement to May 1, 1892, estimated to be five million feet or more. That firm agreed to manufacture this lumber in a good and workmanlike manner, and properly cross-pile and cover it; and the defendants agreed to pay for it the prices specified for the different grades. There were many different grades, too numerous to mention here, and a separate price for each grade. The stipulation as to payments was: "Fifty per cent cash for all lumber in yard, as estimated on the first day of May, 1891; for all lumber cut in the month of May, fifty per cent cash on or before the tenth day of June, 1891, and so on during the life of this contract—it being the intent and meaning of this contract that the advance payment shall be made on or before the 10th of one month for all lumber cut the previous month. The remaining fifty per cent due on said lumber is to be paid as follows: For all lumber shipped one month, said parties are to pay for on or before the 15th of the following month, on actual measurement, in ninety days' acceptance, or cash discount of eight per cent. All lumber to be paid for on or before nine months from the date of last estimate, or nine months from May 1, 1892." The agreement had the following provision, in regard to insurance against loss or damage by fire: "Each party to pay one-half of the insurance up to the four-fifths value required by the standard lumber insurance form."

Chittenden, Herrick & Co. assigned this contract, June 1, 1892, to the Chittenden Lumber Company; and that ⁶⁹⁰ company agreed with the defendants, in writing, that the contract should continue in force for one year longer, ending May 1, 1893, with some changes made in respect to the prices of lumber. In July, 1893, the Chittenden Lumber Company assigned the contract to the Wexford Lumber Company. From May, 1891, Chittenden, Herrick & Co. and the Chittenden Lumber

Company delivered to the defendants, at the place agreed upon, all the lumber sold by the said agreement and supplemental agreement, at the prices agreed upon, these deals amounting to about seventy-one thousand dollars. The defendants, from time to time, made payments under these contracts. These payments were numerous, extending through three years or more from and after the date of the contract. Settlements were made between them, and adjustments had, upon all questions respecting the inspection and the grades of lumber sold under the contract. In March, 1896, the Wexford Lumber Company assigned all its rights under these contracts to the complainants.

In April, 1892, Chittenden & Herrick entered into a contract with the defendants to sell to them all the pine lumber to be manufactured from the timber on specified lands, estimated to cut fifteen million feet. The lumber was to be graded, and the contract fixed the price of each grade. The lumber was to be delivered free on board. The contract also fixed the time and terms of payment; also contained an agreement that Chittenden & Herrick should keep the lumber insured to eighty per cent of its value, and pay two-thirds of the cost of insurance—the other one-third to be paid by the defendants. A supplemental contract was also made between these parties, by which the price of lumber should be one dollar per one thousand higher than the price named in the contract. Shipments were made from time to time under these contracts to the defendants, and all has been shipped except about eight hundred thousand or nine hundred thousand feet. This lumber was charged to the defendants at the prices stipulated in the contracts. The payments were numerous, and were made at various times during 1893 and ~~1891~~ 1894. Chittenden & Herrick kept the lumber sold under the contract insured as agreed. The defendants claim they effected additional insurance, and that Chittenden & Herrick and their assigns are indebted to them in the sum of several hundred dollars for such additional insurance. Some controversy arises also over the price of lumber under this and the supplemental contract. In August, 1892, Chittenden & Herrick assigned to the complainants all payments due or to become due from the defendants, and empowered the complainants to receive and receipt for such moneys; and in January, 1896, they assigned all the moneys due or to become due under the supplemental contract to the complainants.

In May, 1893, another contract was entered into between Clyde C. Chittenden and William F. Chittenden, under the firm

name of the Chittenden Lumber Company, and the defendants, by which they agreed to sell to the defendants all their cut of pine and hemlock lumber and lath from May 1, 1893, to May 1, 1894, estimated at five million feet, and to be cut from specified lands. Under this contract the different grades of lumber, lath, and timber were fixed at different prices; and the Chittenden Lumber Company agreed to load out the lumber upon the order of the defendants, and deliver the same on cars on Cadillac rate—the defendants agreeing to pay all taxes on the lumber, and pay one-half of the insurance. The times and terms of payment were fixed by the contract. In February, 1894, the Chittenden Lumber Company assigned to the complainants all moneys due on the contract. In July, 1893, the Chittenden Lumber Company had assigned to the Wexford Lumber Company all its right, title, and interest in the contract. The Chittenden Lumber Company and its assigns, after the contract was executed, delivered to the defendants all the lumber and lath mentioned in the contract, and has fully performed it on its part. Shipments were large and numerous. The defendants paid from time to time to the Chittenden Lumber Company and its assigns for the lumber so delivered; ⁶⁹² such payments extending through the years 1893 and 1894. Under this contract the defendants also claim moneys paid for additional insurance, and this is also in dispute. Some claim is also made by the defendants for certain lumber destroyed by fire. The Wexford Lumber Company, in 1896, assigned this contract to the complainants, and all its rights and interests thereunder.

It is alleged by the bill that the accounts in respect to the contracts of May, 1891, April, 1892, and May, 1893, are still open and unsettled. It is further set up in the bill that the defendants claim and insist that all transactions under the three contracts and the two supplemental contracts should be considered on a final settlement, and that, upon a settlement of all the transactions under the contracts, they claim a balance of money coming to them; and they threaten to commence an action at law against the complainants for such moneys. The complainants insist by the bill that if the accounts between Chittenden, Herrick & Co., the Chittenden Lumber Company, Chittenden & Herrick, the complainants, and defendants, in respect to all the transactions under and in the performance of the contracts mentioned, were properly taken, a balance of six thousand nine hundred and thirty dollars over and above all payments and set-

offs would be coming from the defendants to them, together with interest thereon.

The only question to be determined is whether, under the facts and circumstances alleged in the bill, the case falls within any rule of equity in respect to an accounting. It is contended by the defendants that the interposition of a court of equity in matters of accounting can be invoked only: 1. Where the defendant occupies a fiduciary relation toward the complainant; 2. Where a discovery is necessary to enable the complainant to obtain relief; 3. Where the accounts are mutual and complicated. It is conceded by all the parties that no fiduciary relations exist between the parties here, and that no discovery is necessary to enable the complainants to obtain relief. The only question, then, is whether the accounts are mutual and complicated, ^{or} or whether the accounts are so complicated, though not mutual, that a court of equity will take cognizance of the case.

It is contended by the defendants that the account must be not only complicated to such an extent as to render it practically impossible to take it in a suit at law, but must be mutual, while, on the part of the complainants, it is contended that where the accounts are all on one side, but there are circumstances of great complication or difficulty in the way of adequate relief, a bill for an accounting is well brought, on the sole ground that it is the most convenient remedy. Many authorities have been cited by counsel in their briefs; each contending that, under the authorities so cited, his contention is well sustained. It is contended by the defendants that while the bill alleges, in general terms, that the accounts are mutual, long, and complicated, and cannot be properly taken except in a court of equity, yet that no fact or circumstance is shown in support of this statement, and that, under well-adjudicated cases, such general averments are not sufficient to give jurisdiction to courts of equity, but that facts and circumstances from which the court can see that such complications exist must be shown.

We are satisfied, from a reading of the bill, that these accounts of necessity, must be greatly complicated. Three contracts are set out, together with two supplemental ones. These contracts extend over a long period of time, and involve many thousands of dollars. There is a great variety of grades of lumber in each contract, each grade having a separate price. Payments were made under them, extending through a series of years. Great controversy arises over the insurance paid by the

defendants—whether it was properly and legitimately paid. There is also controversy over some portion of the lumber burned, and whether other lumber was shipped in place of it. So that if a court of equity will take cognizance of a case of accounting where the accounts are complicated, and where there would be great difficulty in the way of ⁶⁹⁴adequate relief by an action at law, it seems to us that this is one.

In *Appeal of Brush Electric Co.*, 114 Pa. St. 574, the bill was dismissed below upon the ground that the complainants had an adequate remedy at law. The supreme court of Pennsylvania reversed that ruling, saying: "Equitable jurisdiction does not depend on the want of a common-law remedy; for, while there may be such a remedy, it may be inadequate to meet all the requirements of a given case, or to effect complete justice between the contending parties; hence the exercise of chancery powers must often depend on the sound discretion of the court. So a bill may be sustained solely on the ground that it is the most convenient remedy."

In *Society of Shakers v. Watson*, 68 Fed. Rep. 730, 37 U. S. App. 141, 15 C. C. A. 632, speaking of the jurisdiction of courts of equity where no adequate remedy at law was believed to exist, it was said: "A large branch of equity jurisdiction has always been concurrent with that of the courts of law; that is, has extended over the same general subjects as those taken cognizance of in actions at law, but where, from the nature of the circumstances, and on account of the inadequacy of its remedies, a court of law cannot afford the due and appropriate relief."

In *Weymouth v. Boyer*, 1 Ves. Jr. 416, 424, Mr. Justice Buller, sitting for the lord chancellor, says: "We have the authority of Lord Hardwicke that if a case was doubtful, or the remedy at law difficult, he would not pronounce against the jurisdiction of this court. The same principle has been laid down by Lord Bathurst."

Several other Pennsylvania cases, aside from those quoted from, hold that if the accounts are all on one side, but there are circumstances of great complication or difficulty in the way of adequate relief, a bill for an accounting is well brought, on the sole ground that it is the most convenient remedy. In *Johnston v. Price*, 172 Pa. St. 427, it was said: ⁶⁹⁵"It is almost a work of supererogation to cite the perfectly familiar authorities that, in order to oust the equitable jurisdiction, the remedy or supposed remedy at law must be full, adequate, and complete, or that equitable jurisdiction does not depend on the want of a

common-law remedy, but may be sustained on the ground that it is the most convenient remedy."

The rule is laid down in 3 Pomeroy's Equity Jurisprudence, second edition, section 1421, that: "A suit in equity for an accounting is proper where the accounts are all on one side, but there are circumstances of great complication, or difficulties in the way of adequate relief at law."

We think the following authorities and cases also sustain this proposition: 1 Encyc. Pl. & Pr. 95; O'Connor v. Spaight, 1 Schoales & L. 305; Carlisle v. Wilson, 13 Ves. Jr. 276; Farmers etc. Bank v. Polk, 1 Del. Ch. 167; Darthez v. Clemens, 6 Beav. 165; Kennington v. Houghton, 2 Younge & C. 620; Taff Vale Ry. Co. v. Nixon, 1 H. L. Cas. 110; South Eastern Ry. Co. v. Brogden, 3 MacN. & G. 8; Watt v. Conger, 13 Smedes & M. 412; Seymour v. Long Dock Co., 20 N. J. Eq. 396; Kimberley v. Dick, L. R. 13 Eq. 1; Kirby v. Lake Shore etc. R. R. Co., 120 U. S. 136; Devereux v. McCrady, 46 S. C. 133.

In Mitchell v. Great Works etc. Mfg. Co., 2 Story, 648, the bill was filed for an accounting. Defendants demurred upon the ground that the complainants had a complete remedy at law. Mr. Justice Story said: "It is certainly true that, in matters of account, courts of equity possess a concurrent jurisdiction, in most, if not in all, cases with courts of law. In the present case, taking the statements of the bill to be true, which we must upon the demurrer, it seems to us not only clear that it is a case fit for the interposition of a court of equity, but that it is emphatically so, as one where a court of law could not render any justice in the matter, or, if any, it must be a very crippled and imperfect redress. It is, indeed, impossible to read the bill, and not to feel that some of the claims there set up, considering the complications ^{and} and changes of interests of the parties, cannot be adequately examined or properly disposed of except in a court of equity."

Seymour v. Long Dock Co., 20 N. J. Eq. 396, was a bill for an accounting. The demand on one side was for labor and material, and, on the other side, the extent of the liability to pay. The master said: "The whole machinery of courts of equity is better adapted for the purposes of an account than that of the courts of common law, and in many cases, as has been said, when accounts are complicated it would be impossible for courts of law to do entire justice between the parties. Courts of equity, in cases of complex accounts, take cognizance sometimes from

the very necessity of the case, and from the incompetency of a court of law, at nisi prius, to examine it with the necessary accuracy. In this case, on this ground alone, I think jurisdiction of this cause must be maintained, even supposing the objection had been duly raised."

In *Taff Vale Ry. Co. v. Nixon*, 1 H. L. Cas. 110, it was said: "Each case must be decided according to the peculiar circumstances belonging to it. It is therefore nothing to the purpose to show that there are cases where the court will not entertain jurisdiction because it is a matter of law. Each case must be investigated in order to see whether it comes within the rule laid down as that upon which a court of equity exercises its jurisdiction."

We are satisfied in the present case that, though the accounts may not be mutual, there are circumstances of such complication in the way of adequate relief at law that a court of equity should retain jurisdiction.

The order overruling the demurrer will therefore be affirmed, and the defendants will have twenty days from this date to answer over.

Grant, Montgomery, and Moore, JJ., concurred.

Hooker, J., did not sit.

ACCOUNTS—EQUITY JURISDICTION OVER.—Equity will not take jurisdiction to compel an accounting, because the account is complicated, in all cases: *Uhlman v. New York Life Ins. Co.*, 100 N. Y. 421; 4 Am. St. Rep. 482. Where the accounts to be examined and stated are one side only, a court of equity will not assume jurisdiction of a bill for an accounting, unless the accounts are so complicated as to require the aid of equity to adjust them, or a discovery is prayed for and facts are alleged which show the necessity of such discovery: *Beggs v. Edison Electric etc. Co.*, 96 Ala. 295; 38 Am. St. Rep. 94, and note. Equity has no jurisdiction in cases of account where the legal remedy is complete and adequate: *Goddin v. Bland*, 87 Va. 706; 24 Am. St. Rep. 678, and note.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

HOOPER v. PIKE.

[70 MINNESOTA, 84.]

SURETYSHIP—CONSIDERATION OF PROMISE TO PAY—EXTENSION OF TIME AS.—An extension of the time of payment is a sufficient consideration for the promise of a third party, as surety, to pay the debt.

SURETYSHIP—RELEASE—REVIVAL OF LIABILITY BY NEW PROMISE.—If a surety has been released by an extension of the time of payment without his consent, he may, without any new consideration, revive his liability by a new promise, at least if it is in writing.

SURETYSHIP—RELEASE—REVIVAL OF LIABILITY BY ACKNOWLEDGMENT.—After a surety has been released by an extension of the time of payment, without his consent, an absolute and unqualified acknowledgment of the liability in writing will revive it, and imply a new promise.

SURETYSHIP—RELEASE—WAIVER OF STATUTE OF LIMITATIONS BY ACKNOWLEDGMENT OF LIABILITY.—An absolute acknowledgment of liability, on the part of a surety who has been released by an extension of the time of payment, without his consent, waives the statute of limitations after the same has run.

Appeal by the plaintiff from an order denying his motion for a new trial. The defendants were Charles Eliot Pike, and his father, C. E. Pike.

Charles N. Akers and D. D. Williams, for the appellant.

Frederic A. Pike, for the respondents.

85 CANTY, J. On November 26, 1889, the defendant, Charles Eliot Pike, was indebted to plaintiff in the sum of two hundred dollars, for which the latter held the note of the former, who on that day drew on his father, the defendant C. E. Pike,

a draft in favor of plaintiff for the sum of two hundred dollars, due in ninety days from that date, with interest on that sum at the rate of seven per cent per annum. The draft was accepted by the father, and delivered to plaintiff, who thereupon surrendered the note. This action was brought on the draft. The court below found in favor of the father, C. E. Pike, and from an order denying a new trial plaintiff appeals.

²⁶ The court below seems to have found for the defendant, C. E. Pike, on several grounds, each of which is contrary to the law and the evidence; at least, if the court did not find for this defendant on all of these grounds, it is impossible to tell on which ground it did find for him, as the only conclusion of law is that the plaintiff take nothing against this defendant, and that the latter recover his costs and disbursements of this action.

The court found, as a finding of fact, "that there was no agreement between plaintiff and defendant, C. E. Pike, as to said draft, or as to said indebtedness of defendant, Charles Eliot Pike." When C. E. Pike accepted the draft, and it was delivered to plaintiff, it is clear that the former made an agreement with the latter "as to said draft or as to said indebtedness." The court further found "that the indorsement and acceptance of said draft by defendant, C. E. Pike, was without consideration." If this can be called a finding of fact, it is equally unfounded. It is clear that, by receiving the draft and surrendering the son's individual note, plaintiff extended the time of payment for ninety days. This was a good and sufficient consideration for the acceptance by the father, even if, as he contends, he was but a mere surety, and the son remained the principal debtor: *Nichols v. Dedrick*, 61 Minn. 513. See, also, *Turle v. Sargent*, 63 Minn. 216; 56 Am. St. Rep. 475.

The court further found "that upon the maturity of said draft and thereafter, the plaintiff, by sundry agreements with defendant, Charles Eliot Pike, extended the time of the payment of the indebtedness of said Charles Eliot Pike to plaintiff, all without the knowledge or consent of defendant, C. E. Pike." It is true that, after the maturity of the draft, the time of payment of the indebtedness was extended a number of times. It is also possible that the evidence will warrant a finding that, as to some of these extensions, the father did not, at or prior to the extension, consent to the same. But the evidence is conclusive that he did consent to several of the extensions at or prior to the time the extension was given, and that, after all the extensions had been given, he recognized his liability in such a way as to

waive his release and revive his promise, if he had been released. During the time of these transactions, plaintiff resided at Oshkosh, Wisconsin, C. E. Pike resided at St. Paul, Minnesota, ^{sr} and Charles Eliot Pike, his son, at Washington, District of Columbia.

When plaintiff received the two hundred dollar draft, he discounted it at his own bank. At its maturity, Pike, the son, agreed to pay one-half, and plaintiff agreed to renew the other half for three months. The son failed to carry out the agreement. He subsequently sent to plaintiff his note, indorsed by his father, for one hundred and five dollars, which included interest, and his own individual note for the other one-half. Plaintiff used these notes at his bank, instead of the two hundred dollar draft, which he took up, but did not surrender to defendants. Thereafter, for the purpose of making successive renewals of the indebtedness, the son sent his own notes, not indorsed by his father, for the two hundred dollars and interest thereon; and these were, one after another, used at the bank as a renewal of the indebtedness to it incurred by the discount of said draft. These renewals continued until 1894, the last one being made March 18th of that year.

In the meantime the following correspondence took place between plaintiff and Pike, the father: On June 6, 1890, the father wrote plaintiff that he was disappointed because his son did not take care of the one hundred and five dollar note above referred to. On June 11, 1890, plaintiff wrote the father as follows: "Since writing you a few days since, I find that I have your acceptance of Charles Eliot Pike's draft for two hundred dollars, which covers the same one hundred and five dollars as was covered by your indorsement of Charles Eliot Pike's note. I do not wish to hold duplicate evidence of the same indebtedness. I have therefore canceled your indorsement of Charles Eliot Pike's note for one hundred and five dollars and sent the indorsement to Charles Eliot Pike this day."

On October 7, 1890, the father wrote that he was about to go to Europe, to be gone a few months. He added: "I wished to see you in relation to the debt which my son Charles owes you. It has troubled me that he has not already paid you, and I would like to settle it up for him before I leave. . . . May I presume that, if he still wishes more time, you will wait upon him until my return?"

The father remained in Europe about two years. On December 27, 1893, about a year after his return, plaintiff wrote him

as follows: "Pursuant to your request made several years since, I ^{ss} have continued my indorsement for your son Charles Eliot." Then follows a statement of the amount due, including items of interest for successive periods of renewal, the total being two hundred and thirty-eight dollars and thirty cents. He adds: "I hold your acceptance for two hundred dollars and interest seven per cent, dated November 26, 1889." The father answered: "Just before I went abroad, my son wrote, in answer to my inquiry, that I need give myself no concern about the matter of his note; and, perhaps too carelessly, I have not written to him about it since my return. You have certainly been very tolerant, and what you say is a matter of surprise to me. I will only add that, after hearing from my son, I will give you a more definite reply than I now do."

On January 7, 1895, plaintiff wrote: "Your son, Charles Eliot Pike, does not keep up payment on his note to me. There is now due upon your acceptance about two hundred and thirty-three dollars. Please let me know when you can arrange for payment, or part payment, on the same."

No answer was made to this letter, and the claim was put in the hands of an attorney for collection. On March 5, 1895, the father wrote, stating that he had been informed by the attorneys that they had for collection his acceptance made some time since in favor of his son. He added: "If my income during the last year had not been materially (though I hope only temporarily) diminished, I would do something at once toward paying my son's obligation (and incidentally my own)."

He then stated that his son expected to obtain funds to pay at least a part of the amount due. He added: "As to myself, in the event of my son's default, I cannot now see my way to make a payment of any part of the amount due until July. Mr. F. suggests that, if nothing is paid immediately, it might be needful to put the claim in judgment. But, while I do not wonder at your impatience, I hope you will not consider that step necessary." It will be observed that this letter was written about a year after the last extension of time to the son.

Here we have an absolute acknowledgment by the father of his ^{ss} liability. Such an acknowledgment waives the statute of limitation after the same has run: Wood on Limitations of Actions, sec. 68; 13 Am. & Eng. Encyc. of Law, 718, note 2. It is well settled that, where a surety has been released by an extension of time of payment without his consent, he may, without any new consideration, revive his liability by a new promise; at

least, if it is in writing: Brandt on Suretyship and Guaranty, sec. 300; Smith v. Winter, 4 Mees. & W. 454; Stevens v. Lynch, 18 East, 38; Fowler v. Brooks, 13 N. H. 240; Bramble v. Ward, 40 Ohio St. 267. We are of the opinion that an absolute and unqualified acknowledgment of the liability in writing will also revive the liability, and imply a new promise: See cases last above cited.

The point is made that the trial court has not found any such waiver of the release of the father, and has not been requested to make any additional finding to that effect. Whether or not this point is well taken we will not stop to consider, as the court below has misconceived the rights of the parties to such an extent and in so many respects that there must, in any event, be a new trial.

The order appealed from is reversed.

STATUTE OF LIMITATIONS.—A NEW PROMISE is implied from a general unqualified acknowledgment of a debt: Custy v. Donlan, 159 Mass. 245; 38 Am. St. Rep. 419. An unqualified acknowledgment of a debt as existing constitutes a new promise sufficient to take the debt out of the statute of limitations: Note to Ward v. Jack, 51 Am. St. Rep. 746.

STATUTE OF LIMITATIONS—SURETYSHIP.—A NEW PROMISE by a surety, after discharge, in consideration of forbearance for a definite term, to be holden for a longer period, is binding, and waives the discharge, though he had no knowledge of the matters discharging him, if there has been no fraudulent concealment, and if the principal was still liable when the new promise was made. A new promise by a surety, after discharge, with knowledge of the facts discharging him, is binding without any new consideration; otherwise, if he has no such knowledge: New Hampshire Sav. Bank v. Colcord, 15 N. H. 119; 41 Am. Dec. 685.

JOHNSON v. SALTER.

[70 MINNESOTA, 146.]

MECHANIC'S LIEN—GENERAL CONTRACT FOR BUILDINGS ON CONTIGUOUS LOTS—APPORTIONMENT—SEPARATE LIEN STATEMENTS.—If the purpose of a contract is to secure the building of a row of three houses of uniform material, style, and price, all to be erected and completed within the same time, upon one contiguous tract of land, the contract is general, in that it relates to and includes all of the houses. Hence, if the builder constructs the three houses pursuant to the purpose of this one general contract, he is not bound to apportion the amount of his lien between the several houses and file a separate lien upon each, particularly where the statute declares, in effect, that an apportionment and separate filing are not necessary in such a case.

MECHANIC'S LIEN—CONSTRUCTION OF WORDS, "GENERAL CONTRACT," IN STATUTE—BUILDINGS ON CONTIGU-

OUS LOTS.—The words "general contract," as used in a statute providing, in effect, that whenever any contractor furnishes labor and materials and erects two or more buildings on contiguous lots pursuant to the purposes of one general contract with the owner, it is not necessary to file a separate statement upon each building nor to apportion the amount of the entire lien between the several buildings, do not mean an entire and indivisible contract as to its consideration. They simply mean that the contract must be entire, in that it includes all of the buildings and provides for the erection of all of them, or some portions of all of them, pursuant to the purposes of the one general contract.

MECHANIC'S LIEN—STATEMENT—SUFFICIENCY OF. WHERE CLAIM IS ON LOT, BUT NOT UPON BUILDING.—A statement for a mechanic's lien is sufficient, where the building is erected upon the lot for the owner thereof, and a lien is claimed upon the lot, though the statement does not, in express terms, claim a lien upon the building. The building, as to the owner, is a part of the lot, and, where the latter is correctly described, a claim of lien upon the lot includes the building.

Appeal by the defendant, Salter, from an order denying a motion for a new trial.

Francis W. Sullivan, for the appellant.

Eckman & Stevenson, for the respondents.

149 **START, C. J.** This action was brought to recover from the defendant, Salter, the balance due to the plaintiffs for the erection of three frame buildings, and to have the amount thereof decreed to be a lien upon the three lots upon which the houses were erected.

Findings of fact and conclusions of law were made, whereby judgment was ordered for the plaintiffs, decreeing the entire amount claimed to be a lien as prayed. The defendant, Salter, appealed from an order denying his motion for a new trial. The trial court found that the defendant Salter was and is the owner of lots 356, 358, and 360 in block 111 Duluth proper, which are contiguous and contain less than one acre in area. That on September 20, 1895, the parties entered into a written contract, whereby the plaintiffs agreed to furnish all labor and materials and erect for the defendant two houses, one on lot 358 and one on lot 360, for the agreed price of sixteen hundred and forty-one dollars for the two. That by the same contract the plaintiffs also agreed to build an additional or third house on lot 356, for the same price pro rata as stipulated for the first two houses named, if the defendant should so elect within thirty days from the date of the contract. By the terms of the contract he reserved the right to add this third house to the contract. That on October 10, 1895, pursuant to the terms of the contract, the

defendant notified the plaintiffs to build the third house on lot 356, and between September 20, 1895, and December 3, 1895, the plaintiffs built the three houses on the three lots respectively, according to the terms of the contract. The first item for the erection of the two houses first named in the contract was furnished September 21, 1895, and for the third house October 10, 1895. That on February 7, 1896, the plaintiffs filed in the office of the register of deeds a lien statement, which was duly recorded, claiming a lien upon all three of the lots for a balance of fourteen hundred and thirty-six dollars due for labor and materials and extras furnished for the erection of the three houses pursuant to the contract.

The defendant assigns as error the receiving in evidence the lien statement and the record thereof, the finding that the three houses were erected under one contract, and the conclusion of law to the effect that the unpaid balance was a lien on the premises. The principal question raised by these assignments of error is, whether the ¹⁵⁰ three houses were erected under "one general contract," as that term is used in General Statutes of 1894, section 6235, which provides, in effect, that whenever any contractor furnishes labor and materials and erects two or more buildings on contiguous lots pursuant to the purposes of one general contract with the owner, it is not necessary to file a separate statement upon each building nor to apportion the amount of the entire lien between the several buildings. The three houses were all built under one contract. The contract was absolute as to the first two houses and the contract price was fixed at sixteen hundred and forty-one dollars. Upon the margin of the contract, and as a part of it, were written these words: "The right of the owner is reserved to add to the contract house number 3, at the same price pro rata as herein stipulated for the two, any time within thirty days from above date."

The owner, the defendant, Salter, by his architect, orally notified the plaintiffs to build the third house within the time limited, and they proceeded to do so, as already stated. There was no other contract as to house 3.

The evidence fully sustains the finding of the trial court that all three houses were built under one contract. The only difference in the terms of the contract as to the several houses was that as to the first two the contract was absolute, and as to the last one conditional—that is, it was not to be erected unless the defendant elected to have it added to the contract; when he so elected, the contract was absolute as to all of the houses, and its

terms applied equally to all. The defendant, however, claims that, conceding there was but one contract, it was not an entire and indivisible contract. It may be conceded, without so deciding, that the contract was not entire, in the sense that a failure to perform it in its entirety—for example, by failing to build one of the houses—would defeat a recovery for the other two, less any damages the defendant might sustain by failure to fully perform the contract; or, in other words, it may be conceded that the consideration for the performance of this contract was divisible. But this is not the test for determining whether the work and materials were performed and furnished “pursuant to the purposes of one general contract,” as the words are used in the statute.

¹⁵¹ Where a row of houses is to be built pursuant to one contract upon contiguous lots and of the same materials, and the work upon all is to be carried forward and completed within the same time, it might be impracticable for the contractor to keep a separate account of the materials and labor for each house, and file a separate lien for each. This statute was intended to relieve him from the necessity of doing so. To limit the operation of the statute by construction, and substitute therein the words “one entire contract” for “one general contract,” would defeat the very object of the statute. The purpose of the contract in question was to secure the building of a row of three houses of uniform material, style, and price, all to be erected and completed within the same time, upon one contiguous tract of land. The contract was general; that is, it related to and included all of the houses. The plaintiffs constructed the three houses pursuant to the purposes of this one general contract, and they were not bound to apportion the amount of their lien between the several houses and file a separate lien upon each.

The defendant claims that this conclusion is contrary to the decision of this court in the cases of *Reilly v. Williams*, 47 Minn. 590, *Miller v. Shepard*, 50 Minn. 268, and *Menzel v. Tubbs*, 51 Minn. 364.

In the first-named case, the contract provided for the erection of two houses of the same plan, and of equal value in labor and materials, upon each of two contiguous lots, for the sum of six thousand five hundred and eighty dollars for both. The contractor completed the contract, and, after being paid more than one-half of the contract price, released one of the lots; and it was held that he might file and enforce his lien for the balance due on the remaining lot, there being no third parties to be

prejudiced by the release of the other lot. There is nothing in the opinion indicating that the words "general contract," as used in the statute, are the equivalent of an entire and indivisible contract.

In the second case relied on, the section of the statute in question was neither involved nor referred to.

The last case (*Menzel v. Tubbs*, 51 Minn. 364) held that two owners in severalty of contiguous lots may by their acts connect them so as to constitute one lot, within the meaning of the lien law, as where they join in the construction of a single ¹⁵² building on both lots. The opinion refers to General Statutes of 1894, section 6235, for the purpose of showing that there was nothing in the statute conflicting with the conclusion reached by the court. The language used in this connection is this, page 369: "The section is treating of the case of two or more buildings united together, or of separate buildings on the same or contiguous lots, and the word 'general' is used with reference to such two or more or separate buildings; so that to support a claim of lien upon all of them the contract must be entire, so as to include them all, in order to connect them and make them one for the purpose of liens."

This language affords no support to the claim of the defendant that the words "general contract," as used in the statute, mean an entire and indivisible contract as to its consideration. On the contrary, it is strictly in harmony with the conclusion reached in this case. See, also, *Glass v. St. Paul etc. Co.*, 43 Minn. 228. The contract must be entire, in that it includes all of the buildings and provides for the erection of all of them, or some portions of all of them, pursuant to the purposes of the one general contract.

The further claim is made by the defendant that the description of the property upon which a lien was claimed in the lien statement was insufficient. The lots were correctly described upon which the statement showed the houses were erected, and a lien claimed thereon; but it was not stated in express terms that a lien was claimed on the buildings erected upon the lots. The buildings were erected upon the lots for the owner thereof, the defendant, and as to him they became a part of the lots, and a claim of a lien upon the lots included the buildings.

Order affirmed.

MECHANIC'S LIEN—DISCONNECTED BUILDINGS—ESSENTIALS OF CLAIM.—When materials have been furnished under a single and entire contract for a number of buildings erected on con-

iguous lots owned by the person to whom the material is furnished, a materialman's lien will attach to all the buildings and lots, and in an action to enforce such lien, it does not devolve upon the materialman to show how much of the material is placed in each building: Note to Salt Lake Lithographing Co. v. Ibox Mine etc. Co., 62 Am. St. Rep. 946. Compare monographic note to Pacific Rolling Mill Co. v. Bear Valley Irr. Co., 65 Am. St. Rep. 168, showing when a mechanic's lien may or must include property in addition to that upon which the work was performed, or the materials furnished.

MECHANIC'S LIEN.—A DESCRIPTION of property sufficient for identification is indispensable to a mechanic's lien, but the lien notice is sufficient, if it describes the premises and states the amount due, to whom, and from whom, and for what it is due: *Fernandez v. Burleson*, 110 Cal. 164; 52 Am. St. Rep. 75, and note.

STATE v. MYERS.

[70 MINNESOTA, 179.]

APPEAL—OBJECTION NOT MADE BELOW CANNOT BE FIRST URGED ON.—An objection to the admission of evidence not made on the trial cannot be urged on appeal for the first time.

JUSTICE OF THE PEACE—DOCKET ENTRIES—WHEN INFORMALITIES WILL BE DISREGARDED.—All informalities and inaccuracies in the entries on the docket of a justice of the peace will be disregarded if the meaning is ascertainable, and is conformable to law.

JUSTICE OF THE PEACE—DOCKET ENTRIES—EFFECT TO BE GIVEN TO.—Effect must be given to the entries in the docket of a justice of the peace according to the manifest intention of the justice in making them.

JUSTICE OF THE PEACE—JUDGMENT—ENTRY OF VERDICT, WITH COSTS AS TAXED, CONSTITUTES, WHEN.—The entry by a justice of the peace in his docket of the verdict of the jury, with the costs as taxed, is, in legal effect, a judgment; and it makes no difference that he inserted the costs in the body of his docket after, and as a part of, the verdict, where his manifest intention was, that the amount of the verdict and costs should constitute the judgment.

JUSTICE OF THE PEACE—EVIDENCE—VERDICT AS AN AID IN CONSTRUING DOCKET ENTRIES.—The original verdict of a jury before a justice of the peace is competent, relevant, and material as an aid in construing his docket entries.

Application for a writ of mandamus against Myers, a justice of the peace. It was made by the state on the relation of Mary Hanke. A peremptory writ was granted, and the defendant appealed.

W. S. Hammond, for the appellant.

Seager & Lobben, for the respondent.

¹⁸⁰ **START, C. J.** The appellant is a justice of the peace in and for Watonwan county, and as such has in his custody the

docket and files of A. Sturm, as a justice of the peace, his predecessor in office.

The relator, claiming that on August 16, 1895, she recovered a judgment for the sum of forty dollars and forty-seven dollars and thirty-nine cents costs in an action then pending before A. Sturm, as such justice of the peace, wherein she was plaintiff and Peter Stemper was defendant, and that such judgment was duly entered in the docket of the justice, duly demanded of the appellant that he issue an execution in her favor upon such judgment. He refused to do so. Thereupon the relator sued out an alternative writ of mandamus requiring the appellant to issue the execution, or show cause why he should not do so. The appellant answered the writ, admitting that he was in possession of the justice docket referred to, and that there was of record therein certain proceedings in the action named, but he denied that there was ¹⁸¹ any record of any judgment therein in favor of the plaintiff in such action. The trial court found that the relator did recover such judgment, and that it was of record in such docket, and ordered a peremptory writ to issue requiring the execution to be issued, from which order the appellant appeals.

On the trial the relator introduced, over the objection and exception of appellant, a writing in the following words:

In Justice Court.—A. Sturm, J. P.

State of Minnesota, }
County of Watonwan. }

Mary Hanke, Plff. }

vs. }

Peter Stemper, Deft. }

We, the jury in the above-entitled action, find for the plaintiff, and assess her damages \$40 00-100 dollars.

Dated August 16th, 1895.

A. WARNKE,
Foreman of the Jury.

There was no indorsement of filing on such writing, but both parties admitted the writing was one of the files in the action of Mary Hanke against Peter Stemper. The respondent objected to the writing being received as evidence, on the ground that it was "incompetent, irrelevant, and immaterial."

The docket shows the pendency of the action in question, the appearance of the parties, issue formed, and a trial by jury on August 16, 1895, and concludes with these words:

"Pleas made, and officers sworn, and the following verdict given by jury: 'We, the jury in the above-entitled action, find for the plft., and assess her damages at \$40.00 and costs; costs of this action \$47.39.

"A. L. WARNKE,

"Foreman of Jury.'"

On the margin of the docket there is an itemized statement of the costs in the case, showing the amount of fees due each officer separately. Included in the amount due to the justice is twenty-five cents for the judgment. The total costs so taxed were \$47.39, and were entered in the body of the docket. The appellant assigns as error the receiving of the verdict for the reason that it was not identified. Such was not the objection made to its admission ¹⁸² on the trial, and it cannot be urged on appeal for the first time. The original verdict was competent, relevant, and material as an aid in construing the docket entries.

The other assignments of error are to the effect that the finding of the trial court, that the justice rendered judgment for the plaintiff for forty dollars and forty-seven dollars and thirty-nine cents costs and entered it in his docket, is not sustained by the evidence. Reading the docket entries, including the marginal entries as to costs, in the light of the original verdict, it is evident from the docket that the justice taxed the costs and entered them in the body of the docket as a part of the verdict, intending that the amount of the verdict and costs added by him should constitute the judgment. Had the justice entered the verdict as it was returned, and added the words, "Judgment accordingly and for \$47.39 costs," it would have been a sufficient entry of the judgment. All informalities and inaccuracies in the entries on the docket of a justice of the peace will be disregarded if the meaning is ascertainable, and is conformable to law: *McGinty v. Warner*, 17 Minn. 23 (41).

The docket entries in this case show the rights adjudicated. The verdict of the jury fixed absolutely the amount of the recovery. The justice had no power over the verdict, and no discretion in the premises. He entered the verdict in his docket, and taxed and inserted the costs in his docket as a part of the verdict. This was informal, but no one can fail to understand from the docket that the plaintiff was entitled to recover forty

dollars damages and forty-seven dollars and thirty-nine cents costs. Effect must be given to the entries in the docket according to the manifest intention of the justice in making them, which was that the amount of the verdict and costs should constitute the judgment: See *Gaines v. Betts*, 2 Doug. (Mich.) 98, where the following entry was held to constitute a good judgment: "The jury returned with a verdict for the plaintiff for eighteen dollars damages, and costs of suit, taxed at five dollars"; also *Overall v. Pero*, 7 Mich. 315.

Order affirmed.

APPEAL.—OBJECTIONS NOT RAISED AT TRIAL cannot be urged for the first time on appeal: Note to *Greene v. Greene*, 59 Am. St. Rep. 567.

JUSTICE OF THE PEACE—JUDGMENT.—THE FORM OF THE ENTRY of a judgment in the docket of a justice of the peace is to be regarded as immaterial, when the truth is stated so as to be intelligible, especially where all formalities as to such an entry are dispensed with by statute. The judgment of a justice's court is not expected to be in perfect form. Matters of form, in such a judgment, are to be overlooked: *Davis v. Trump*, 43 W. Va. 191; 64 Am. St. Rep. 849, and note.

EVIDENCE.—THE RECORD OF A VERDICT is always admissible to prove the fact that such verdict was returned in any case where such fact becomes material: *Littleton v. Richardson*, 34 N. H. 179; 66 Am. Dec. 759.

BERG AND ANDSETH v. GREAT NORTHERN RAILWAY COMPANY.

[70 MINNESOTA, 272.]

REAL PROPERTY—NEGLIGENCE—PERSONAL INJURY FROM PRAIRIE FIRES—PROXIMATE CAUSE—CONTRIBUTORY NEGLIGENCE.—If an effort is made by a person to save his own property, which is in danger of destruction from fire negligently set by another, and he is burned in so doing, the negligent setting of the fire is the proximate cause of the injury, and the former may, if he was free from negligence, recover for such injuries from the latter; but it is otherwise if he was guilty of contributory negligence by rashly, recklessly, and unnecessarily exposing himself to danger.

Actions to recover for personal injuries. The court held that the plaintiffs were not entitled to recover, and each one appealed.

Charles S. Marden and M. R. Tyler, for the appellants.

William R. Begg, for the respondent.

²⁷⁵ MITCHELL, J. The defendant negligently set a fire on its right of way, which spread over the prairie and upon the premises of the plaintiff, Andseth. When he saw the fire coming, he and his hired man, Berg, went out to take measures to save from the approaching fire some haystacks belonging to Andseth and situated on his own land. They went to one stack and burned a firebreak around it, and then went to another stack about sixty rods distant and were attempting to do the same thing there when they discovered that the fire was rapidly approaching them. The fire being then on three sides of them and the land on the fourth side being covered with a heavy growth of dry grass, they rushed through the fire on a side where the grass had been cut, leaving nothing but the dry stubble, but, in doing so, their persons were quite seriously burned.

²⁷⁶ These actions were brought to recover for these personal injuries. The court found that the plaintiffs were guilty of contributory negligence, and on that ground held that they were not entitled to recover. The questions presented by these appeals are: 1. Whether the evidence justified this finding; and 2. Whether the negligence of the defendant was the proximate cause of the injuries complained of.

Referring first to the second question, we are of opinion that, leaving out of consideration for the present the question of plaintiffs' contributory negligence, there was no intervention of another independent agency inflicting the injury, to break the causal connection between the negligent act of the defendant and the injuries suffered by the plaintiffs. It may be true that if the plaintiffs had remained where they were when they discovered the fire approaching, and made no effort to save the stacks, they would not have been injured. But, assuming that they acted with reasonable prudence and care, plaintiffs' effort to save the property was a mere condition, and not the cause of these injuries. In making reasonable efforts for that purpose they would be doing, not only what the law authorized, but what their duty to the defendant required; and if, in doing this, they sustained injury, the defendant, which was responsible for the fire, would be liable. Its negligence would be the proximate cause of the injury.

This doctrine has been held and applied under so great a variety of circumstances that we shall only cite two cases in which it has been applied to "fire cases" like the present—*Liming v. Illinois Cent. R. R. Co.*, 81 Iowa, 246; *Rajnowski v. Detroit etc. R. R. Co.*, 74 Mich. 20; 78 Mich. 681. We have confined the de-

cision to the particular facts of this case, but do not wish to be understood as holding that the rule would be different had plaintiffs attempted to save the property of another.

2. But, as in every other case, if the plaintiffs were guilty of contributory negligence, by rashly, recklessly, and unnecessarily exposing themselves to danger in a manner which a reasonably prudent man would not have done under like circumstances, they cannot recover. No fault is found with what they did after they attempted to escape, but the claim is that they were negligent and ²⁷⁷ even reckless and foolhardy in continuing their efforts to save the stack until all means of safe escape were cut off. We think that, under the evidence, this was a question of fact, upon which the court's finding cannot be disturbed. The rapidity with which these prairie fires travel, the fitful manner in which they are liable to change their course with every changing gust of wind, are matters of common knowledge and must be presumed to have been known to the plaintiffs as men of ordinary intelligence.

The evidence tends to show that the fire was traveling rapidly—faster than the plaintiffs could run—and that this fact was known to them; that they made no effort to escape until the fire was in close proximity to them on three sides, and that on the fourth side there was a heavy growth of grass, and consequently to run in that direction would be almost sure death. Their only excuse for remaining so long is that, when they commenced work, the main fire had passed by them; but that there was a change in the wind that suddenly drove the fire back on them. But it is a matter of common knowledge that these changes are of not infrequent occurrence, especially when there is some local agency, such as a large fire, liable to produce atmospheric disturbances. It does not appear that there was anything unusual or extraordinary about this change. If human life or even property of great value had been at stake, plaintiffs would have been justified in taking greater risks; but all that was involved was property of comparatively small value. Under all the circumstances, we are unable to say that the finding of the court was not justified by the evidence.

Both of the judgments appealed from are affirmed, but statutory costs to be taxed only in one.

REAL PROPERTY—LIABILITY FOR FIRES WHICH SPREAD UPON ANOTHER'S LAND.—The owner of land firing a prairie thereon must use reasonable precautions to prevent injury to others, and is liable for a failure to do so: *Johnson v. Barber*, 5 Gilm. 425; 50

Am. Dec. 416. If negligence exists, either in setting or caring for the fire, and injury to another happens therefrom, liability attaches: *Brummit v. Furness*, 1 Ind. App. 401; 50 Am. St. Rep. 215. See monographic note to *McNally v. Colwell*, 30 Am. St. Rep. 501, on the liability of a private person for fires. See, also, the note to *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 823-828, discussing proximate and remote cause with respect to the spread of fires.

HANSON v. HARTSE.

[70 MINNESOTA, 282.]

SALE—ANIMAL FIT FOR HUMAN FOOD—"LUMPY JAW"
—**IMPLIED WARRANTY.**—In selling a fat steer to a retail butcher, whose business is to buy and slaughter cattle, and to sell the meat to his customers to be used by them for food, there is no implied warranty that the animal is fit for food, although the seller knows the purpose for which the animal is bought. Hence, the buyer cannot recover on such a warranty, although the animal has a disease called "lumpy jaw," which renders its flesh unwholesome and wholly worthless for food.

Action for damages, which resulted in a finding for the plaintiff. The lower court made an order granting a motion for a new trial unless the plaintiff would consent to take judgment for thirty-one dollars, and, in case of such consent, denying a new trial. The defendant appealed.

F. H. Peterson, for the appellant.

C. M. Johnston and J. F. Keene, for the respondent.

²⁸² **MITCHELL, J.** According to the allegations of the complaint, as well as the uncontradicted evidence, the plaintiff was a retail butcher, whose business was to buy and slaughter cattle, and sell the meat to his customers to be by them used for food. The defendant was a farmer and the owner of a fat steer. The complaint alleges that plaintiff bought the steer of the defendant for the purposes of his business; ²⁸⁴ that at the time of the purchase the animal was affected with the disease known as "lumpy jaw," and was wholly worthless and unfit for food, all of which facts were well known to the defendant; but that defendant, well knowing the diseased condition of the steer and the purposes for which the plaintiff was buying it, did wrongfully, and for the purpose of deceiving the plaintiff, withhold and conceal from plaintiff the fact that the animal had "lumpy jaw," but on the contrary did, with intent to defraud the plaintiff, misrepresent the true condition of its health, there-

by inducing him to purchase it. This action was brought to recover damages, measured by the sum paid for the steer and the expenses of employing a veterinary surgeon to examine the animal and of destroying its carcass.

It will be observed that the action was essentially one of tort for fraudulent representations as to the condition of the animal and the fraudulent concealment of its diseased condition. There was neither allegation nor proof of any express warranty that the animal was fit for human food.

The evidence was undisputed that the animal had the disease known as "lumpy jaw," and hence that its flesh was unwholesome and wholly worthless for food; also that plaintiff and defendant both knew before the sale that it had a lump on one of its jaws which plaintiff himself examined before he made the purchase. We think the evidence was also conclusive that defendant knew the purposes for which plaintiff was purchasing the steer. Assuming, without deciding, that the evidence would have justified the jury in finding that the defendant knew or had good reason to believe that this lump was the result of the disease called "lumpy jaw," and that the flesh of the animal was unwholesome, and fraudulently concealed this fact from the plaintiff for the purpose of inducing him to buy, yet the evidence on that point was certainly not conclusive. Neither was that question submitted to the jury.

The court submitted the case to the jury exclusively upon the theory that there was an implied warranty on part of the defendant that the meat of the animal was fit for domestic use, and instructed them that if they found that the meat was diseased and unfit for use as food (upon which the evidence was undisputed), the ²⁸⁵ plaintiff would be entitled to recover, unless they also found that at the time of the sale he was advised by the defendant that the animal had a disease that made the meat unfit for the purposes for which the plaintiff intended to use it. As there was no evidence that the defendant so advised the plaintiff, the charge of the court amounted to an instruction to find for the plaintiff, which the jury did. Hence the charge of the court can only be sustained upon the ground that on the facts there was an implied warranty on part of the defendant that the animal was fit for food.

The doctrine of an implied warranty on the sale of articles intended for food, if it exists at all, does not extend beyond the case of a dealer who sells provisions directly to the consumer for domestic use. It does not extend to sales between dealers,

whether wholesale or retail, or to sell again and not for consumption by the immediate buyer.

We are not aware of any well-considered case to the contrary. While there are expressions in some of the cases which seem to favor a contrary rule, yet we think that an examination will show that in most of them it appeared that the seller knew or had reason to suspect at the time of the sale that the article was unsound and unfit for food, and concealed that fact from the buyer, and hence that the action was really one for deceit and not on a warranty. Indeed, it has been urged by able authorities that the doctrine of an implied warranty, even in the sale of provisions by a dealer to the immediate consumer, had its origin in the United States in a misconstruction of the meaning of the language used in 3 Blackstone's Commentaries, 165. the claim being that the author only had reference to an action for deceit. And Mr. Benjamin in his work on Sales, section 670 et seq., argues very forcibly that in England the responsibility of a victualer, butcher, or other dealer in articles of food to the immediate consumer for selling unwholesome food was one imposed by statute, and did not arise out of any contract of implied warranty.

There may be considerations of public policy which should take sales by dealers in provisions for immediate consumption by the purchaser out of the general rule of caveat emptor, but the exception to the rule certainly does not extend beyond that. This is not a new question in this court: *Ryder v. Neitge*, 21 Minn. 70. See ²⁸⁶ *Howard v. Emerson*, 110 Mass. 320; 14 Am. Rep. 608; *Giroux v. Stedman*, 145 Mass. 439; 1 Am. St. Rep. 472; Benjamin on Sales, Am. note 647, 648.

We are referred to General Statutes of 1894, sections 6805, 6979, 6982, as changing the common-law rule, but we find nothing in them that has any bearing on the question.

Order reversed.

SALES—ANIMALS—IMPLIED WARRANTY OF FITNESS FOR FOOD.—There is no implied warranty that a cow, sold by a farmer to retail butchers, is fit for food, although he knows that they buy her for the purpose of cutting her up into beef for immediate use: Note to *Giroux v. Stedman*, 1 Am. St. Rep. 475. This case shows that there is no implied warranty that hogs are fit for food, where farmers, who are not dealers in provisions, kill the hogs and sell them, knowing that the purchasers intend them for domestic use.

WALLACE v. CARPENTER ELECTRIC HEATING MANUFACTURING COMPANY.

[70 MINNESOTA, 321.]

CORPORATIONS—INSOLVENCY—LIABILITY OF HOLDERS OF "WATERED" STOCK—EQUITABLE RIGHTS OF CREDITORS.—If a corporation issues stock as fully paid up, when in fact it is not, and afterward becomes insolvent, the original holders of such "watered" stock, as well as their transferees with notice, are answerable to a creditor, who became such after the stock was issued, for the difference between the par value of the stock and the amount paid the corporation therefor to the extent necessary to satisfy his claim, and the creditor is entitled to maintain an action in equity to compel such stockholders to pay his claim, on the ground that the stock of the corporation was fraudulently issued as fully paid up, when in fact it was not.

CORPORATIONS—INSOLVENCY—SALE OF STOCK BELOW PAR—CONSTRUCTION OF STATUTES.—If the price at which the stock of a corporation may be sold is already fixed by a former statute, at a price to be not less than par, a subsequent statute giving authority only to create, issue, and dispose of such an amount of paid-up, special, or preferred stock as the directors may deem advisable, does not authorize the corporation to issue its stock as fully paid up, and to sell it for less than par, and on such terms as its directors deem advisable.

CORPORATIONS—INSOLVENCY—SUIT AGAINST HOLDER OF "WATERED" STOCK—BURDEN OF PROOF.—A judgment creditor who seeks to collect his debt against an insolvent corporation from the holder of "watered" stock must assume the burden of showing that he acquired his stock in good faith, without actual notice of facts making its issue fraudulent as to him, or that he purchased it from a bona fide transferee.

CORPORATIONS—SHARES OF STOCK—NEGOTIABLE PAPER.—A certificate of shares in a corporation is not negotiable paper.

Action against the Carpenter Electric Heating Manufacturing Company and the American Electric Heating Corporation to ascertain and enforce the liability of the heating corporation for unpaid installments on the stock of the manufacturing company owned by it, in case the heating corporation failed to pay a judgment in favor of the plaintiff against the manufacturing company, the amount of which was something over five thousand five hundred dollars. The action was dismissed, and the plaintiff appealed.

W. S. Dwinnell, for the appellant.

Otto Kueffner, for the respondents.

³²⁴ **START, C. J.** This is an equitable action by a judgment creditor to enforce payment of his judgment by a stockholder of the debtor corporation ³²⁵ on the ground that its stock

was fraudulently issued as fully paid up, when in fact it was not.

The material facts, as found by the trial court, are substantially these: The plaintiff on October 31, 1895, recovered judgment for \$5,587.71 against a corporation of this state known as the "Carpenter Electric Heating Manufacturing Company," which will be designated as the "Carpenter company." The judgment has never been paid. The capital stock of the defendant Carpenter company was \$400,000, divided into 4,000 shares of the par value of \$100 each. Prior to the recovery of such judgment the other defendant herein, the American Electric Heating Corporation, which will be designated as the "American company," purchased and became and now is the owner of 3,946 shares of the stock of the Carpenter company, and immediately thereafter the latter sold all of its assets for full value to the American company. Shortly prior to May, 1891, a third corporation, which for brevity we designate the Nevins company, then owning certain letters patent upon devices used in manufacturing electric heating apparatus, entered into a written contract with George H. Finn, whereby the Nevins company granted to Finn and his assigns the exclusive right to manufacture and sell, and also the right to sell to others the right to use, this patented device; also all other like patented devices the Nevins company might thereafter acquire.

In consideration of this grant, Finn agreed to pay to the Nevins company a royalty of twenty-five per cent of the list prices of all goods manufactured thereunder. He also agreed to organize a corporation for the manufacture of such devices with a nominal capital stock of \$400,000, to which corporation he would transfer the license so obtained, and pay such corporation \$5,000 for developing the devices and carrying on the business of such corporation, for which he or those named by him should receive 1,500 shares of the full-paid capital stock of the new corporation, and cause 1,000 other shares of such stock to be issued and delivered to the Nevins company. The remaining 1,500 shares of stock were to be held in trust and sold for the benefit of the corporation.

Finn, pursuant to such contract, organized the Carpenter company in May, 1891, and immediately upon its organization paid to ~~the~~ it \$5,000, and transferred to it all the rights acquired by him under his contract with the Nevins company, and in consideration thereof the Carpenter company issued to Finn 4,000

shares of its capital stock, purporting to be full paid stock, upon condition that he should transfer 1,000 shares thereof to the Nevins company, and 1,500 shares to a trustee, to be held and known as "treasury stock," and sold for the benefit of the corporation issuing it. He so transferred the 1,000 shares and the 1,500 shares, and received and retained for himself and associates the remaining 1,500 shares of this stock. The 1,500 shares of treasury stock were sold for the benefit of the Carpenter company for \$25,000, and no more. Other than as here stated, no consideration was paid to the Carpenter company for the 4,000 shares of its capital stock. The value of the license and right so transferred by Finn to the Carpenter company was at the time worth no more than he had so agreed to pay therefor.

The defendant, the American company, when it acquired the title of the 3,946 shares of the Carpenter company stock, had full notice and knowledge of the circumstances under which the original 4,000 shares of stock were issued, and the consideration paid therefor; but it did not appear that the American company acquired title to any of this stock from the persons who originally took the same, except the 1,000 shares transferred to the Nevins company in payment of the license, nor did it appear that any of the parties other than the Nevins company, from whom the American company acquired its stock, had any knowledge of the facts under which the 4,000 shares were originally issued, or that they did not in good faith believe that such shares of stock were paid for in cash at their par value when issued. This negative statement of what did not appear, inserted by the trial court in its findings of fact, interpreted in the light of the evidence, means simply this: that neither party offered any evidence as to whether or not the parties, except the Nevins company, from whom the American company acquired its shares of stock, were or were not bona fide purchasers of the stock for value, without any notice that it was not in fact fully paid for when it was originally issued.

³²⁷ Upon these facts, the trial court, as a conclusion of law, held that the plaintiff was not entitled to any relief, and that the action be dismissed. Judgment was so entered, from which the plaintiff appealed.

The decision of the trial court was based upon two grounds: (a) That General Statutes of 1894, section 3415, authorizes a manufacturing corporation to issue its stock as full paid, and dispose of it at less than par and on such terms as its directors deem advisable; (b) That, although the defendant, the American

company, had notice of the circumstances under which its stock was originally issued and the consideration paid therefor when it purchased the stock, yet, if it acquired the stock from bona fide purchasers, the latter would be protected, and their equities would inure to the benefit of the American company, and it would also be protected. This last ground necessarily implies that the burden of proof was upon the plaintiff to show that the transferrers of the American company were not bona fide purchasers of the stock, for there was no finding or evidence that they were such.

If either of the reasons are good, it follows that the trial court's conclusion of law is sustained by the facts found; but, if both are untenable, such facts do not sustain the judgment rendered.

1. The respondent, however, does not concede this, but claims that the trial court found that the stock of the Carpenter company was paid for in full when issued; that the plaintiff failed to show any fraudulent issue of stock or overvaluation of the property taken in payment of it; that the trial court refused to find any fraud.

If these claims are justified by the record, the judgment in this case is right, whether the reasons assigned by the court for its decision are correct or not.

The finding of the court was that the stock was "issued as purporting to be full paid stock," not that it was in fact fully paid for. While the court did not find in express words that there was a fraudulent issue of stock as to creditors of the corporation, and an overvaluation of the property received in payment of the stock, it found the facts from which such a conclusion necessarily and legally follows.

It expressly found that the license and rights transferred to the ²²⁸ Carpenter company by Finn were worth no more than he agreed to pay therefor. He agreed to pay \$5,000 therefor, and cause 1,000 shares of stock of the corporation to be organized (the Carpenter company) to be issued to the Nevins company as fully paid up. Hence the Carpenter company received only \$5,000 for the \$150,000 of stock issued to Finn, and he never paid in money or property any greater sum therefor, and for the \$150,000 of treasury stock the corporation received only \$25,000; that is, for \$300,000 of its stock the Carpenter company received only \$30,000, or an average of \$10 per share, and for \$100,000 of its stock it received the exclusive right to manufacture and sell the devices covered by the patent by paying a royalty of twenty-five per cent of the list prices of all goods.

manufactured. It commenced business by falsely and intentionally representing to the commercial world that it had a paid-up capital of \$400,000, when, taking the most favorable view for the corporation of the admitted facts, it had been paid only \$130,000 in money and property for the whole of its stock, or less than one-third of its par value. Upon the facts found by the trial court, it is idle to claim that the issuing of the stock of the Carpenter company as paid up was an honest transaction. There was no room for any honest mistake of judgment in the premises. It was upon the facts found from its inception a gross fraud, as a matter of law, unless it was expressly authorized by the statute.

While the precise date when the plaintiff's debt was contracted was not found by the court, yet it necessarily follows, from the finding of the court that the whole stock was issued as purporting to be fully paid immediately upon the organization of the corporation, that the plaintiff's debt was contracted after the stock was so issued. The findings of fact, then, bring this case within the principles laid down in the former decisions of this court, and the plaintiff is equitably entitled, to the extent necessary to pay his judgment, to charge the American company with the difference between the par value of its stock and the amount paid the Carpenter company therefor: *Hospes v. Northwestern Mfg. Co.*, 48 Minn. 174; 31 Am. St. Rep. 637; *Hastings Malting Co. v. Iron Range Brewing Co.*, 65 Minn. 28.

2. This brings us to the question whether General Statutes of 1894, section 3415, authorizes, as respondent claims, manufacturing and other corporations ³²⁹ to issue their capital stock as paid up when it is not in fact. The section reads thus: "Corporations having capital stock divided into shares, unless specially authorized, shall not issue any shares for a less amount to be actually paid in on each share than the par value of the shares first issued; provided, that railroad and navigation and manufacturing corporations, and corporations for buying, holding, improving, selling, and dealing in lands, tenements, hereditaments, real, mixed, and personal estate and property, created or organized under this chapter, or under any charter or special act of incorporation heretofore passed, shall have power to create, issue, and dispose of such an amount of special, preferred, or full paid stock of the capital stock of such corporation as may be deemed advisable by the board of directors of such corporation; provided, that any corporation may, by its articles of incorporation or by any amended article of its articles of incorpora-

tion, provide for special, preferred, and common stock, or special or preferred and common stock, of the capital stock of such corporation; and any corporation heretofore or hereafter organized without changing its articles of incorporation may issue its capital stock as a part special and a part preferred and a part common, or a part common and a part either special or preferred, by direction of its board of directors, when so authorized by a majority of its stockholders at its annual meeting or at a meeting called for that purpose; and said board of directors, when so authorized by said meeting of said stockholders, may give such preference as it may deem best to such special or preferred stock, or such special and preferred stock."

So much of this statute as precedes the first proviso is the original section, as enacted by General Statutes of 1866, chapter 34, section 163. The first proviso was enacted by Laws of 1867, chapter 18, section 2, and amended by Laws of 1887, chapter 49. The second proviso was added by Laws of 1891, chapter 71.

It is claimed by the respondent that the effect of the proviso is to take corporations therein mentioned out of the operation of the statute as it was originally enacted, and that the section as it now stands authorizes such corporations to issue their stock as full paid, and dispose of the same for less than par and on such terms as their board of directors may deem advisable; that is, that the statute authorizes such corporations to issue fictitious stock and thereby obtain a false credit.

A certificate for paid-up shares in a corporation is simply a written statement in the name of the corporation that the holder thereof ^{is} is a stockholder, and that the full par value of his shares has been paid to the corporation. If the shares in fact have not been so paid for, the certificate that they have been is a false representation that assets of the corporation have been increased to the amount of the par value of the stock so issued. And when a corporation represents that it has a paid-up capital of a given amount, it represents to the business world that at the time it issued the stock it received money or property to the full par value of its stock. The issuing of the stock of a corporation as paid up when it is not so in fact is a public and a private wrong—a cheat and a fraud—which enables the corporation to obtain credit and property by false pretenses.

Ethically, the legislature might with the same propriety authorize an individual to misrepresent his assets for the purpose of obtaining credit as to authorize a corporation, other than a mining corporation, to issue watered stock. Therefore, while

the meaning of this statute is not entirely clear, it ought not to be construed, unless the express language used leaves us no other alternative, so as to impute to the legislature an intention to legalize a practice denounced by courts and text-writers as immoral, contrary to public policy, and illegal independent of any statute prohibiting it.

The only basis for claiming that this statute authorizes the issuing of paid-up stock contrary to the fact is that the proviso is an exception to the prohibition against issuing any stock unless fully paid; hence it is urged that no effect can be given to the proviso unless it legalizes the issuing of stock as paid in full when it is not. The language of the proviso is: "Shall have power to create, issue and dispose of such an amount of special, preferred, or full paid stock . . . of such corporation as may be deemed advisable by the board of directors of such corporation."

If the words "full paid" were omitted from the proviso, would it leave the proviso without effect—a nullity? Clearly not, for the meaning would then be clear. The proviso then would authorize the corporation to create, issue, and dispose of such an amount as its directors deemed advisable of special or preferred stock; that is, stock having a preference or special rights over the other stock of ³³¹ the corporation. The proviso with the words "full paid" omitted, taken in connection with the statute to which it was added, would not be susceptible of any reasonable construction except that it authorized the creation and sale at not less than its par value of special and preferred stock. Restore the omitted words to the proviso, and read the statute as a whole, and its meaning is precisely the same.

The purpose of the proviso was to authorize the creation and sale of special or preferred stock. The proviso does not assume to deal with the price at which the stock authorized to be issued may be sold. That was already provided for by the original statute which required the price to be not less than par. It does not, by its language or necessary inference, authorize the directors to dispose of any of the stock on such terms as they deem advisable; but the sole authority is to create, issue, and dispose of such an amount of paid-up, special, or preferred stock as they deem advisable. This is the proper construction of the statute.

There is no suggestion in the statute that stock of any class may be issued as paid up if it is not so in fact. The language is "full-paid stock"; that is, stock which has been paid for at its

full par value. The second proviso to this statute, in which the words "full paid" are omitted, is a legislative construction of the first proviso, for it deals with the subject of issuing special or preferred stock, omitting the words "full paid."

Our conclusion that General Statutes of 1894, section 3415, does not authorize, but forbids, the issuing of stock by the corporations therein named as fully paid up when such is not the fact, is supported by the cases of *Hastings Malting Co. v. Iron Range Brewing Co.*, 65 Minn. 28, and *Rogers v. Gross*, 67 Minn. 224. In the first case cited it was expressly held that the corporation was exclusively a manufacturing corporation, and the question was directly involved as to the liability to creditors of stockholders who received their stock as fully paid when such was not the fact; and the conclusion reached is based upon the proposition that a manufacturing corporation was not authorized to issue its stock as paid up when it was not in fact. It is true, however, that this proviso to the statute invoked in this case was not referred to or discussed by counsel or court in either ²²² of the cases cited; hence we have treated the question as an open one.

3. The last reason urged in support of the conclusion of law of the trial court is that no evidence was offered to show that the defendant, the American company, did not purchase its stock of parties who were bona fide purchasers without notice; hence it does not appear that the plaintiff's equities are superior to those of the defendant.

This places the burden of proof on the wrong party. If the defendant purchased of a bona fide transferor it knows that fact better than any one else. A certificate of shares in a corporation is not negotiable paper. But the weight of authority seems to be to the effect that where the equities of a creditor of a corporation come in conflict with those of a bona fide purchaser without notice of the shares of the corporation issued as paid up when such is not the fact, the equities of the latter will prevail.

It is not necessary in this case to decide this question, for all of the authorities agree that a purchaser who acquired his shares of watered stock with notice of the facts as to their issue is liable to the creditors of the corporation to the same extent as the original subscriber: 2 Morawetz on Private Corporations, sec. 824; 2 Thompson on Corporations, sec. 1685; 1 Cook on Stocks and Stockholders, sec. 49. If the defendant's transferor was a bona fide purchaser, and the defendant wished to assert his —

equity to defeat that of the plaintiff, the burden was clearly upon it to establish the equity. Such would be the case even if certificates of stock were negotiable paper: *Cummings v. Thompson*, 18 Minn. 228 (246); *Merchants' Exch. Bank v. Luckow*, 37 Minn. 542; *Bank of Montreal v. Richter*, 55 Minn. 362.

The defendant neither by its answer nor evidence asserted or even suggested that its transferrer was a purchaser without notice. On the contrary, it denied in its answer that it ever owned or held any of the stock of the Carpenter company. The court, then, cannot, for the purpose of defeating the equities of the plaintiff, assume without evidence that the defendant's transferrer was a bona fide purchaser.

It follows that the trial court's conclusion of law was not sustained by its findings of fact, and that the judgment must be reversed, ³²³ and this case remanded to the district court with direction to amend its conclusions of law in accordance with this opinion, and enter judgment for the plaintiff.

So ordered.

CORPORATIONS—UNPAID STOCK—LIABILITY OF STOCK-HOLDERS.—A stockholder is liable until his stock is fully paid up. He is liable for unpaid stock, whether he is a purchaser or an original subscriber; and cannot escape liability for existing debts by transferring his stock, for a purchaser of stock, which has not been fully paid up, is liable to the same extent as the party who transfers it to him. Creditors have a right to presume that stock subscribed has been or will be paid up, and, if it is not, a court of equity will, at their instance, require it to be paid: *Note to Sprague v. National Bank*, 64 Am. St. Rep. 34. Compare monographic note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 838, 855, on the liability of stockholders to creditors of corporations for corporate debts.

STATE v. BANK OF NEW ENGLAND.

[70 MINNESOTA, 396.]

BANKS—INSOLVENCY—ONE WHO HOLDS STOCK AS COLLATERAL SECURITY IS A STOCKHOLDER—LIABILITY.—One who holds a certificate of stock in a banking corporation as collateral security for a debt is, under the Minnesota statute, answerable as a stockholder, and is liable for debts of the corporation in an amount equal to double the amount of stock standing in his name upon the books of the bank during the time he holds the stock and for one year after any transfer thereof by him. Hence, if the bank becomes hopelessly insolvent during that time, the statutory liability may be enforced against such stockholder.

Action to enforce the statutory liability of a stockholder. The state was a creditor of the bank, and upon its application a

receiver was appointed for the bank. On behalf of the creditors of the bank, one J. A. Hanson was allowed to intervene in the receivership action. One J. Frank Calhoun, who held stock in the bank as collateral security for the payment of a debt, was found to be a stockholder, and he appealed.

Bartleson & Paul, for the appellant.

C. H. Childs and W. S. Dwinnell, for the respondent.

400 BUCK, J. J. A. Hanson, as intervenor and as plaintiff, in his own behalf and in behalf of numerous other creditors of the defendant bank, brought this suit against the stockholders thereof to enforce their statutory liability.

The Bank of New England was incorporated under the laws of this state in the month of January, 1892, with a capital of fifty thousand dollars. In June, 1892, the stockholders voted to increase the capital stock to one hundred thousand dollars, and it is a part of this increased capital stock that was claimed to have been held by the defendant Calhoun. There was no dispute but what the bank was hopelessly insolvent and suspended payment on June 26, 1893, and made a general assignment of all its property, under the insolvency laws of this state, on July 6, 1893, and ever since has been insolvent. The main facts as to this claim and Calhoun's liability are embraced in the finding of the trial court as follows: "The court further finds that certificate No. 98, for fifty shares of the capital stock of said bank hereinbefore found to have been issued to J. Frank Calhoun, was made out in the name of said Calhoun and dated the first day of July, 1892; that said certificate was not delivered to said Calhoun until the fourteenth day of September, 1892, and probably was not actually issued until about that time, at which time A. J. Blethen, who was then president of the bank and manager of its business, requested a loan of four thousand five hundred dollars from said Calhoun, and agreed to secure said loan with a certificate of the stock of the Bank of New England of the par value of five thousand dollars; that on said day said Calhoun made said loan to said Blethen, and said Blethen thereupon executed his note for four thousand five hundred dollars, payable to said Calhoun, and at the same time delivered to him said stock certificate No. 98, made out in said Calhoun's name and bearing date July 2, 1892, as aforesaid; that on the 23d of November, 1892, said Blethen paid said note of four thousand five hundred dollars and said Calhoun thereupon sur-

rendered to him said certificate No. 98, the same having been indorsed in blank by him, and said certificate was returned to said bank and canceled; that during said time from the 14th of September to the twenty-third day ⁴⁰¹ of November, 1892, said Calhoun was in possession of said certificate of stock, and had knowledge of its recitals and contents, but he did not know that the same had been issued as a part of the increased stock of said bank; that he never subscribed for nor took said stock with knowledge that the same was a part of the increased stock of said bank, nor for any other purpose than as a collateral security for the payment of said note."

Under these facts, the court found, as a conclusion of law, that Calhoun became and was a stockholder, and liable as such, and the only question presented is whether, upon these facts, he was a stockholder within the meaning of the statute.

General Statutes of 1894, section 2501, in part, reads as follows: "The stockholders in each bank shall be individually liable in an amount equal to double the amount of stock owned by them for all the debts of such bank, and such individual liability shall continue for one year after any transfer or sale of stock by any stockholder or stockholders."

Within the time fixed by the statute imposing this liability upon stockholders, there were fifty shares of the stock in the defendant bank standing in Calhoun's name upon the books of the bank; and if, during such time, he was the actual owner thereof, he was liable for the debts of the bank, under the terms of the statute above quoted, if the bank was then insolvent. Nor is he relieved from this liability as a stockholder because he held the certificate of stock in question as collateral security for a debt. Thompson on Liability of Stockholders, section 223, citing numerous authorities to sustain this position, says:

"The reason why the courts so hold, briefly, is that a man cannot become the legal owner of stock, receive dividends, vote at elections, and enjoy all other rights appertaining to the ownership of it, without shouldering the liabilities attaching to such a position. Another good reason is, that he will not be suffered to hold himself out to the public as the owner of stock, and afterward deny that relation. Besides, if creditors were compelled to look beyond the legal title, they could never know against whom to proceed, and it would embarrass them in the pursuit of their rights to compel them to inquire into equities which might exist between the stockholder and some third person": See, also, Pullman v. Upton, 96 U. S. 328; National Bank v. Case, 99 U. S. 628.

⁴⁰² Even if these things were not done by Calhoun, he had the rights appertaining to the ownership of the stock, and the right, as a stockholder, to demand or accept the benefits should impose upon him the duty of shouldering the burdens. That he accepted the stock and used it is unquestioned. It is not a question of whether he paid for the stock, and had it issued in his own name, with the intent to become a stockholder in the bank, but whether the liability did not accrue when he permitted himself to be held out to the public as a stockholder, by accepting the stock in his own name, and allowing it so to stand upon the books of the corporation. Parties dealing with corporations have a right to assume that one representing himself to the world as a stockholder in such corporation, by permitting his name to stand on its books as such, must take the responsibilities of the situation.

If the business of the corporation had been profitable, he would have been entitled to have enjoyed the same; but when the business ceases to be profitable, and the ordinary assets of the bank are insufficient to meet the legal and just demands of creditors, he is bound to respond to the liability imposed by statute. The opinion in the case of *Burgess v. Seligman*, 107 U. S. 20, cited by appellant as holding to the doctrine that one who accepts a certificate of stock issued directly upon the agreement that it is to be held only as collateral security is not thereby rendered liable as a stockholder either to the company or its creditors, is based upon the statute of the state of Missouri, and is not in point in this case.

Nor is there any merit in the contention of appellant that the stock in question was reissued to Davidson and Olson prior to the date of its surrender by the appellant.

The question of rights or liability between the transferrer and transferees is not in issue here, and the rights of creditors cannot be affected by any discrepancy between the dates of cancellation and reissue of the certificates of stock. The certificate was delivered to Calhoun September 14, 1892, made out in his name, although dated July 2, 1892; and he kept possession thereof until November 23, 1892, when he surrendered it, and, in less than a year after it was delivered to him, the bank became hopelessly insolvent, and thus the statutory liability sought to be enforced against him ⁴⁰³ accrued within the time fixed by law rendering him liable as a stockholder.

Judgment affirmed.

Liability of Persons Holding Stock as Collateral.

It is thoroughly established that one to whom stock has been transferred in pledge, or as collateral security for money loaned, and who appears on the books of the corporation as the owner of the stock, is liable as a stockholder for the benefit of creditors: *Pauly v. State Loan etc. Co.*, 165 U. S. 606; *National Bank v. Case*, 99 U. S. 628; *Pullman v. Upton*, 96 U. S. 328; *Tuthill Spring Co. v. Smith*, 90 Iowa, 331; *National Commercial Bank v. McDonnell*, 92 Ala. 387; *Ball Electric Light Co. v. Child*, 68 Conn. 522; *Bowden v. Farmers' etc. Bank*, 1 Hughes, 307; *Calumet Paper Co. v. Stotts Inv. Co.*, 96 Iowa, 147; 59 Am. St. Rep. 362; *Johnson v. Somerville, etc. Co.*, 15 Gray, 216; *Moore v. Jones, 3 Woods*, 53; *First Nat. Bank v. Hingham Mfg. Co.*, 127 Mass. 563; *Grew v. Breed*, 10 Met. 569; *Rosevelt v. Brown*, 11 N. Y. 148; *Aultman's Appeal*, 98 Pa. St. 506; *Erskine v. Loewenstein*, 82 Mo. 301, affirming the same case, 11 Mo. App. 595; *Adderly v. Storm*, 6 Hill, 624; *United States Trust Co. v. United States Fire Ins. Co.*, 18 N. Y. 199, 224; *Mann v. Currie*, 2 Barb. 294; *McKim v. Glenn*, 66 Md. 479; *Crease v. Babcock*, 10 Met. 525, 545; *Wheelock v. Kost*, 77 Ill. 296; note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 865; *Magruder v. Colston*, 44 Md. 349; 22 Am. Rep. 47; *Hale v. Walker*, 31 Iowa, 344; 7 Am. Rep. 137; *Bagley v. Tyler*, 43 Mo. App. 195; *In re Central Bank*, 18 Ont. App. 499; *National Foundry etc. Works v. Oconto Water Co.*, 68 Fed. Rep. 1006; *Harper v. Carroll*, 66 Minn. 487; *Simmons v. Hill*, 96 Mo. 679, 685; *Sleeper v. Goodwin*, 67 Wis. 577; *Chatham Bank v. Brobston*, 99 Ga. 801; *Holyoke Bank v. Burnham*, 11 Cush. 183; *In re Patent etc. Co.*, 3 De Gex & S. 146; *Davis v. Essex Baptist Soc.*, 44 Conn. 582, 585.

For this several reasons are given. One is, that he is estopped from denying his liability by voluntarily holding himself out to the public as the owner of the stock, and his denial of ownership is inconsistent with the representations he has made; another is, that by taking the legal title he has released the former owner; and a third is, that after having taken the apparent ownership and thus become entitled to receive dividends, vote at elections, and enjoy all the privileges of ownership, it would be inequitable to allow him to refuse the responsibilities of a stockholder: *National Bank v. Case*, 99 U. S. 628, 631, per Mr. Justice Strong; *Pauly v. State Loan etc. Co.*, 165 U. S. 606.

If stock in a corporation is held by a person in his own name, and it appears on the books to be so held, he is answerable therefor as a stockholder, whether he holds it as collateral or as his absolute property: *Sleeper v. Goodwin*, 67 Wis. 577. Although others may have a lien upon, or equitably own, stock in a corporation, the legal title is in, and the legal liability for debts of the corporation rests upon, him in whose name the stock is registered: *Richardson v. Abendroth*, 43 Barb. 162; *Bagley v. Tyler*, 43 Mo. App. 195. Persons to whom stock has been transferred by way of hypothecation for debts, and in whose name it stands registered at the time of default, are stockholders, and as such are liable for unsatisfied debts of the corporation: *Matter of Empire City Bank*, 18 N. Y. 199. If a

pledgee of stock registers it on the books of the corporation as transferred to himself absolutely, he thereby voluntarily makes himself a stockholder and is liable as such; and a court has no power to relieve him from any part of his liability: *Harper v. Carroll*, 66 Minn. 487. In determining who are stockholders, a court does not look beyond the legal title, or registered shareholder, or inquire under what equity he holds, except, perhaps, where there has been a fraudulent transfer to avoid liability: *Adderly v. Storm*, 6 Hill, 624; *Bagley v. Tyler*, 43 Mo. App. 195.

A company or corporation may be a pledgee of stock as well as an individual. Thus, a corporation authorized to loan money on real, chattel, or personal security, to buy, sell, hold, and transfer notes and other securities, and evidences of indebtedness, to make contracts, acquire and transfer property, in like manner as private individuals, has power to accept stock in another corporation as collateral security for signing a note on which the corporation obtains money: *Calumet Paper Co. v. Stotts Inv. Co.*, 96 Iowa, 147; 59 Am. St. Rep. 362; and where a company has accepted shares of stock in another company as security, and has procured a transfer thereof to itself, it will not be allowed to repudiate the transaction when the possession of the shares appears likely to occasion a liability, after having dealt with the shares as its own, and received dividends: *Royal Bank of India's case*, L. R. 7 Eq. 91; L. R. 4 Ch. App. 252; *Weikersheim's case*, L. R. 8 Ch. App. 831. So a loan company which advances money on the security of shares, that are transferred to it, and accepted by it, in the ordinary absolute form, cannot escape liability on the ground that it is merely a trustee for the borrower: *In re Central Bank*, 18 Ont. App. 489.

The liability of a pledgee of stock, as a stockholder, where the stock has been transferred to him on the books of the company continues until the retransfer of the stock on the books takes place, although, in the mean time, the pledgee's debt has been paid, and the certificate handed back to the pledgor: *Adderly v. Storm*, 6 Hill, 624; *Johnson v. Somerville etc. Co.*, 15 Gray, 216.

In this connection, the question naturally arises, what will be the effect of a transfer by the pledgee of stock? It is undoubtedly true that shareholders of the stock of a corporation have a general right to transfer their shares, and thus disconnect themselves from the corporation and from any responsibility on account of it. Thus, stock in a national bank was pledged to secure a debt, with power to the pledgee to sell it on default of payment, and it was held that a sale by him pursuant to the power was not voidable as a fraud on creditors of the bank, though he sold because he believed the bank insolvent, and in order to escape personal liability as a stockholder: *Magruder v. Colston*, 44 Md. 349; 22 Am. Rep. 47; and the transfer of stock, held as collateral security, to avoid liability as a stockholder, has been held not to constitute a conversion: *Heath v. Griswold*, 5 Fed. Rep. 573. But this right of transfer has its limitations and a transfer for the mere purpose of avoiding liability to the company, or its creditors, is held to be fraudulent and void. The transferer, therefore, remains liable. Hence, where one takes the stock

of a national bank, by way of pledge or collateral security for a loan of money, and causes the stock to be transferred to himself on the company's books, thus incurring immediate liability as a stockholder, he cannot relieve himself from such liability by making a mere colorable transfer of the stock, with the understanding that, at his request, it shall be retransferred to him: *National Bank v. Case*, 99 U. S. 628.

A pledgee of shares of stock may legally cause the stock to be transferred on the company's books into the name of an irresponsible agent or representative of the pledgee, and, if he does so, he is not answerable on the certificates. It has been decided by a majority of the supreme court of the United States that a pledgee of shares of stock in a national bank, who, in good faith and with no fraudulent intent, takes the security for his benefit in the name of an irresponsible trustee, for the avowed purpose of avoiding individual liability as a stockholder, and who exercises no powers or rights of a shareholder, does not incur any liability, as such, to creditors of the corporation in case it fails: *Anderson v. Philadelphia Warehouse Co.*, 111 U. S. 479. Compare *Newry Ry. Co. v. Moss*, 14 Beav. 64; *Addison's case*, L. R. 5 Ch. App. 294.

On the other hand, a holder of stock as collateral security is not answerable as a stockholder where the stock has not been transferred to him upon the books of the corporation: *Henkle v. Salem Mfg. Co.*, 39 Ohio St. 547. In other words, a pledgee of stock who holds the certificates, but who does not appear on the books of the company as a stockholder, is not answerable as a stockholder: *Henkle v. Salem Mfg. Co.*, 39 Ohio St. 547; *Welles v. Larrabee*, 36 Fed. Rep. 866; *Pauly v. State Loan etc. Co.*, 165 U. S. 606, affirming the same case, 58 Fed. Rep. 666; 56 Fed. Rep. 430. The pledgee may protect his interest in the stock, and may, at the same time, avoid liability as a stockholder by having the stock transferred into his name as "pledgee"; that is, he may cause the certificate to be issued in his own name, with the word "pledgee" added. If the transfer is made in this way, the pledgee is not, in the event of the company's insolvency, answerable either on the statutory or subscription liability: *Pauly v. State Loan etc. Co.*, 165 U. S. 606; *First Nat. Bank v. Hingham Mfg. Co.*, 127 Mass. 563.

A pledgee of shares of stock in a national bank, who does not appear, by the books of the bank, or otherwise, to be the owner, is not, upon the insolvency of the bank, answerable for an assessment upon the shares, under a statute rendering shareholders liable for the debts of the association to the extent of the par value of their stock: *Welles v. Larrabee*, 36 Fed. Rep. 866. So a corporation which holds certain shares of stock in a national bank as collateral security for a loan, and which is represented on the registry of the bank to be the holder of such stock "as pledgee," is not subject, upon the bank's insolvency, to the statutory liability of a stockholder: *Pauly v. State Loan etc. Co.*, 56 Fed. Rep. 430; affirmed in same case, 58 Fed. Rep. 666; 165 U. S. 606. One who holds, as collateral security for a loan, certain shares of stock in an insolvent national bank, which stock is registered upon the books of the bank in

his name "as collateral," is not answerable, under the statutory liability of shareholders, for an assessment upon such shares: *Beal v. Essex Sav. Bank*, 67 Fed. Rep. 816. A pledgee of national bank stock is not answerable as a stockholder for assessments, except by way of estoppel, and neither the cashier nor the bank is estopped from showing the actual nature of the holding, and that the stock is held merely in pledge, where the shares are registered on the books as follows: "*F. A. Cranston, Cashier Old National Bank, Providence, R. I.*" for it is apparent, from such an entry, that both the cashier and the bank are concerned in the stock; and that, as the title of the bank to the stock has manifestly not been perfected, its interest in the stock must be as a security, the cashier being, presumably, a proper person to whom to make a transfer by way of collateral security. In such a case, neither the bank nor the cashier is a shareholder or liable as a shareholder: *Baker v. Old Nat. Bank*, 86 Fed. Rep. 1006. A person who holds stock by direct issue as collateral security for a debt of the company to him is not answerable to creditors of the company, as if he subscribed for it, unless he allowed himself to be represented as a shareholder to the creditors who gave credit upon the faith of that liability: *Andrews v. National Foundry etc. Works*, 76 Fed. Rep. 166; 77 Fed. Rep. 774. A corporation having power to use and sell, and which receives shares of national bank stock in pledge, still remains a pledgee, and is not answerable, as a shareholder, to assessment on the stock, where it, in good faith, and without suspicion of the bank's insolvency, causes new certificates to be issued in the name of one of its employes, on the ground that it is unwilling for the shares to stand in the name of the original owners: *National Park Bank v. Harmon*, 79 Fed. Rep. 891. Where a certificate of stock was pledged with an indorsement "as collateral," but was afterward redeemed, being indorsed in blank by the pledgee to the pledgor, and again pledged, the second pledgee was held not put on his notice by the words "as collateral," and the first pledgee was held liable as stockholder: *Matthews v. Massachusetts Nat Bank*, Holmes, 410. The burden is on one who takes a certificate of stock in a corporation, as collateral security for a debt, to show that he holds the stock merely as pledgee, and not as absolute owner: *First Nat. Bank v. Hingham Mfg. Co.*, 127 Mass. 563.

The rule that a pledgee of stock, to whom the stock has been transferred on the company's books, is liable to creditors of the corporation, and that a pledgee of shares is not answerable to creditors of the company where his name does not appear on the corporate books, has been very frequently applied in the case of a pledge of shares of stock in a national bank: *Baker v. Woolston*, 27 Kan. 185; *National Bank v. Case*, 99 U. S. 628; *Baker v. Old Nat. Bank*, 86 Fed. Rep. 1006; *Moore v. Jones*, 3 Woods, 53; *Bowden v. Farmers' etc. Bank*, 1 Hughes, 307; *Magruder v. Colston*, 44 Md. 349; 22 Am. Rep. 47; *Hale v. Walker*, 31 Iowa, 344; 7 Am. Rep. 137; *Wheelock v. Kost*, 77 Ill. 296; *First Nat. Bank v. Hingham Mfg. Co.*, 127 Mass. 563. So far as the liabilities of such a pledgee are concerned there seems to be no material difference between a national bank and any other

corporation, but it may be some satisfaction to know that the previous cases relating to the liability of shareholders in national banks were examined in *Pauly v. State Loan etc. Co.*, 165 U. S. 606, 619, and held to establish: 1. "That the real owner of the shares of the capital stock of a national banking association may, in every case, be treated as a shareholder within the meaning of section 5151 of the Revised Statutes of the United States. 2. That if the owner transfers his shares to another person as collateral security for a debt due to the latter from such owner, and if, by the direction or with the knowledge of the pledgee, the shares are placed on the books of the association in such a way as to imply that the pledgee is the real owner, then the pledgee may be treated as a shareholder within the meaning of section 5151, and therefore liable upon the basis prescribed by that section for the contracts, debts and engagements of the association. 3. That if the real owner of the shares transfers them to another person, or causes them to be placed on the books of the association in the name of another person, with the intent simply to evade the responsibility imposed by section 5151 on shareholders of national banking associations, such owner may be treated, for the purposes of that section, as a shareholder, and liable as therein prescribed. 4. That if one receives shares of the stock of a national banking association as collateral security to him for a debt due from the owner, with power of attorney authorizing him to transfer the same on the books of the association, and being unwilling to incur the responsibilities of a shareholder as prescribed by the statute, causes the shares to be transferred on such books to another, under an agreement that they are to be held as security for the debt due from the real owner to his creditor—the latter acting in good faith and for the purpose only of securing the payment of that debt without incurring the responsibility of a shareholder—he, the creditor, will not, although the real owner may, be treated as a shareholder within the meaning of section 5151." A case in which the stock list of a bank gives information to all who examine it that certain shares are held only as "pledgee," is to be distinguished, of course, from the above: *Pauly v. State Loan etc. Co.*, 165 U. S. 606, 620.

A pledgee of stock in a corporation is not liable as a shareholder where he has been exempted from such liability by statute: *Mathews v. Albert*, 24 Md. 527; *McMahon v. Macy*, 51 N. Y. 155, 161; *Henkle v. Salem Mfg. Co.*, 39 Ohio St. 547. The supreme court of the United States, in *Burgess v. Seligman*, 107 U. S. 20, construed the statute of Missouri, and held that the pledgees of stock were not liable to corporate creditors upon the shares so held by them; and this is now the rule in that state: *Union Sav. Assn. v. Seligman*, 92 Mo. 635; 1 Am. St. Rep. 776. This case overrules *Griswold v. Seligman*, 72 Mo. 110, and *Fisher v. Seligman*, 75 Mo. 13, and the note to the former case, in the American Series, quotes at length from *Burgess v. Seligman*, 107 U. S. 20.

A corporation may pledge its unissued stock, and where it does so to secure a corporate debt, the pledgee is not answerable to other corporate creditors on such stock. Thus, if the corporation pledges its unissued stock to one of its creditors as collateral security, he is

not, upon the insolvency of the corporation, answerable to corporate creditors whose claims accrued before the issue was made: *Gilman v. Gross*, 97 Wis. 224. So, if a corporation pledges its stock as collateral security for a debt due from the company to the pledgee, and the certificates show upon their face that they are fully paid, the pledgee cannot, upon the company's insolvency, be held answerable on the stock: *Bloomenthal v. Ford* [1897], A. C. 156, reversing *Ex parte Bloomenthal* [1896], 2 Ch. 525. In Wisconsin, where a corporation pledges its own stock to one of its own creditors, such creditor is not answerable thereon, as a stockholder, to corporate creditors: *Andrews v. National Foundry etc. Works*, 77 Fed. Rep. 774; unless he has misled them by his conduct, in which case he might become liable to those specially misled: *Andrews v. National Foundry etc. Works*, 76 Fed. Rep. 166, 175.

AMANS v. CAMPBELL.

[70 MINNESOTA, 493.]

AGENCY, FACT OF—LIABILITY OF AGENT WHO FAILS TO DISCLOSE.—A person acting as agent for another is personally answerable, if, at the time of making the contract in his principal's behalf, he failed to disclose the fact of his agency. Under such circumstances, he is subject to all the liabilities, express or implied, created by the contract, in the same manner as if he were the principal in interest.

AGENCY, DISCLOSURE OF—WHAT DOES NOT AMOUNT TO—UNDISCLOSED PRINCIPAL—UNDISCLOSED AGENCY.—If a person named O. H. Campbell, having the exclusive and entire management and control of a business, employs another to perform services, his mere use, in making the contract, of the name of "Campbell & Co.," without indicating, in any other way, that he does so as agent for another person or firm doing business by that name, does not amount to a disclosure of his agency for his wife, Della Campbell, doing business under the name of "Campbell & Co." The case is one not merely of an undisclosed principal, but of an undisclosed agency.

Action against the defendant, O. H. Campbell, and the McCord Lumber Company. The written contract, "Exhibit A," was as follows: "I hereby agree to work for Campbell & Co. during the logging season of 1896 and 1897 at ——— dollars per month, cooking, on the following conditions," et cetera. This was signed by the plaintiff. There was a judgment for the plaintiff, and the defendants appealed from an order denying a motion for a new trial.

Campbell & Stilson, for the appellants.

J. C. Marshall, for the respondent.

484 MITCHELL, J. This was an action to recover personal judgment against the defendant Campbell for services in a logging camp, and to have the amount adjudged a lien on the logs which belonged to the defendant lumber company; but the questions presented by this appeal relate exclusively to plaintiff's right of action against Campbell.

The undisputed evidence is, that Campbell personally employed plaintiff; that neither at the time of making the contract nor during the times plaintiff was performing the services did he disclose any agency, unless it was by the use of the name of "Campbell & Co." in the written contract (Exhibit A) which he procured from plaintiff, and in the signature of time checks which he issued to the plaintiff and other laborers in the camp; that in using this name he in no way indicated that he was agent for someone else, or that he himself was not "Campbell & Co.," or the Campbell of "Campbell & Co.," unless such facts were indicated by the use of the name itself; that from start to finish he was the only person who appeared in connection with the business, and had to all appearances the exclusive management and control of it, precisely as if he himself had been the principal.

Neither at the time of making the contract nor while performing it had plaintiff any knowledge or notice of any agency, or that Campbell was not the principal, unless he was chargeable with such notice by the fact that Campbell used the name "Campbell & Co." in the contract (Exhibit A) and in signing time checks to the workmen. While one of the members of the lumber company testified that he knew that "Campbell & Co." meant Delia Campbell, the wife of the defendant Campbell, and that he thought people generally throughout the community knew that fact, yet there is not a single fact in evidence tending to support that opinion. It had been testified to that the "firm" of "Campbell & Co.," consisting of Delia Campbell alone, had existed for about three years, but there was no evidence that she had ever conducted any business under that name, unless it was the logging operations during the winter of 1896-97 at the camp at which the plaintiff was employed; and it appears that even in that business she never appeared or took any part in person.

485 The defense interposed in this action was that "Campbell & Co." was Delia Campbell, and that the defendant Campbell was merely her agent. There is much in the evidence tending to show that defendant himself was in fact "Campbell & Co."

But, assuming that in fact he was merely agent for his wife, the case was, upon the evidence, one for the application of the rule that a person acting as agent for another will be personally responsible if, at the time of making the contract in his principal's behalf, he fails to disclose the fact of his agency; that by reason of such failure he becomes subject to all the liabilities, express or implied, created by the contract, in the same manner as if he were the principal in interest: 1 Am. & Eng. Ency. of Law, 2d ed., 1122, and cases cited.

The case is one not merely of an undisclosed principal, but of an undisclosed agency. The fact that defendant used the name "Campbell & Co.," but without indicating in any way that he did so as agent, and not as his own business name, did not, under the circumstances, amount to a disclosure of an agency. There was nothing in this to indicate that he was not "Campbell & Co." or the Campbell of "Campbell & Co." The name might probably suggest that there were others associated with him as partners, but we think that would be all. If there had been a firm consisting of members other than defendant doing business under that name, generally known as such in the community, a different case would be presented. In such case, knowledge of the fact of defendant's agency might be chargeable to the plaintiff.

None of the cases cited by defendant's counsel seem to us to be in point. In *Preston v. Foellinger*, 24 Fed. Rep. 680, so much relied on by counsel, the plaintiff contracted with the actual party in interest in person, and not with the party whom he sought to hold liable.

The view we have taken of the case renders it unnecessary to consider any of the other assignments of error, as none of the points raised by them have any bearing upon the ground upon which we have concluded that the case should be decided.

Order affirmed.

AGENCY—PERSONAL LIABILITY OF AGENT.—If an agent, in making a contract, fails to disclose his agency to the person with whom he is dealing, he is personally answerable on the contract: Note to *Anderson v. Timberlake*, 62 Am. St. Rep. 110. If an agent contracts, in his own name, he is personally answerable, and cannot escape liability by proving that he had a principal and intended to contract for him alone: Note to *Shuey v. Adair*, 63 Am. St. Rep. 892. It is the duty of an agent, if he would avoid personal liability, to disclose his agency. It is not the duty of others to discover it, and, if the agent fails to disclose his agency, and deals with persons who are unaware of it, he must answer personally for the debt he contracts: *Baldwin v. Leonard*, 39 Vt. 260; 94 Am. Dec. 824; *Bick-*

ford v. First Nat. Bank, 42 Ill. 238; 89 Am. Dec. 436. One who acts as agent of an undisclosed principal may be treated as principal by the party with whom he deals: Welch v. Goodwin, 123 Mass. 71; 25 Am. Rep. 24.

LEHMANN v. CHAPEL.

[70 MINNESOTA, 496.]

EVIDENCE—RES GESTAE—DECLARATIONS ABOUT POSSESSION.—When the nature of a person's possession is a material subject of inquiry, his acts and declarations accompanying and characterizing the possession, are admissible as part of the res gestae.

EVIDENCE—RES GESTAE—ADMISSIBILITY OF DECLARATIONS TO CHARACTERIZE POSSESSION AFTER A SALE.—If a vendor, with the consent of the vendee, remains in possession of personal property after a sale, and the creditors of the vendor attack the sale as fraudulent, the declarations of the vendor while thus in possession are admissible in evidence against the vendee as part of the res gestae, to characterize the possession.

EVIDENCE—RES GESTAE—HUSBAND IN POSSESSION OF PROPERTY CLAIMED BY HIS WIFE—COMPETENCY OF HIS STATEMENTS AS TO OWNERSHIP.—When a husband is in possession of property, which his wife claims to have bought from a third person, such as a saloon, stock of liquors and cigars, the husband's statements as to its ownership, are, in an action brought by his wife against an execution creditor of her husband, for a wrongful conversion of the property, a part of the res gestae and competent evidence, where the material issue is, whether the property actually belonged to the wife, her husband being in possession merely as her agent, or whether, as the creditor claims, the transfer to the wife and pretended agency of the husband were merely colorable, the property being, in fact, the husband's and his possession really in his own right.

Action for conversion. The defendant moved for a judgment in his favor, notwithstanding a verdict for the plaintiff, or for a new trial. An order was made denying the motion, and the defendant appealed.

O. H. O'Neill, for the appellant.

John H. Ives, for the respondent.

497 MITCHELL, J. This was an action to recover damages for the wrongful conversion of a saloon stock, consisting of liquors and cigars, which plaintiff alleged was her property. The defendant denied that the goods were plaintiff's, alleged that they belonged to her husband, and justified the taking under an execution against him. Plaintiff testified that she bought the stock and paid for it with her own money, and put her husband in possession of the property and of the saloon business

as her agent. The evidence on part of the defendant showed that the husband was in the possession, control, and management of the property and business, with all the indicia of ownership; that the lease of the saloon building and the liquor licenses, both city and federal, were in his name; that his name was on the window of the saloon; that goods bought to replenish the saloon stock were, so far as appears, always consigned and billed to him, and bills of goods thus bought made out in his name and rendered to him. The evidence was also undisputed that the plaintiff never examined the stock before the alleged purchase; that she knew little or nothing about the saloon business; that she paid no attention to it after the purchase, and knew nothing as to what was being bought for the saloon, or, except in a very general way, as to how the business was being conducted.

A witness who had testified to having had a conversation with the husband in the saloon while he was thus in possession and control was asked, "Was anything said between him and you in reference to who owned the saloon at that time?" To this question plaintiff's counsel objected, and the objection was sustained. We are of opinion that this was error. It is true that the question was merely preliminary, but by its exclusion all further inquiry was shut off. In determining the competency of the evidence sought to be elicited it must be kept in mind that the material issue was whether the property actually belonged to the plaintiff, her husband ⁴⁰⁸ being in possession merely as her agent, or whether, as the attaching creditor claimed, the transfer to the wife and pretended agency of the husband were merely colorable, the property being in fact the husband's and his possession really in his own right.

It may be safely laid down as a general rule that, when the nature of a person's possession is a material subject of inquiry, his acts and declarations accompanying and characterizing the possession are admissible as part of the *res gestae*. A familiar illustration of the application of this rule is where a party is claiming title by adverse possession, and the question is whether his possession was adverse: *Brown v. Kohout*, 61 Minn. 113. Another is where the question is under whom a tenant in possession was holding. There is no occasion at this time to enter upon any general discussion of the doctrine of *res gestae*, which is one of the most difficult subjects in the law, and one which calls for the exercise of the keenest discrimination. Neither shall we attempt to consider generally the application of, or the limitations, if any, to, the rule just announced.

It is sufficient for present purposes to say that, under that rule, according to the general consensus of the authorities, where a vendor has, with the consent of the vendee, remained in possession of the property after the sale, and the creditors of the vendor are attacking the sale as fraudulent, the declarations of the vendor while thus in possession are admissible in evidence against the vendee as part of the *res gestae*, as characterizing the possession: Wait on Fraudulent Conveyances, sec. 279, and cases cited; Bump on Fraudulent Conveyances, sec. 600; Rice on Evidence, 950; Wharton on Evidence, sec. 1116; Dailey v. Linnehan, 42 Minn. 277.

All the authorities agree that the fact of the vendor's possession after the sale is competent evidence; for it is as old as Twyne's case that possession by the vendor after sale, with the consent of the vendee, is a badge of fraud or a secret trust in favor of the vendor; and, if the fact of possession is competent, it would seem logically to follow that any acts or declarations of the vendor while thus in possession, tending to characterize it, must also be competent. Many of the authorities place the admissibility of such evidence upon the ground that, so long as the debtor grantor remains in ^{49*} possession, the *res gestae* of the fraud may be considered as still continuing and in progress; but, whatever be the precise ground upon which it is put, the rule is now wellnigh universal that such evidence is admissible as part of the *res gestae*, to characterize the possession.

This question has generally arisen between the vendee and the creditors of the vendor, where the former had permitted his vendor to remain in possession after the alleged sale; but there is no reason why the same rule should not be applied to cases analogous in principle, although involving a somewhat different state of facts. The mere fact that the alleged title of the wife came from a third party does not alter the case.

The husband went into, and continued in, possession with her consent. That possession was evidence of fraud and of a secret trust in favor of the husband, the same as if the wife's pretended title had been derived from him. We are referred to King v. Frost, 28 Minn. 417, and Olson v. Swensen, 53 Minn. 516, as holding in accordance with the contention of the respondent. Our own decisions on the question under consideration may be subject to the same criticism as those in most other jurisdictions, viz., of not being always entirely consistent. In fact, the modern tendency is to enlarge rather than restrict the field of evidence, and there is no more striking example of this than the

phase of the doctrine of *res gestae* which we have been discussing. In neither of the cases cited does the question seem to have received much consideration, and no authorities are cited, except a dissenting opinion from another state, and in so far as they hold differently from the rule here announced they cannot be followed. *Dailey v. Linnehan*, 42 Minn. 277, is exactly in point, and is in accord with the almost unbroken line of decisions in other jurisdictions. It is true that in that case the evidence admitted was acts of the party in possession, but there is no distinction in principle between acts and declarations accompanying and characterizing the possession.

Order reversed.

EVIDENCE—RES GESTAE—DECLARATIONS OF VENDOR AS TO POSSESSION—FRAUD.—Declarations by a party in possession of personal property as to ownership thereof, accompanying some principal fact which they serve to explain and qualify, are sometimes said to be a part of the *res gestae*, and, with the proper limitations and restrictions may, in certain cases, be permitted to go in evidence: *Relley v. Haynes*, 38 Kan. 259; 5 Am. St. Rep. 737. The declarations of a vendor of personal property, while he remains in possession thereof, though after the sale, as to the character of his possession, are admissible in evidence against his vendee: *Murphy v. Mulgrew*, 102 Cal. 547; 41 Am. St. Rep. 200. If the vendor of goods remains in the actual possession of them, his statements explanatory of such possession, and of the relation which he then holds to the property, are admissible for the purpose of showing fraud in the sale, if they have that tendency: *Grant v. Lewis*, 14 Wis. 497; 80 Am. Dec. 785; monographic note to *Horton v. Smith*, 42 Am. Dec. 633, on when the declarations of a vendor are evidence against his vendee to show fraud. Compare *Gallagher v. Williamson*, 23 Cal. 331; 83 Am. Dec. 114.

CASES
IN THE
SUPREME COURT
OF
MISSOURI

HENNESSY v. BAVARIAN BREWING COMPANY.

[145 MISSOURI, 104.]

ON THE DEATH OF A MINOR CHILD whose father is dead and whose mother has remarried, the right of recovery for causing such death through negligence vests in her, though the child lived with her and its stepfather, and the latter had assumed toward it the relations of father.

DEATH OF MINOR CHILD, RIGHT TO RECOVER FOR. The right given a parent by statute to recover for the death of a minor child, caused by the negligence or other wrong of another, is the same right which the child would have had had it survived the injury, and hence is not dependent on the fact that the parent is entitled to the services or earnings of the child, nor is it limited to the value of such services.

CHILD, DEATH OF MINOR.—A STEPFATHER in whose family a minor child of his wife resides and who has assumed toward it the duties of a father, and is hence entitled to its services and earnings, cannot, under the statutes of Missouri, recover for its death, due to the negligence or other wrong of another. Such a cause of action is vested wholly in the mother, and the damages to which she is entitled are not limited by the fact that she has no right to such services or earnings.

RES JUDICATA.—JURISDICTION OF COURTS.—The decision of the Kansas city court of appeals is not *res judicata* nor binding on the supreme court of the state, on a subsequent appeal.

JURISDICTION.—AMOUNT IN DISPUTE.—For the purpose of determining the amount in dispute and ascertaining therefrom whether the supreme court of Missouri has jurisdiction of a cause, the amount claimed in the petition must be accepted as the amount in dispute, when the judgment appealed from wholly denies the plaintiff's right of recovery. It is not material that at a former trial the plaintiff recovered a designated amount, much less than that sued for, and, on appeal to the court of appeals, the cause was reversed, and a new trial awarded, and rules of decision stated in the opinion of the court which, if correct, must defeat the plaintiff's action.

DEATH OF MINOR CHILD.—THE AMOUNT IN DISPUTE in an action to recover for the death of a minor child is not restricted to compensation for his services at the wages received just prior to his death, nor can the appellate court determine what such amount is, for it cannot know to what extent the earning power of the child might have been increased during his minority, had his life been spared.

Beebe & Watson, for the appellant.

Ben. T. Hardin, for the respondent.

¹⁰⁰ **MARSHALL, J.** Action for five thousand dollars' damages for death of a minor son of plaintiff. Thomas Dolin, an unmarried minor, thirteen years old, was the son of plaintiff by her former marriage. After her second marriage the stepfather supported the minor. His mother permitted ¹⁰⁰ him to work for defendant and he turned over his wages to his mother, who used them to buy clothing for him. The death is alleged to have been caused by the negligence of the defendant in not providing proper appliances and safeguards in its factory to prevent injury to the employé, who was required to work close to, but not with or on, the defective appliances. The plaintiff obtained judgment for nine hundred dollars, the defendant appealed to the Kansas City court of appeals, where the judgment was reversed and the cause remanded: *Hennessey v. Bavarian Brewing Co.*, 63 Mo. App. 111. The case was tried anew in the circuit court upon exactly the same pleadings and evidence, on plaintiff's part, as it was on the first trial. Pursuant to the opinion of Kansas City court of appeals the circuit court sustained a demurrer to the evidence, and entered judgment for defendant. Plaintiff then appealed to this court.

1. The Kansas City court of appeals based its decision upon two grounds: 1. That the petition did not state facts sufficient to constitute a cause of action, in that it did not allege a loss of services to the plaintiff by the death of her son; and 2. That the evidence does not establish such a loss. The first conclusion is predicated upon the idea that "the right to recover for loss of service is founded on the relation of master and servant, and not on that of parent and child" (*Hennessey v. Bavarian Brewing Co.*, 63 Mo. App. 116), and that upon the death of the child's father the mother was obliged to support him during minority, and thence was entitled to his services during her widowhood, but that upon her remarriage the "stepfather would stand in the place of the natural parent, and the reciprocal rights, obligations, and duties of parent and child would attach," if the

stepfather "admitted the child into his family and ¹¹⁰ treated him as a member thereof, and thereby assumed the relation of parent."

The second conclusion rests upon the facts deduced from the evidence that the stepfather did admit the child into his family, treated him as a member thereof, and assumed the relation of parent to him, and that the relation of master and servant between the mother and child ended as soon as the stepfather so acted, and that, as the mother was no longer obligated to support the child, she was not entitled to his services, and not being entitled to his services, she lost nothing by his death, but that notwithstanding the stepfather was, in this case, obliged to support the child, and therefore was entitled to his earnings, he could not maintain an action of this character, because, neither under the statute of this state nor at common law, could a stepfather maintain an action for the death of a minor caused by the wrongful act of another.

Bluntly but logically stated, this reasoning asserts the startling proposition that if a widow with a minor child remarries and the stepfather admits her child into his family as a member of it and assumes the relation of father to him, and if a third party wrongfully kills the child, there is no civil liability to anyone therefor—not to the mother, because her rights were cut out by her second marriage and the assumption by the stepfather of the natural father's place toward the child, and not to the stepfather because neither the common law nor the statute gives a stepfather a right to maintain such an action.

The error that underlies such conclusions arises from confusing the common-law obligation of the parent, natural or standing in loco parentis to the child, to support it during minority, carrying with the obligation the correlative right to the earnings of the child, with the right, conferred by statute, upon the father ¹¹¹ (natural) and mother, or the survivor of them, to maintain an action against a third party for the wrongful killing of their child.

The case of *St. Ferdinand etc. Academy v. Bobb*, 52 Mo. 357, is a fair illustration of all the cases cited by the Kansas City court of appeals in support of the first conclusion. That case was an action by a third person against a stepfather, who stood in loco parentis, for necessities furnished the child. The legal proposition announced in the case is that when a stepfather so acts toward a stepchild, "the presumption in such case is, that they deal with each other as parent and child, not as master and

servant. This relation being established, the reciprocal rights, duties, and obligations pertaining to it arise between them, the same as if he were the natural father": *St. Ferdinand etc. Academy v. Bobb*, 52 Mo. 360.

Whilst at common law, and in states, like ours, where the common law has been adopted, this correlative duty and right exists between a stepfather and a stepchild, it rests, not upon contract, as in case of master and servant, but upon the relation of parent and child. It continues only during the minority of the child. At common law, neither the natural father, nor the stepfather standing in loco parentis, could maintain a civil action for the wrongful killing of the child, because at common law such actions were unknown. The principal of the common law was *actio personam moritur cum persona*. Hence, cases which decide the relative duties and rights of parent and child with respect to suits for necessities furnished by third persons to the child, or for wages earned by the labor of the child, have no possible application to cases like this. Likewise, cases which hold that after the remarriage of the widow and the assumption by the stepfather of the obligations of a natural father to his stepchild, the mother is released from liability for necessities furnished the child¹¹³ and loses the right she had during widowhood to recover against third persons for services performed by the child, are of no value in determining the question here involved. They rest upon entirely different principles and involve rights arising out of the relation of parent and child, and not questions of tort.

The fact that in some cases it has been held that the measure of damages in cases of this kind arising under a statute like ours is the loss of services of the child during minority, minus the expense of maintenance, plus the expense of medical attendance during the child's last illness and of the funeral, does not establish the right to maintain this character of action nor determine the person on whom that right is conferred by the statute. And it is proper here to say that the damages here allowed are both compensatory and penal, and that in *Parsons v. Missouri Pac. Ry. Co.*, 94 Mo. 296, this court, speaking through Brace, J., construed the meaning of our statute fixing the measure of damages and said "the law allows the parent of such minor substantial damages, and they may be measured by the experience and judgment of the jury." In cases like this, under the statute, the father and mother do not recover the value of services rendered by their child, as the father or stepfather does, as a cor-

ollary to the obligation to support in cases arising *ex contractu* or in *assumpsit*, but they recover, in tort, on the right which the child would have had if he had survived the injury, and which right died with the injured party at common law, but has been by our statute expressly transmitted to them, *eo nomine*. No new right of action is given by our statute. It is solely a preserved, transmitted right: *Proctor v. Hannibal etc. R. R. Co.*, 64 Mo. 112; *White v. Maxcy*, 64 Mo. 552; *Elliott v. St. Louis etc. R. R. Co.*, 67 Mo. 272; *Gray v. McDonald*, 104 Mo. 311; *Miller v. Missouri Pac. Ry. Co.*, 109 Mo. 350; 32 Am. St. Rep. 673. By the common ¹¹³ law, no such right of action was transmitted to any one. The stepfather, therefore, had no such right, notwithstanding his right to recover for services performed by the child, when he stood in *loco parentis* to it. Our statute, upon which the right alone rests and by which it has been transmitted from the child, vests it expressly in the father and mother, *eo nomine* (who must join in the suit and each have an equal interest in the judgment), or if either of them be dead, then to the survivor. The fact that the mother is given an equal interest with the father marks the difference between actions of this character and suits for the recovery of the wages of the child, which can only be recovered by the father, or stepfather standing in *loco parentis*, and demonstrates the impropriety of attempting to solve questions of this character by reference to cases which involved necessities furnished to or wages earned by the child.

The fact that the statute intended to transmit the rights of the deceased child to the father and mother, and that the relation between them as husband and wife does not affect their rights as parents, and the dissolution of the marital relations between them does not dispense with the necessity for joining both in the litigation, and that neither can maintain the action alone, and that the remarriage of the wife after the dissolution of her former marital relations makes no difference as to her rights as the mother of the deceased, is aptly illustrated by the history of the cases of *Buel v. St. Louis Transfer Co.*, 45 Mo. 562, and *Crockett v. St. Louis Transfer Co.*, 52 Mo. 457. The child of Ruth and Samuel F. Buel was killed by the alleged negligence of the defendant. The father and mother were divorced persons. The father refused to join the mother in the suit, so she instituted it as sole plaintiff and ¹¹⁴ joined the husband as a codefendant. After the expiration of the year from the time the accident occurred the petition was amended so as to make the father a coplaintiff, instead of a codefendant. Speaking of the divorce

this court said: "There is no force in the objection that Mr. and Mrs. Buel, the plaintiffs, had been divorced prior to the accrual of the cause of action sued on. They do not sue as husband and wife, but simply as parents. The divorce did not affect the fact of parentage. The statute does not give the action to the husband and wife, as such, but to the father and mother, as the parents of the deceased minor. The circumstance of the divorce explains the fact that the suit was originally commenced by Mrs. Buel as a *feme sole*": *Buel v. St. Louis Transfer Co.*, 45 Mo. 564. And as to the right being in the father and mother, the court held that the action could not be sustained by one without joining the other: *Buel v. St. Louis Transfer Co.*, 45 Mo. 563. Before the case was retired in the circuit court Mrs. Buel married John Crockett, and he was made a party plaintiff. Thus there were Mrs. Buel-Crockett and her former husband, Buel, and her then husband, Crockett, parties plaintiff, and the court held they were all necessary parties, Mr. Buel as father, and Mrs. Buel-Crockett as mother of their deceased child, and Mr. Crockett as the then husband of the mother: *Crockett v. St. Louis Transfer Co.*, 52 Mo. 457. In this case Crockett was never the stepfather of the child, as he married the child's mother after the death of the child, and was joined as plaintiff because the statute then required the husband to be joined with the wife. But it is direct authority upon the construction to be placed upon the statute, as to who are proper parties in a proceeding under the statute, and for holding that the mother's right to maintain an action of this character is vested in her because of her relation of mother to the deceased, and that such right is personal to her ¹¹⁵ and is not affected by a divorce from her former husband or by her remarriage. In this case, the father was dead, and the mother, as survivor, alone had a right to maintain this action. Her second husband was not the father of the deceased and hence has no right to maintain the action, and her marriage a second time did not sever her relation of mother to her son, nor take away from her the right which the statute transmitted to her as mother to recover damages which her son might have recovered if he had survived the injury.

The judgment of the Kansas City court of appeals was therefore erroneous on both propositions decided by it, and as the circuit court on the trial *de novo* followed that decision its judgment is likewise erroneous.

2. The contention that the decision of the Kansas City court

of appeals is *res adjudicata* and binding upon this court is untenable. The cases cited by the learned counsel apply only where the second appeal is taken to the same court that formerly decided the case. This court has not decided this case before, and the decision of the Kansas City court of appeals is not binding on this court.

3. The amount in dispute in this case is the amount claimed in the petition, which is five thousand dollars (*State v. Gill*, 107 Mo. 44; *State v. Rombauer*, 130 Mo. 288), and this brings this case within the appellate jurisdiction of this court. The fact that on the first trial the plaintiff recovered judgment for nine hundred dollars fixed that sum thereafter as the amount in dispute, and made the case properly appealable to the Kansas City court of appeals, because if that judgment stood it was all the plaintiff could recover or the defendant could be made to pay. But when that judgment was reversed by the Kansas City court of appeals, the amount in dispute immediately became, as ¹¹⁶ it originally was before any judgment was rendered, five thousand dollars. It is argued, however, that the evidence shows that deceased was only receiving four dollars per week, and that at this rate he would have earned less than two thousand five hundred dollars before he attained his majority, not making any deductions for his maintenance, and hence that in no event could a judgment ever be rendered which would make the case properly one within the appellate jurisdiction of this court. This argument is based upon the erroneous premise that the son would never, during his minority, earn more than he was able to at the age of thirteen or fourteen years. Instances are not infrequent in our day and generation when youths who started on small wages worked their way to good paying positions in life, even before attaining their majority. And this possibility is confined to no one favored class. It is open to everyone, without regard to the station in life in which he was born. We cannot judicially declare how much any given minor would earn between the ages of fourteen and twenty-one. That is a question to be decided by the facts in each case. The only safe rule is to regard the amount claimed in the petition as the amount in dispute, until the claim has been merged into judgment: *Vineyard v. Lynch*, 86 Mo. 684.

As the action of the circuit court was predicated solely upon the decision of the Kansas City court of appeals, and as the merits of the case have not been discussed by counsel, and no point has been made as to whether the plaintiff made out a

prima facie case on the facts, we express no opinion thereon, but for the error in taking the case from the jury for the legal reasons assigned, we reverse the judgment of the circuit court and remand the cause for further proceedings by that court.

All concur.

PARENT AND CHILD—RECOVERY FOR DEATH OF CHILD. Statutes giving to parents the right to sue for the wrongful death of a minor child are in derogation of the common law, and must be strictly construed: *Thornberg v. American Strawboard Co.*, 141 Ind. 443; 50 Am. St. Rep. 334, and note. Such a right exists only for the benefit of the person or persons specified in the statute. If none such exists, then no recovery can be had: *Thornberg v. American Strawboard Co.*, 141 Ind. 443; 50 Am. St. Rep. 334. If the father is dead the mother has a right of action: *Commrs. of Hartford Co. v. Hamilton*, 60 Md. 340; 45 Am. Rep. 739; *Ohio etc. R. R. Co. v. Tindall*, 13 Ind. 366; 74 Am. Dec. 239; or one standing in loco parentis may recover: *Whitaker v. Warren*, 60 N. H. 20; 49 Am. Rep. 302. But the word "father" in a statute does not mean stepfather, nor does the word "child" mean stepchild: *Thornberg v. American Strawboard Co.*, 141 Ind. 443; 50 Am. St. Rep. 334. Concerning the measure of damages in such a case, see monographic notes to *Carey v. Berkshire R. R. Co.*, 48 Am. Dec. 622, and *Louisville etc. R. R. Co. v. Goodykoontz*, 12 Am St. Rep. 381.

APPEAL—JURISDICTION—AMOUNT INVOLVED.—If the amount involved in an action was greater than one thousand dollars, and an appeal was taken to the appellate court, where the judgment was reduced below that sum, and an appeal was then taken by the appellant to the supreme court, the latter has jurisdiction though the decision of the appellate court has reduced the amount in controversy to a sum less than one thousand dollars: Note to *Mutual Reserve etc. Assn. v. Smith*, 61 Am. St. Rep. 175. See monographic note to *Fix v. Siasung*, 21 Am St. Rep. 617.

ST. LOUIS v. WENNEKER.

[145 MISSOURI, 230.]

MUNICIPAL CORPORATIONS, PROPERTY HELD IN TRUST BY, TAXATION OF.—Property devised to a city, to be held in trust to furnish relief to all poor emigrants and travelers on the way to settle in the west, is not exempt from taxation under a constitution declaring that the property of all cities, counties, and other municipal corporations shall be exempt from taxation, and also exempting lots in any such city or within one mile thereof to the extent of one acre, and other lots to the extent of five acres, with the buildings thereon, when used exclusively for religious worship, for schools, or for purposes purely charitable.

PROPERTY HELD IN TRUST BY A MUNICIPAL CORPORATION for a purpose which any other trustee might execute, as where the trust is subject to supervision and the trustee to change by the courts, is not property of the city, and hence not exempt from taxation as municipal property.

TAXATION.—WAYS AND MEANS ARE PROVIDED FOR THE TAXATION of property held for charitable purposes, when there is a general statute directing the assessment and taxation of all real property not exempt therefrom.

TAXATION.—AN ASSESSMENT FOR THE PURPOSE OF TAXING REAL PROPERTY MUST BE IN THE NAME OF THE OWNER, if known. If property has been devised to a municipal corporation in trust for a specific purpose, the assessment of it to "Mullanphy Emigrant Relief Fund" is void, though Mullanphy was the donor of the fund, and the trust was to be for the relief of poor emigrants.

B. Schurmacher and Chas. Claffin Allen, for the appellant.

Geo. E. Smith and G. A. Finkelnburg, for the respondent.

²³³ **WILLIAMS, J.** The city of St. Louis, as trustee under the will of Bryan Mullanphy, deceased, instituted this proceeding in equity to prevent the enforcement of, and to procure a decree canceling certain tax bills against real estate, constituting part of the trust property.

Mullanphy died in said city on the 15th of June, 1851. He gave to the city of St. Louis, by his will, one-third of all his property, real, personal, and mixed, "in trust to be and constitute a fund to furnish relief to all poor emigrants and travelers coming to St. Louis on their way bona fide to settle in the West." The city accepted the trust by an ordinance approved November 16, 1857. The real estate was partitioned, and plaintiff's share under the will set off by metes and bounds.

The petition alleges "that since the year 1865 all the property thus owned by the plaintiff was expressly exempted by the constitution and laws of the state of Missouri from taxation. Yet, notwithstanding such exemption, the assessor of the city of St. Louis did pretend to assess said property for taxation from time to time for the years and in the manner hereinafter more fully shown, and did deliver the pretended tax bills evidencing such pretended assessments to the defendant and his predecessors in office so that the same are now all held by the defendant as such collector, and the defendant threatens to enforce the same as liens ²³⁴ against the property hereinafter described." The petition then states that said tax bills are void for the following reasons: "That they are assessed against property which, by the constitution and laws of the state, at the date of the assessment, was wholly exempt from taxation"; and "that they are assessed either against the 'Mullanphy Emigrant Relief Fund' or against the 'Mullanphy E. R. Fund,' whereas there is not and was not at the date of such assessment any person, natural or artificial,

known by that name, but that the name of such pretended owner as contained in such tax bills is a mere abstraction." A full description of the tax bills is given, and the prayer is that defendant be enjoined from enforcing them, and that they be canceled.

The defendant demurred on the ground that the petition failed to state facts sufficient to constitute a cause of action. This was overruled and a decree entered as prayed, and defendant has brought the case here.

1. The first question for decision arises out of the claim that this property is exempt from taxation. This involves a construction of the constitutional provisions on that subject.

Sections 6 and 7 of article 10 of the constitution of this state adopted in 1875, are as follows:

"Sec. 6. Property exempt from taxation.—The property, real and personal, of the state, counties, and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely ²³⁵ charitable; also, such property, real or personal, as may be used exclusively for agricultural or horticultural societies; provided, that such exemptions shall be only by general law.

"Sec. 7. Other exemptions void.—All laws exempting property from taxation, other than the property above enumerated, shall be void."

It is plain that the framers of the constitution did not intend to permit property regardless of its amount to be relieved from taxation simply because of its use for charitable purposes. A restriction is placed upon the exemptions that may be made upon that ground. Lots in incorporated cities and towns, or within one mile of the limits thereof, to the extent of one acre, and lots one mile or more from such limits to the extent of five acres "when the same are used . . . for purposes purely, charitable" may be exempted by general law. There is an express prohibition against the exemption of any other property than that specifically enumerated. The real estate in question here greatly exceeds the limits above mentioned. It is not claimed, nor indeed can it be, that it can escape taxation under the constitutional provision set out above, because of the use to which it is devoted under the Mullanphy will.

Section 6 of article 10 of the constitution in terms directs that property of the state, and of counties and other municipal corporations, shall be nontaxable. Immunity is claimed for this real estate solely under that provision. It is said that it is the property of the city of St. Louis, and hence is exempt.

The legal title is unquestionably in said city, but it remains to be determined whether it is the property of the city within the meaning of the above section of the constitution. It is certainly not held by it in the same manner or in the same right as its general corporate property. The devise is to it as trustee. The gift ²³⁶ is not to the city of St. Louis. A trust is created for the benefit of a particular class, and the testator selected the city to execute it. Any other trustee might with equal propriety have been chosen, and, in carrying out the provisions of the will, such trustee would not have been assuming any municipal function or interfering with the property of said city. A court of chancery might even yet, in a proper case and, upon a proper showing, remove the trustee. "A court of chancery is vested with the same jurisdiction over corporate trusts which it ordinarily possesses and exercises over other trust estates. . . . The choice of trustees is a matter of judgment, and the deviser of the trust has, in the exercise of that judgment, preferred an artificial to a natural person. Both, as trustees, are equally liable to animadversion and control of the courts": *Chambers v. St. Louis*, 29 Mo. 578. The city, however, could not thus be deprived of its property, viz., that of which it was the rightful and real owner.

Again, this court has recognized the fact that said real estate is not the "property of the city of St. Louis" in the usual and ordinary meaning of these words. It was said in *Chambers v. St. Louis*, 29 Mo. 578, in discussing the power of said city to take under Mullanphy's will: "The question whether the city can take the land in trust is a compound one, and involves: 1. The inquiry whether, under her charter, she can take the land; and 2. Although she may have the capacity to take it purely as a gratuity, or for her own use, yet whether she can take and hold it for the object mentioned in the testator's will, thereby making herself a trustee in respect to it." "It is not denied but that the city under her charter could take all the lands devised to her within her limits, if the devise had been to her own use, uncoupled with the trust to which, by the terms of the devise, it was subjected." "The next ²³⁷ question in order is, whether the city, even admitting that she can hold the lands outside of

her limits for her own use and in her own right, can become a trustee of them for the benefit of others." The trust, too, was not created solely for the benefit of those who might, at the time, be charges upon the city; nor is the relief to be accorded confined to such amounts as otherwise might properly be appropriated therefor from public funds.

The reason for exempting from taxation property of the state and its municipalities is plain. Judge Cooley in his work on Taxation, second edition, page 172, expresses it thus: "All such property is taxable if the state shall see fit to tax it, but to levy a tax upon it would render necessary new taxes to meet the demand of this tax, and thus the public would be taxing itself in order to raise money to pay over to itself." This reason does not exist for excluding from the tax books the Mullanphy real estate. The city, as trustee, can only use the property for the class and in the manner designated in the will. It cannot be applied by said city to its own benefit, or for municipal purposes.

The argument of respondent concedes that if the property was held in trust by an individual or a private corporation, it would be subject to taxation. We can not think that a different rule should prevail on the sole ground that a municipal corporation is the trustee. The constitution should not be construed to exempt real estate held in trust by a city, and to require the taxation of that held by the same title, and upon the same trusts by an individual trustee.

The legislature (Sess. Acts 1897, p. 59) has conferred power upon each county of the state to receive property in trust for charitable uses, and to act as trustee in such cases. Respondent's contention would exempt such property in the hands of the county, but ²³⁸ subject it to taxation, if held for the same purpose, by any other trustee.

Only lots to the extent of one acre in incorporated cities and towns and to the extent of five acres in country districts can be relieved from taxation, under the constitution, on the ground of the use thereof for charitable purposes: Const., art. 10, sec. 6. An easy way of escaping this prohibition exists if respondent's theory should be adopted. It will then be only necessary to make the county the trustee, and the exemption will follow, regardless of the number of acres so held by it.

We think that the property of a county or city exempted from taxation by the constitutional provisions hereinbefore quoted, is that of which such county or city is the beneficial owner, which

is held by it "for its own use" and not merely in trust. It does not include that in which the only interest of the municipality is as trustee. We therefore hold that this real estate is not exempt from taxation.

2. The point is made that the tax bills are void because the property therein described has never been subjected to taxation by the general assembly. In other words, that there is no statute providing for its assessment and directing the manner thereof. Neither, it is said, is there any procedure marked out for the enforcement of the tax lien. If the premises are correct, the conclusion necessarily follows that the tax bills are invalid.

The legislature must provide for the taxation of property. The "ways and means" for the assessment thereof must be prescribed by law. Omissions in that behalf cannot be supplied by the courts: *Kansas City v. Mercantile Mut. etc. Assn.*, 145 Mo. 50; *Valle v. Ziegler*, 84 Mo. 214; *State v. St. Louis etc. Ry. Co.*, 77 Mo. 202.

²³⁹ The revenue laws direct the assessment and taxation of all real estate not exempt therefrom. These provisions are broad enough to include this property, if an individual was the trustee. When we hold that it stands upon no different footing, so far as taxation is concerned, simply because the city occupies that position, we necessarily affirm that the revenue laws apply to this real estate. It does not stand upon the same plane as a class or species of property which might be taxed but for the assessment for which no provision has been made. The general laws direct the assessment of real estate. There is no reason for requiring a special act applicable to this property. It can be assessed just as it would be if there was a different trustee: *State v. Burr*, 143 Mo. 209.

3. Lastly, respondent objects that the assessments were not legally or properly made. The property in some instances was assessed to and the tax bills made out against the "Mullanphy Emigrant Relief Fund" and in others the "Mullanphy E. R. Fund."

The statutes require the assessment to be made in the name of the owner if known, and if not known, the name of the original patentee, grantee, or purchaser from the federal government must be given upon the assessor's books. This forms the foundation of the proceedings against the owner to enforce the tax and foreclose the lien therefor: 2 Rev. Stats. 1889, secs. 7553, 7555, 7562, et cetera; *Hubbard v. Gilpin*, 57 Mo. 441; *Abbott v.*

Lindenbower, 42 Mo. 162. It cannot be pretended that the trustee was unknown.

A legal assessment is a prerequisite to a valid tax. "There is a general concurrence of authority that, when the statute provides for the assessment of occupied lands to the owner or occupant, the requirement that it shall be so assessed is imperative": Cooley on Taxation, 2d ed., p. 396. It is true that it ²⁴⁰ has been held that a slight change in the corporate name will not vitiate the assessment: Souhegan etc. Factory v. McConihe, 7 N. H. 309. An individual also may be proceeded against by the name under which he does business, and by which he is known: Patchin v. Ritter, 27 Barb. 34. These cases cited by appellant do not meet the question for determination here.

There was no attempt in the case at bar to make the assessment in the name of any individual or corporation. Neither the real name nor any appellation by which the corporation is known is given in the assessment or tax bills. It is evident that it was not intended to give any such name. We must therefore hold that the tax bills are void. Hence the demurrer was properly overruled, and the judgment must be affirmed.

It is so ordered.

Gantt, C. J., and Sherwood, Burgess, Robinson, and Brace, JJ., concur.

Marshall, J., having been of counsel, took no part in the decision.

TAXATION — EXEMPTION — PROPERTY OF MUNICIPAL CORPORATIONS.—The property of municipal corporations is subject to taxation unless there is a law exempting it: Sanitary Dist. v. Martin, 173 Ill. 243; 64 Am. St. Rep. 110. But this does not apply to public property used only for governmental purposes. Buildings and other property owned by municipal corporations, and appropriated to public uses, are but the means and instrumentalities used for municipal and governmental purposes, and are, therefore, exempt from general taxation by necessary implication in the absence of any statutory or constitutional prohibition: See monographic note to Board of Commrs. v. Ottawa, 33 Am. St. Rep. 404.

YOUNG v. DOWNEY.

[145 MISSOURI, 250.]

JUDICIAL SALES, PUBLICATION OF NOTICE FOR FOUR WEEKS, WHAT IS NOT.—If a statute requires the notice of an application for leave to sell real estate to be published for four weeks before the first day of the term at which the order is to be applied for, a publication in four regular issues of a weekly newspaper is not sufficient, if the first publication was less than four weeks prior to the commencement of such term. It is not material that the order of sale was not entered until more than four weeks after such publication.

ADMINISTRATOR'S SALE, VOID FOR WANT OF NOTICE OF APPLICATION FOR LEAVE TO SELL.—If a statute provides that an administrator seeking an order to sell real property shall give notice of his application for the order, a failure to give such notice for the length of time prescribed by statute renders the sale void.

ADMINISTRATOR'S SALE, PRESUMPTION RESPECTING THE PUBLICATION OF THE NOTICE OF THE APPLICATION FOR.—From an order to sell real property and the confirmation of sale and the conveyance by the proper officer to the purchaser, a presumption will be indulged that all necessary, antecedent steps were taken to authorize the sale. This presumption is not conclusive, and is overthrown when it affirmatively appears from the records in the case that the notice of the intention to apply for the order of sale could not have been published for the time prescribed by statute.

James W. Boyd and Benjamin Phillip, for the appellant.

Jas. W. Coburn, for the respondents.

253 BURGESS, J. This is ejectment for the possession of several tracts of land, all alleged to be in the possession of the defendants. The petition is in the usual form. The defendants filed answer, the effect of which was to deny plaintiff's right to recover possession of the land, and to allege the sale and purchase of it by defendant Downey, at administrator's sale, where it was sold for the payment of debts against the estate of William H. Downey, deceased, by order of the probate court of Platte county, Missouri, at which said sale the defendant Downey became the purchaser, paid the purchase price and received a deed therefor.

Plaintiff filed reply denying all new matter set up in the answer, and alleging that all proceedings in the probate court in regard to the sale of the interest of William H. Downey of which defendant Downey became the purchaser were null and void; that defendants had received the rents and profits thereof since the administrator's sale, and asking that an accounting be had, et cetera.

In 1876, one William H. Downey died intestate, owning an undivided one-fourth interest in the land involved in this litigation. The defendant, William Rees, owned an undivided one-half of said lands and the defendant John M. Downey the remaining undivided one-fourth.

At the time of his death, William H. Downey left surviving him his widow, Angelina Downey, and an infant child, Lewis Downey, his only heir. The defendant, John M. Downey, qualified as administrator of the estate. A few months afterward, at the July term, 1876, of the probate court of Platte county, Missouri, the administrator filed his petition therein, setting forth the fact that the personal property was insufficient to pay the debts of the estate, and praying for an order authorizing him to sell the undivided one-fourth interest of his decedent in the land in question. ²⁵⁴ On the fourth day of September, 1876, the probate court made an order that all persons interested in the estate of William H. Downey, deceased, be notified by publication that unless they appeared on the first day of the next (October) term of said court, the second day of October, 1876, and made it appear to the contrary, an order for the sale of the undivided one-fourth interest of the said William H. Downey, deceased, in said lands would be made for the payment of his debts. Notice was published in the "Western Commercial," a weekly newspaper, in four issues of that paper, viz: The first insertion appeared September 8th, the second September 15th, the third September 22d, and the fourth September 29th. The first day of the October term, 1876, of the probate court of Platte county, Missouri, was the second day of October, so that the first publication of said notice was made only twenty-four days before the first day of said October term of said court.

On the first day of October term, Angelina Downey, the widow, appeared, and in writing objected to any order being made for the sale of said lands, until her interest in the same should be ascertained and set apart, and her homestead assigned to her; and requested that the court suspend all proceedings upon the petition of the administrator until the land was divided and her homestead assigned to her. At the time these objections were made, Angelina Downey was not curator of her infant child, Lewis Downey, she being appointed as such seven days later, on the 9th of October, 1876. On the twenty-seventh day of October, and at the October term, 1876, the court sustained the widow's objections, and made an order that all further proceedings in the application of the administrator for the sale of

his decedent's land for the payment of his debts be suspended until the further order of the court, and ²⁵⁵ until the rights of the widow in the real estate were determined.

The widow, on the sixth day of December, 1876, for herself, and as curator for her minor child, brought suit in partition in the probate court (which at that time had jurisdiction in partition) against defendants John Downey and William Rees, praying for division of the land owned by them in common, according to their respective interests. At the January term, 1877, an interlocutory decree was entered, and at the April term a final decree in partition was made, by which said lands were divided and the lands in controversy in this case were set off to Lewis Downey, as his property; the dower of the widow being assigned to her out of a part of the lands set off to Lewis Downey, and described by metes and bounds as follows, to wit: Beginning at the southeast corner of the southeast quarter of said section 13, thence north with range line to a stone on said range line 12.50 chains north of quarter section corner of section 13, thence west 16.37½ chains to the right of way of the Kansas City, St. Joe & Council Bluffs Railroad, thence with east line of same to quarter section line running east and west through the center of section 13, thence west with said quarter section line 1.75 chains, to the west side of right of way of said railroad, thence with the west side thereof, south 26½ degrees east, 65 chains to a stone in the center of ditch, thence, south 68½ degrees west, 10.20 chains to a stone in center of said ditch; thence south 35.50 chains to a stone under the bank of Missouri river, thence east (estimating to bank of said river) 21 chains to the beginning, containing 90.50 acres more or less, being 63.25 acres more or less of bottom land and 27.25 acres more or less of bluff or timber land. The remainder of the land was set off to the defendants jointly.

²⁵⁶ The widow afterward intermarried with James W. Young. Two children were born of this marriage, one named Myrtle, who died when she was thirteen months old, and Stephen Lee Young, plaintiff in this suit. The widow died in August, 1881. Lewis Downey died in June, 1895, aged twenty, leaving his half-brother, the plaintiff, a minor, his sole heir at law, who as such inherited and is the owner of all the lands which were set off in the partition suit to Lewis Downey, unless, as is claimed by the defendants, John M. Downey became the owner of said property by virtue of administrator's sale and deed hereinafter to be mentioned.

At the end of the October term, 1876, an order was made continuing the "petition of John M. Downey, administrator, for an order of sale to pay debts" to the January term, 1877, but no order was made at the January term continuing the matter over to the next (April) term, or any other term. The partition of the lands having been accomplished at the April term, 1877, on April 5th, the administrator appeared in the probate court on the following day, April 6th, and on his motion the court made an order of sale which culminated in the deed to defendant Downey. This order was made upon the original petition asking for a sale of Downey's undivided one-fourth interest in all of the lands formerly owned in common, and without any new petition or notice other than that which had been published for twenty-four days prior to the October term, 1876, in which it was recited that the application for an order would be made at that term for the sale of William H. Downey's undivided one-fourth interest in all of the lands then owned in common. The order of sale was not for the undivided one-fourth interest of William H. Downey, deceased, in the lands described in the petition or the notice published, but for the entire interest in all the lands which had been ²⁵⁷ set off to Lewis Downey in the partition suit, excepting the ninety acres which had been assigned to the widow as her dower. These ninety acres were not included in the order. The administrator was instructed to sell at private sale. Three days later, without any notice of any kind, the court, upon the administrator's motion, entered an order amending the order of sale made on April 6th, so as to embrace the ninety acres of land belonging to Lewis Downey (subject to his mother's dower), which had not been included in the first order made. This was also ordered to be sold at private sale. The administrator had the lands appraised, sixty-three acres of the dower land being appraised at twelve dollars and fifty cents per acre, all of the remaining lands at about five dollars per acre, and thereupon he sold all of it at private sale to himself for the appraised value, eighteen hundred and fifty-five dollars. A deed was made to defendant Downey in pursuance to the "sale," which was approved by the court, and this constitutes the defendant's claim of title to the lands in controversy.

In rebuttal the plaintiff offered to show by William Kyle and James Palmer that at the time the land in controversy was about to be sold by the administrator it was worth at least forty dollars per acre; that at that time they desired and intended to purchase one hundred acres thereof, and were then willing and

able to give at least the sum of forty dollars per acre therefor; that they expected said lands to be sold at public sale by the administrator, and that they watched for a notice of sale, and that they did not know that said lands had been sold until after it had been sold by the administrator to himself. On defendant's objection, the court refused to receive the testimony offered, and plaintiff excepted.

In accordance with said reply, the plaintiff then and there in open court offered to enter into an accounting and settlement with the defendants, and to ²⁵⁸ascertain what sum, if any, was due from the plaintiff to the defendants, and offered to pay to the defendants whatever money they, or either of them, may have expended for the purchase of the land in controversy, or any part thereof, and taxes, with interest, and all other sums of money which might be found to be due to the defendants, or either of them, by reasons of the purchase of said land, and to pay into court whatever sum of money might be found to be due to the defendants upon a proper accounting, the payment of said money to be a condition precedent to the right of plaintiff to recover the possession of any of the land sued for. This offer was by the court refused and rejected, and plaintiff excepted.

After said offer was made, the court peremptorily instructed the jury that under the pleadings and evidence the verdict should be for the defendants. Thereupon the plaintiff took a nonsuit with leave to move to set aside the same. Motion to set aside the nonsuit was made in due time and overruled, and this case is here upon appeal.

It is urged that the administrator's sale and deed are void because the notice required by the statute to be given to the parties in interest was published only for twenty-four days before the day on which the parties were required to appear and show cause why the order of sale should not be made, when the statute requires twenty-eight days' notice. The probate court had the power to order a sale of the lands belonging to the estate of William H. Downey, deceased, for the payment of debts against the estate by proceeding under section 47, page 500, of the General Statutes of 1865, upon filing a statement of the accounts of the administrator, showing that the personal estate was insufficient to pay the debts against the estate; or by proceeding under section 22, page 498, of the same statute, by the ²⁵⁹presentation of a petition showing that the personal property was insufficient to pay the debts (as provided by section 10, page

497, of said statute), accompanied by a true account of his administration, a list of debts due to and by the deceased and remaining unpaid, and an inventory of the real estate and of the remaining personal estate with its appraised value, the whole to be verified by the administrator.

The proceedings for the sale of the land in question in this case were under section 22, *supra*, and when such is the case the statute requires (Gen. Stats. 1865, sec. 25, p. 498) that where such petition and accounts, lists and inventories, shall be filed, the court shall order that all persons interested in the estate shall be notified as hereinbefore stated. While the notice was published in a weekly newspaper published in said county, it was only published for twenty-four days instead of four weeks before the first day of the court at which the order of sale was made. That is, the first insertion of the notice of the intended application for an order for the sale of the land was on September 8, 1876, while the first day of the next term of the probate court thereafter was on the second day of October.

In *Teverbaugh v. Hawkins*, 82 Mo. 180, it was held that an order of a probate court for the sale of lands belonging to a decedent for the payment of his debts without the petition therefor, and without notice of the intention to apply for the same as required by law, is void, and a sale thereunder will pass no title, except where, on a settlement of the accounts of the administrator, it appears the personal estate is insufficient to pay the debts of the estate; in which event the court can make the order of sale of its own motion. In *Hutchinson v. Shelley*, 133 Mo. 400 (as in the case at bar), the order of sale was not made on an annual settlement. None was due, and the record showed that it was made ²⁶⁰ on the petition of the administrator. The court observed: "By section 147 of the Revised Statutes of 1889 (Gen. Stats. 1865, sec. 25), when the petition was filed the law required that notice to the heirs should be given by publication in some newspaper for four weeks or by ten handbills put up in ten public places twenty days before the term of the court at which such an order could be made, and yet the record affirmatively shows upon its face that such notice was not given, but the order was made the same day it was filed. Hence it was invalid": Citing *Valle v. Fleming*, 19 Mo. 460; 61 Am. Dec. 566; *Agan v. Shannon*, 103 Mo. 661; *Ferguson v. Carson*, 86 Mo. 673.

When defendants showed the order of sale by the probate court of Platte county for the sale of the land in question, the

order approving the sale, and the deed from W. P. Chiles, ex officio clerk of said court, to the defendant, Downey, the presumption will be indulged therefrom, until the contrary is shown, that all antecedent steps requisite for the sale were taken (*Price v. Springfield Real Estate Assn.*, 101 Mo. 107, 20 Am. St. Rep. 595), and that the order of sale was made upon proper publication of notice, but, when it affirmatively appears to the contrary from said records, as in the case at bar, that it is impossible that the notice could have been given, the order of sale must be held invalid: *Valle v. Fleming*, 19 Mo. 455; 61 Am. Dec. 566; *Agan v. Shannon*, 103 Mo. 661.

The statute with respect to the publication of the notice (*Gen. Stats.* 1865, sec. 25) is mandatory, in that it provides that such notice shall be published for four weeks in some newspaper in the county in which the proceedings are had before the term of the court at which such order will be made. The first publication was on September 8, 1876, while the October term of the probate court began on the second day of that month, so that the length of time from the first publication to the first ²⁶¹ day of court was only twenty-four days, four days less than four weeks. It is perfectly clear, therefore, that the requisite notice was not given, and the court was without jurisdiction to make the order of sale, and that defendant Downey acquired no title to the land by reason of his purchase and deed. In holding otherwise we think the court committed reversible error.

As this is the vital question involved in this appeal we deem it unnecessary to pass upon other questions raised by plaintiff, as they may not arise upon another trial.

For reasons stated we reverse the judgment and remand the cause.

Gantt, P. J., and Sherwood, J., concur.

JUDICIAL SALES—PUBLICATION OF NOTICE—SUFFICIENCY.—In order to obtain a price in some measure commensurate with the actual value of the property to be sold on execution or judicial sale, it is evident that some notice must be given of the nature of the property and of the time and place of the sale. Where the time for which notice must be given is fixed by statute the court cannot shorten it. The words, "at least once a week for four successive weeks," mean that the notice must be published, so that not more than a seven days' interval shall occur between any two successive publications: See extended note to *Maddox v. Sullivan*, 41 Am. Dec. 239; monographic note to *Hoffman v. Anthony*, 75 Am. Dec. 708.

EXECUTORS AND ADMINISTRATORS—SALES—SUFFICIENCY OF NOTICE—CONFIRMATION.—An administrator's sale under an order of court conveys no title if the notice of application

for the order is insufficient: *Gibson v. Roll*, 30 Ill. 172; 83 Am. Dec. 181, and note. Such notice is insufficient and the sale invalid where the statute provides that the first publication of the notice must be a least six weeks before the presenting of the petition, and there are less than six weeks between the first publication of the notice and the time specified therein for the presenting of the petition, notwithstanding the petition is in fact presented after the time so specified and after the lapse of six weeks: *Gibson v. Roll*, 30 Ill. 172; 83 Am. Dec. 181. As to the effect of orders confirming judicial sales, see monographic note to *Watson v. Tromble*, 29 Am. St. Rep. 495. Recitals in a decree of the probate court that proof was made of publication according to law, and that legal notice of the sale had been given the heirs, are prima facie evidence of due and legal notice: *Monk v. Horne*, 38 Miss. 100; 75 Am. Dec. 94.

ST. LOUIS v. DORR.

[145 MISSOURI, 466.]

A MUNICIPAL CORPORATION HAS NO IMPLIED POWER to restrict the use of real property fronting upon any street therein to residence purposes only, nor to inhibit the doing of business on property abutting on any street.

MUNICIPAL CORPORATIONS—FORBIDDEN SPECIAL LAWS.—If the constitution of a state declares that the legislature shall provide by general laws for the classification of cities and towns, and the number of classes shall not exceed four, and the legislature does proceed to designate the four classes, a subsequent statute purporting to confer a power on cities which have, or may acquire, a population of three hundred thousand or more, is void, where it, in effect, creates five classes, or, in other words, confers on cities of the first class having a population of more than three hundred thousand powers not possessed by other cities of the first class having a less population.

MUNICIPAL CORPORATIONS—CONSTITUTIONAL LAW. The freeholders' charters of the cities of Missouri of the first class, including St. Louis, cannot be amended by an act of the legislature as to matters of municipal and local concern.

MUNICIPAL CONCERNS, WHAT ARE.—A general statute purporting to authorize all cities within the state of a designated population to set aside streets therein as boulevards and to prohibit the use of lands fronting on such boulevards except for residence purposes, deals with a subject of strictly municipal concern, and is hence invalid, if such legislature has not the right to interfere with the municipal concerns of such cities.

MUNICIPAL CORPORATIONS, RESTRICTING USE OF PROPERTY WITHIN—CONSTITUTIONAL LAW.—A statute purporting to authorize municipal corporations to select streets to be used as boulevards and to exclude the institution and maintenance of any business avocation on the property fronting on such boulevard, is an unwarranted invasion of the right of private ownership of property in so far as it attempts to authorize the exclusion from such property of any legal and innocent business, such as the keeping of a store for the sale of confectionery.

W. C. Marshall, for the plaintiff in error.

I. H. Lionberger and Louis A. Steber, for the defendant.

⁴⁷⁰ BARCLAY, C. J. In March, 1894, the city of St. Louis began an action in a police court against the defendants, Messrs. Dorr and Zeller, to recover a penalty for violation of a municipal ordinance. In the police court the defendants were adjudged not guilty. The city took an appeal to the St. Louis court of criminal correction, where the trial now under review took place.

The substance of the charge against defendants is, that they carry on the business of confectioners in a building (No. 3924) on Washington boulevard, contrary to said ordinance. The ordinance was enacted in 1892. It declares a certain portion of Washington avenue to be a boulevard, and, among other provisions regulating the use of that thoroughfare, provides that "the houses fronting or bordering on Washington boulevard, between Grand avenue and Kingshighway, shall be used as residences only, and no business avocations whatever shall be allowed to be followed in same."

It appears from the record that on March 15, 1894 (and on divers days immediately prior thereto), the defendants were carrying on the interdicted avocation at the place mentioned. They had previously conducted ⁴⁷¹ a confectionery business on Vandeventer avenue, just east of their store on Washington boulevard.

Defendants' counsel at the trial admitted the material facts charged. The defense is, that the ordinance is unconstitutional. The trial court sustained that defense and entered judgment for defendants. The city (after the necessary steps) brought the case to the supreme court by writ of error. It was heard in the second division, which entered an order transferring the case to the court in bank, June 8, 1897. It has since been argued and submitted to the whole court.

1. The claim of the city is, that the ordinance is authorized by "An act relating to boulevards in cities having a population of three hundred thousand inhabitants or more": Laws, 1891, p. 47.

The first section of that act is as follows:

"Section 1. All cities in Missouri having a population of three hundred thousand inhabitants or more, or which shall hereafter reach said population, are hereby authorized and empowered to establish by ordinance boulevards and provide for maintaining the same; and may regulate the traffic thereon, and may exclude heavy driving thereon, or any kind of vehicle therefrom, and may exclude the institution and maintenance of any business avocation on the property fronting on such boulevard, and may

establish a building line to which all buildings and structures thereon shall conform, and may convert existing streets into boulevards, and may levy a special tax on property fronting on said boulevards, to light, sweep, and maintain the same, and the grass and trees thereon, or any part of said expenditures, and for the above purposes, or any of them, may lay out a district or districts in which said special tax shall be levied, and provide for the assessment of said special tax, by assessing the same in favor of the city on the adjoining property fronting ⁴⁷² or bordering on the boulevards where such lighting, sweeping, and maintenance is to be had, in the proportion that the linear feet of each lot fronting or bordering on the boulevard bears to the total number of linear feet of all property chargeable with the special tax aforesaid in the district so established, and may accept dedication of boulevards with conditions thereto attached which shall be binding and conclusive; provided, however, that no ordinance on the above subjects, or any of them, shall be valid unless recommended by the board of public improvements of the city enacting the same."

The other sections of the act need not be quoted.

It is not pretended that there is any other specific authority by which the city of St. Louis is empowered to exclude such a business avocation as that of the defendants from property fronting on, or adjacent to, any public street. Without a clear grant of such power no municipal ordinance (of the sort invoked in this case) could possibly be sustained. Such a restriction as the ordinance imposes upon the ownership of private property could certainly not be supported as a proper exercise of mere general power to regulate the use of streets, or under any express power to which we have been cited in the St. Louis charter. If the act of 1891, relating to boulevards in cities having a population of three hundred thousand inhabitants or more, is not valid as an amendment of the said charter, the ordinance at the foundation of this action is unauthorized (at least so far as concerns the charge against defendants). Being of the opinion that the said boulevard act does not of itself operate to alter the existing charter of the city of St. Louis, we hold said ordinance void, as applied to the facts of defendants' case.

2. The constitution of 1875 prohibits the passage of any local or special law "authorizing the laying out, ⁴⁷³ opening, altering or maintaining roads, highways, streets, or alleys," or "incorporating cities, towns or villages, or changing their charters": Const. 1875, art. 4, sec. 53.

It is further provided in the ninth article as follows:

"Sec. 7. The general assembly shall provide by general laws for the organization and classification of cities and towns. The number of such classes shall not exceed four; and the power of each class shall be defined by general laws, so that all such municipal corporations of the same class shall possess the same powers and be subject to the same restrictions. The general assembly shall also make provisions, by general law, whereby any city, town, or village, existing by virtue of any special or local law, may elect to become subject to, and be governed by, the general laws relating to such corporations."

The scope and intent of the section just quoted have been recently described in a learned opinion of Judge Philips, in a Missouri case in the United States circuit court.

"This provision of the constitution is both mandatory and prohibitory. Its command is not only that the legislature shall provide for the organization and classification of all cities in the state, but such provision must be by general laws, not special enactments. It then commands the classification of such cities, and interdicts the creation of more than four classes. It further commands, not only that the legislature shall define the restrictions and powers of each of said classes, but also that this shall be done by general law. It then proceeds to declare the purpose of the convention in making this requirement to be 'so that all such municipal corporations of the same class shall possess the same powers and be subject to the same restrictions.' The clear intent of which is to prevent the multiplication ⁴⁷⁴ of classes of municipalities, and the giving to one within the same class different powers and functions, and imposing upon anyone restrictions different from those in the same class or division. In short, it is to secure absolute uniformity, by general law, applicable to all the given classes, respecting the faculties with which they might be endowed, and the limitations placed upon their functions by the legislature; so that any person, anywhere, desiring to ascertain what are the powers and restrictions of any one city of a given class in the state, could be advised thereof by looking at the 'general law' defining such powers and restrictions": *Ward v. Boyd Paving etc. Co.* (1897), 79 Fed. Rep. 391, affirmed in *Boyd Paving etc. Co. v. Ward* (1898), 85 Fed. Rep. 27, in a well-considered judgment of Judge Sanborn.

The legislature of Missouri has enacted general laws for the organization of four classes of cities and towns under legislative charters: Rev. Stats. 1889, secs. 972-977. The first class com-

prises cities of one hundred thousand inhabitants and over. For cities of that size, choosing to adopt it, a charter is provided in substantially the same terms as those of the original freeholders' charter of St. Louis: Rev. Stats. 1889, secs. 984-1236.

If the boulevard act of 1891 is entitled to any standing as a general law it is on the theory that the act is applicable to all cities that may in time possess the population stated. The act, then, will necessarily have the effect to enlarge the powers of all cities of the first class when they reach a population of three hundred thousand, leaving the smaller cities of that class without those enlarged powers. Thus the first class of cities with general charters would be divided into two classes, and there would exist at least five classes of legislative charters, in violation of section 7 above quoted, and especially in violation of that part of it which declares that "the power of each class shall be defined by general ⁴⁷⁵ laws, so that all such municipal corporations of the same class shall possess the same powers and be subject to the same restrictions." That part of the constitution forms an impregnable obstacle against such enactments as this.

The section just quoted was designed to put an end to special legislation (however disguised) in relation to the municipal powers of cities and towns that might accept the classified charters applicable to them. The reason for so positive a command on that point was briefly given in the address which accompanied the new constitution when first promulgated.

"Cities and Towns.—Charters of cities and towns must be amended by general law. The advantages of this must be apparent. To illustrate: A single law will suffice for all cities and towns of the same class in the state, whereas now a separate law must be passed for every city. Legislation in the interest of individuals and cliques will be prevented; for while it is easy to procure the passage of an unjust law affecting but a single locality, in which none but the immediate representatives are interested, it would be difficult to procure the passage of a similar law affecting all localities of the same class."

But whatever the reason for the constitutional mandate, its purpose to prohibit the enactment of legislative charters for more than four classes of cities is sufficiently clear to demand enforcement. Fortunately, its language is so plain as to be more difficult of evasion than some other parts of the organic law have proven to be.

Conceding, then (for argument), that the boulevard act before us is in form a general law (because it may apply to all cities

that in future reach the prescribed size), it is yet unconstitutional, because it would add another class to the four classes of legislative ⁴⁷⁶ charters already existing, and would confer on some cities of the first class (on reaching the population of three hundred thousand) municipal powers not possessed by smaller cities of the same class: *Worcester Nat. Bank v. Cheney* (1880), 94 Ill. 430; *Denman v. Broderick* (1886), 111 Cal. 96.

3. But it is contended that the boulevard act is at least valid as an amendment to the charter of St. Louis, and that, as such an amendment, it is not within the intention of the seventh section of the ninth article of the constitution in its prohibition of more than four general classes of city or town charters.

Waiving now all question whether such a narrowing of the application of the boulevard act is permissible (considering its title and its terms), let us examine the merits of the contention. They involve the construction of those provisions of the organic law under which the present charter of St. Louis came into operation. Those provisions are familiar to all who have had occasion to examine into the relations of that city to the state. They form the concluding part of the ninth article of the constitution, and begin with the twentieth section.

St. Louis was not alone in obtaining the privilege of framing a charter for its own government. By the sixteenth and seventeenth sections of the same article, all cities having a population of more than one hundred thousand inhabitants were accorded a similar right. Kansas City has availed itself thereof, and is governed now by a charter prepared by its freeholders and adopted by its own citizens in 1889.

An act of the general assembly was passed in 1893 purporting to empower "every city in this state which is now or may hereafter be organized under and by virtue of the provisions of section 16, article 9, of the constitution of this state, to establish and maintain ⁴⁷⁷ for such city a system of parks and boulevards," et cetera. But the supreme court in bank held that act unconstitutional, and declared that, so far as concerns the local affairs of Kansas City, its present charter cannot be amended by an act of the legislature: *Kansas City v. Scarritt* (1895), 127 Mo. 642; followed in *Kansas City v. Ward* (1896), 134 Mo. 172, and *Kansas City v. Marsh Oil Co.* (1897), 140 Mo. 458.

The correctness of that ruling is admitted in this case by the learned counsel for St. Louis, whose brief states "that the charter of Kansas City cannot be amended as to local matters by an act of the legislature or in any other way than by vote of the

people," and that "as to special matters, therefore, Kansas City will, under this ruling, always have her own rule for the improvement of her streets, which will be different from the rule in other cities." But he, nevertheless, insists that "St. Louis, under section 25 of article 9, may be affected by a general act amending her charter."

Let us inquire why the charter of St. Louis should be considered subject to amendment by the legislature, as to matters of municipal and local concern, while the charter of Kansas City and others framed under section 16 are to be exempt from such amendment.

Section 16 provides that the freeholders' charter adopted under it "may be amended" (after certain preliminaries) by a vote of the people of the city, "and not otherwise." Section 22 provides that the St. Louis charter "may be amended at intervals of not less than two years," by proposals submitted to, and accepted by, a certain part of the qualified voters of the city. But the words "and not otherwise" (occurring in section 16) are wanting in section 22. As to each kind of charter and amendments thereof, it is expressly provided that ⁴⁷⁸ they "shall always be in harmony with and subject to the constitution and laws" of the state. At the close of the article is the further declaration that: "Notwithstanding the provisions of this article, the general assembly shall have the same power over the city and county of St. Louis that it has over other cities and counties of this state" (section 25).

The section last quoted was probably inserted out of abundant caution to indicate that the scheme and charter for the reorganization of the city and county governments of St. Louis were not to be construed to impair the power of the general assembly to legislate for that city and for St. Louis county to the same extent that other cities and counties of the state were subject to that power. Section 25 does not refer to any distinction between local and other subjects of legislation; but sections 20 and 23 indicate that distinction quite clearly.

Section 20 moreover describes, in very significant terms, the legal force of the scheme and charter when duly ratified, viz., "then such scheme shall become the organic law of the county and city, and such charter the organic law of the city, and at the end of sixty days thereafter shall take the place of and supersede the charter of St. Louis, and all amendments thereof, and all special laws relating to St. Louis county inconsistent with such scheme."

"Organic law" is a term usually applied to constitutional law only. It certainly imports a high degree of authority. No such language is used in the sections (16 or 17) under which other large cities are empowered to frame their own charters.

The whole project for the separation of the city and county, and for the investiture of the city of St. Louis with functions of government formerly appertaining to the county, involved the exercise of sovereign legislative ⁴⁷⁹ power. Sections 20 and 23 disclose that the scheme and charter of St. Louis were expected to deal with some topics properly within the domain of the general legislative authority of the state—topics affecting the necessary operations of the machinery of the state government in that locality—as well as to deal with matters of mere local administration of municipal affairs.

The "scheme" was expressly intended to provide for the "enlargement and definition of the boundaries of the city, the reorganization of the government of the county, the adjustment of the relations between the city thus enlarged and the residue of St. Louis county." That adjustment required provisions to be made for the collection of the state revenue in the city, and for the performance of "all other functions in relation to the state" which had previously been performed by the county. Both sections 20 and 23 exhibit the dual relation that the city was expected to sustain toward the state, if the scheme and charter were accepted by the people. The charter of the city (besides regulating its local affairs) contained many provisions to define the mode in which the city should perform many essential governmental duties toward the state, "as if it were a county" (section 23).

The city was practically put in the position of a county for the purposes of executing the functions of government in that locality. As those functions were to be performed by city officers, the scheme and charter undertook, in the first instance, to prescribe how, and by whom, those duties should be discharged. But matters of purely municipal and local concern the constitution intended to commit to local self-government, which the peculiar provisions in regard to St. Louis were designed to authorize.

It may not always be easy to determine what subjects ⁴⁸⁰ are local and municipal and what are not. That difficulty is not a new one. But it is easy to determine in this case that the boulevard act deals with a subject of strictly municipal concern, for the principle of the decision of the supreme court in *State v. Field* (1889), 99 Mo. 352, is decisive of that proposition.

In view of those extraordinary constitutional provisions (which were innovations in our law) and in view of the large powers granted to the freeholders and to the people of St. Louis, it was thought prudent to insert section 25. But the terms of that section certainly do not imply that the general assembly is to have any greater power over the city and county of St. Louis than it has over other cities and counties of the state. The very words of the section indicate that it is not intended to cut down any of the grants of power in other sections of the ninth article. All parts of the organic law should have due weight. Section 25 seems to us to give no sanction to the holding that the charter of the city of St. Louis is subject to amendment by the general assembly in those particulars wherein the freeholders' charter of Kansas City (for example) is exempt from such amendment.

The people of the state expressed in the constitution, in most solemn form, a purpose to give the people of St. Louis power to "frame a charter for the government of the city" (section 20). It was never intended that the charter should be subject to the same sort of change by special legislation as before the constitution of 1875. Yet that would be the case if the simple device of legislation applied to population (as in the act before us) met the approval of the courts.

When we take into view all parts of the constitution bearing on the question of legislation for municipal organizations, we do not doubt that section ⁴⁸¹ 22 in its present form was designed to have the same effect that was ascribed by the court in bank (in *Kansas City v. Scarritt*, 127 Mo., 642) to that part of section 16 pointing out the mode of amendment of charters framed under section 16. The variation of phraseology by the use of the words "and not otherwise" (in section 16) indicates no difference of intent as to the mode of amendment, when the other parts of that article are considered. The method of direct amendment of the St. Louis charter is ordained by section 22, and that method is exclusive; subject, however, to the repeated qualification that the charter of St. Louis and those of all other cities in the state are subject to the constitution and laws of the state.

In respect of those topics which involve the relations of the city to the state, there can be no doubt that the legislative power of the state may properly be exercised over the city of St. Louis, as has been done in many instances disclosed by decisions in the Missouri reports: See *State v. Tolle* (1880), 71 Mo. 645, approving a law in regard to legal advertisements; *Ewing v. Hoblitzelle*

(1884), 85 Mo. 64, sustaining the act regulating registration, elections, and the office of recorder of voters in St. Louis; *State v. Miller* (1890), 100 Mo. 439, construing a statute for the government of the public schools; *State v. Bennett* (1890), 102 Mo. 356, interpreting laws to govern the state board of police in St. Louis; *State v. Bell* (1893), 119 Mo. 70, sanctioning the law in regard to the excise commissioner in St. Louis; *State v. Higgins* (1894), 125 Mo. 364, holding valid the justice of the peace act for St. Louis; *Kenefick v. St. Louis* (1895), 127 Mo. 1, sustaining the act for auditing the sheriff's accounts in St. Louis.

⁴⁸² The general assembly has, furthermore, undoubted power to legislate for St. Louis, as for all other cities, in the full exercise of the police power of the state, as well as to enforce direct mandates of the fundamental law by appropriate statutes, and to pass all proper laws that are general throughout the state. *State v. St. Louis etc. Ry. Co.* (1893), 117 Mo. 1, affords an illustration of legislation of the latter sort. In that case a law intended to prescribe rules for assessing railroad property throughout the state was held applicable to St. Louis and operative to repeal charter provisions on that subject.

But the theory (advanced in this case) that the freeholders' charter of St. Louis may be amended by an act such as that before us, while the freeholders' charters of cities organized under section 16 may not be so amended, seems at variance with the terms of section 25, which is assigned as the basis of that theory. The charter of St. Louis is subject to the legislative power of the state to the same degree that other cities and counties are. But the degree to which the charters of other cities are subject to amendment by acts of the general assembly is limited and defined by section 7 of the same article, already discussed in a previous paragraph of this opinion.

That section imposes positive restrictions on the power to deal at all with city charters, obtained since the constitution of 1875 took effect. Those limitations are as applicable for the protection of the city of St. Louis against legislation upon its local affairs as to protect any other city against such legislation.

Legislation on local topics, properly comprehended in municipal charters, must be enacted in the manner defined by section 7, by general laws, the nature of which is indicated explicitly, viz: "So that all such ⁴⁸³ municipal corporations of the same class shall possess the same powers and be subject to the same restrictions." And the number of classes which the general assembly may create for the organization of cities and towns is positively limited to four.

Those safeguards protect all city charters that have come into being under the constitution of 1875. Municipal charters of earlier date have been held not to fall within those rules as to classification, but to be amendable by general laws, outside the classification prescribed for cities and towns organized since section 7 became part of the organic law: *Rutherford v. Heddens* (1884), 82 Mo. 388; *Rutherford v. Hamilton* (1889), 97 Mo. 543. Those decisions should not be extended to reach any case not falling strictly within the facts then in judgment. But nothing decided in those cases sanctions the contention that freeholders' charters (authorized to be adopted by the terms of the constitution itself) may be amendable by an act of the general assembly such as this before us, conferring municipal powers on all cities now (or hereafter) having three hundred thousand population, when there are already four general classes of legislative city charters, the first of which is subject to adoption by any city having one hundred thousand population.

To permit such an amendment of the charter of St. Louis, or any other constitutional charter, would let loose anew many of the evils of special legislation that the constitution so carefully endeavored to suppress. How earnest was that endeavor is evident from the following passage in the address (already referred to) with which the constitution was presented to the people.

"The evils of local and special legislation have become enormous. We need but look to our session acts to be satisfied that this species of legislation occupies ⁴⁸⁴ the larger portion of the time of our general assemblies, to the neglect and prejudice of public interests. The expense to the state in passing and publishing such laws and the combinations by which private interests have been advanced and dangerous monopolies created are well known. Under the proposed constitution, the general assembly is prohibited from passing such laws. In all cases where a general law can be made applicable a special law cannot be enacted."

We believe in firmly maintaining the barriers which the present organic law has erected against the abuse of legislative power by special and local legislation, and to permit no evasion of the just and wholesome provisions which were intended to abolish that abuse.

We believe in guarding all city charters, accepted under the pledges of the constitution of 1875, from unlawful invasion by special legislation as to local affairs, and believe in enforcing, as vigorously as any other part of the constitution, the provisions

of section 7 of article 9, limiting the number of classes of cities and towns for which the general assembly may pass laws conferring municipal powers.

Doubtless, remarks may be found in some of the decisions mentioned in this opinion (and in some other cases cited in the briefs of learned counsel) which are not in entire harmony with all that is above written. But we believe that the actual judgments pronounced in the most, if not in all, of the cases referred to are supported by the principles we have endeavored to elucidate.

4. Finally, it is suggested that a great number of statutes would be invalidated if the views we have indicated are finally accepted as the law. To this it may be answered that many of the statutes that have been cited as coming under the ban of our ruling are plainly ⁴⁸⁵ sustainable on various grounds indicated in this opinion. But even if this were not so, there would yet be a more satisfactory answer to give, in the words of another: "No length of usage can enlarge legislative power, and a wise constitutional provision should not be broken down by frequent violations": *People v. Allen* (1870), 42 N. Y. 378, 384.

We hold that the boulevard act is not a valid amendment of the charter of St. Louis.

Up to this point Judges Gantt, Macfarlane, Robinson, and Brace concur in all that has been written.

5. In addition to the reasons above given for affirming the judgment, Judges Gantt, Robinson, and Brace consider that the ordinance in question is unconstitutional for the further reason that it is an unwarranted invasion of the right of private ownership of property; and that, even were the ordinance founded upon express authority contained in the local charter (to the same purport as stated in said boulevard act of 1891), the ordinance would, nevertheless, be void in so far as it undertook to prohibit the use of defendants' property for a confectionery store on Washington boulevard, because the ordinance is an invasion of a valuable constitutional right of defendants to the enjoyment of their real property, of which right they could not be deprived without just compensation, by any ordinance, whether authorized by the charter or not: *St. Louis v. Hill* (1893), 116 Mo. 527.

The judgment should be affirmed, and it is so ordered, Judges Gantt, Macfarlane, Robinson, and Brace concurring in this opinion as already indicated.

JUDGES SHERWOOD and BURGESS, dissenting, joined in an opinion written by the former, and which affirmed: 1. That while the charter of St. Louis was not subject to amendment by local or special laws, that city is subject to general laws: Citing *Ewing v. Hoblitzelle*, 85 Mo. 64; *State v. Dolan*, 93 Mo. 467; *State v. Miller*, 100 Mo. 439; *State v. Railroad*, 117 Mo. 1; *State v. Bell*, 119 Mo. 70; 2 That the law here assailed is a general law; 3. That the charter of St. Louis may be amended by general laws; but 4. That it was not within the power of the legislature to authorize the municipality to deprive an owner of the use of his property, and that the statute in question, so far as it attempted to restrict the use of property to residence purposes, was unconstitutional. Upon this subject Judge Sherwood, with the approval of Judge Burgess, said: "In *St. Louis v. Hill*, 116 Mo. 527, where another section of the act of 1891, and an ordinance based thereon, underwent discussion, we there held that the city could not deprive the owner of the use of a portion of his property, by compelling him to set his dwelling-house forty feet back from the 'building line' of Forest Park boulevard, on the ground that the ordinance which authorized such building line and compels its observance, was null and void because: 1. It deprives the owner of his property without due process of law, thus violating section 30 of article 2 of the constitution; 2. Because such ordinance took the property of the owner without affording him compensation therefor, in violation of section 21 of the same article. In other words, we held in that case that the use of property was property itself, within the meaning of the constitution. We still adhere to that view. We regard that case as decisive of this one, the only difference between them being that in the former the ordinance only deprived the owner of a portion of his lot, while in the latter he is deprived of all of his property, unless he will conform its use to the unconstitutional demands of the city authorities. In the exercise of legitimate police regulations a municipality may do many things delegated to it as powers to be exercised for the public good. 'Of this nature is the authority to suppress nuisances, preserve health, prevent fires, to regulate the use and storing of dangerous articles, to establish and control markets, and the like. . . . This power to restrain a private injurious right of property is essentially different from the right of eminent domain. It is not a taking of private property for public use, but a salutary restraint on a noxious use by the owner contrary to the maxim, *Sic utere tuo ut alienum non laedas*': 1 Dillon on Municipal Corporations, 4th ed., sec. 141. Doubtless a municipality, when properly authorized, may forbid the noxious use of property by the owner, or of property that has a tendency or likelihood of becoming noxious: *St. Louis v. Hill*, 116 Mo. 527; but beyond this a city cannot go without infringing the constitutional rights of the owner. And though a city has power conferred upon it by the legislature to pass ordinances of a specified and defined character, and though such ordinances thus passed by virtue of such authority cannot be impeached as invalid because unreasonable, yet such ordinances cannot stand if in conflict with the constitution: 1 Dillon on Municipal Corporations, 4th ed., sec. 323.

Now, in this case, the proposed use is entirely innocuous, and with no tendency to become otherwise. Therefore, judgment affirmed."

STATUTES—SPECIAL LAWS RELATIVE TO MUNICIPAL CORPORATIONS.—The distinction between special and general laws is often closely drawn in construing statutes relative to municipal corporations: Note to *Wanser v. Hoos*, 64 Am. St. Rep. 615. Although population may be made the basis of classification in statutes relating to municipal bodies, such classification cannot be made the means of evading the constitutional interdict against local or special laws. The question whether any particular statute is local or special must be determined not upon its compliance with legislative classification, but upon whether, having regard to the character of the legislation and the limitation upon it contained in the act, the statute is or is not a general law: *Wanser v. Hoos*, 60 N. J. L. 482; 64 Am. St. Rep. 600. For a complete discussion of this matter, see monographic note to *State v. Ellet*, 21 Am. St. Rep. 780; *State v. Des Moines*, 96 Iowa, 521; 59 Am. St. Rep. 381.

MUNICIPAL CORPORATIONS—CONTROL OVER STREETS. The power to vacate and discontinue a street necessarily involves the power to change its use, as by limiting it to a designated class of travel and excluding other modes of travel or use, when no property rights are involved, the legislature may close a highway altogether, or may regulate its use, or restrict it to peculiar vehicles: *Cicero Lumber Co. v. Cicero*, 176 Ill. 9; ante, p. 155. But a city vested with power to regulate its streets has no power to divert their uses from those to which they were dedicated: Note to *Cicero Lumber Co. v. Cicero*, ante, p. 168.

CASES
IN THE
SUPREME COURT
OF
NEBRASKA.

PAXTON v. SUTTON.

[58 NEBRASKA, 81.]

HOMESTEADS—PRE-EXISTING DEBTS.—A debtor may acquire a homestead and hold it exempt from execution for pre-existing debts not then reduced to judgment, although the homestead is purchased with, or obtained by exchange for, nonexempt property. Fraud cannot be imputed to such an act.

H. M. Kellogg, and A. W. Agee, for the appellants.

A. B. Taylor, for the appellee.

⁸² **IRVINE, C.** Jonathan J. Sutton was engaged in the mercantile business at Aurora, in Hamilton county. On February 21, 1893, he was indebted to the plaintiffs in divers amounts for goods sold to him to replenish his stock. On that day he exchanged his stock of goods for one hundred and sixty acres of land in Chase county. The title to eighty acres was taken in himself and to the remaining eighty in his wife. On March 6, 1893, he removed upon the land and has since been occupying it as a homestead. The plaintiffs very promptly reduced their claims to judgment, and on March 6th filed transcripts of their several judgments in the office of the clerk of the district court of Chase county. They then caused executions to be levied upon the land and afterward filed the petition in this case, alleging that by reason of the conveyance to Mrs. Sutton and the claim of homestead the land could not be sold to advantage, and praying that their levies be declared valid and the land subjected to the payment of the judgments. The pleadings and admis-

sions made on the trial left, so far as the homestead was concerned, really no contested issue except whether the purpose of Sutton in ⁸³ making the exchange was to defeat his creditors. There was a finding for the defendants and judgment of dismissal. The court found that the land did not exceed two thousand dollars in value, so that it was exempt from judgment liens and execution or forced sale, unless the special circumstances prevented the operation of the exemption privilege as to these judgments. It is contended that the sole object of Sutton in exchanging his goods for the land and removing upon it was to obtain the benefit of the exemption laws and thereby defeat his creditors. We shall assume that this was shown. Did it constitute such a fraud upon creditors as to estop him from asserting his homestead exemption?

In this state, the homestead exemption may be claimed as well against debts existing when the homestead was acquired as against those created thereafter: *Hanlon v. Pollard*, 17 Neb. 368. The statute makes no distinction between the two classes of debts and the courts cannot create any. The right here depends upon the situation when judgment is recovered and not when the debt is created: *Bowker v. Collins*, 4 Neb. 494; *Hanlon v. Pollard*, 17 Neb. 368. The homestead exemption cannot be claimed as against a judgment recovered before the land became a homestead, because in that case the lien of the judgment had attached, and the acquisition of a homestead character does not displace existing liens. And the law generally is so where the statute does not, as many statutes do, except pre-existing debts from the operation of the exemption. It follows that it is the legal right of a debtor to acquire a homestead, and in order to do so he must usually devote to that purpose money or property that is not exempt. Credit is extended or should be extended with a view to that right. If such be the debtor's absolute right, then it would seem that his motive is immaterial. As in the case of the alienation of exempt property, it is held that such alienation cannot be set aside as fraudulent, because it cannot operate as a fraud; so here, if the right exists to purchase ⁸⁴ exempt property with nonexempt, such purchase cannot operate as a fraud upon creditors. For similar reasons, the appropriation of all a debtor's property to pay a favored creditor is not a fraud upon the others, except as the statute makes an actual fraudulent intent invalidate the transaction. The fact that the debt was incurred in the purchase of a part of the goods from the sale of which the exempt property was acquired does not affect

the case, unless, indeed, the goods were bought with the intention of not paying for them and of converting them into exempt property for the purpose of accomplishing that object. In that case, the goods might be reclaimed if the fraud were seasonably discovered, and it may be that, if not discovered until after their exchange, the property for which they were exchanged might then be charged with the debt. Such a case would not be unlike that of one's stealing property and then claiming it as against the owner. But this case presents no such state of facts. It is true that it appears that a small part of the goods out of which some of the debts arose was not delivered until a few days after the sale of the stock, but these goods were not bought in contemplation of the sale or with the intent to defraud, so far as the evidence discloses.

A few cases are opposed to the view we have expressed—notably *Pratt v. Burr*, 5 Biss. 36. The reasoning of that case would, however, defeat the exemption as against any pre-existing debt, and is based, as in other cases taking a similar view, on the injustice and apparent immorality of a claim of exemption under such circumstances. Such cases neglect the fundamental principle that the courts cannot set aside valid legislative acts or engraft amendments upon them merely because the judges deem the legislation unwise or even unjust. In all cases of exemptions the creditor suffers, because the legislature has deemed the importance of protecting the family in its home and sustenance to be greater than that of enforcing the payment of debts. The great weight of authority is, however, in accordance with the opinion we have indicated. In *Comstock v. Bechtel*, 63 Wis. 656, the question was squarely presented whether a conversion of nonexempt property into exempt, for the sole purpose of placing it beyond the reach of creditors, would subject the latter property to the payment of debts existing at the time of the conversion, and the court held that it would not, that the property from its character remained exempt and the only remedy of the creditor was by attacking the sale of the nonexempt property. *Cipperly v. Rhodes*, 53 Ill. 346, was a case like the one before us, even to the fact of the conveyance of the homestead to the wife, and the homestead was held exempt because “it was not a fraud on creditors to buy a homestead which would be beyond their reach.” So in *Jacoby v. Parkland Distilling Co.*, 41 Minn. 227, the debtor's right was in such case affirmed, because “he is merely exercising a right which the law gives him, and subject to which everyone gives him credit.” Michigan holds to the

same effect, the court saying: "There may be a moral wrong in thus keeping property from creditors, but, if so, it is one which the statute, on grounds of public policy and to prevent distressing families, has sanctioned in allowing the exemption, and therefore is not legally a fraud": *O'Donnell v. Segar*, 25 Mich. 367. And in California, after one decision indicating a contrary view, it is now settled that one may apply nonexempt property to the discharge of encumbrances on a homestead, and claim the whole homestead as exempt: *Randall v. Buffington*, 10 Cal. 493; *In re Henkel*, 2 Saw. 305. The law is thus stated by Foster, J., in *Kelly v. Sparks*, 54 Fed. Rep. 70: "It seems to be well settled on principle and the preponderance of authority that an insolvent debtor, knowing himself to be insolvent, may acquire a homestead for himself and family, and hold the same exempt from his creditors, although purchased with nonexempt assets, and that fraud cannot be imputed to such an act. ⁸⁶ . . . Credit is given the debtor in full view of this comprehensive exemption": See, too, *First Nat. Bank v. Glass*, 79 Fed. Rep. 706.

In the view we have taken of the question discussed it follows that all the land would have been exempt if title had been taken in Sutton. He therefore had the right, as against creditors, to convey or cause to be conveyed a portion thereof to his wife, as the homestead can be claimed from the property of either: *Comp. Stats.*, c. 36, sec. 2. It is unnecessary, therefore, to consider the special attack and special defense with reference to her right.

Affirmed.

HOMESTEADS—EXEMPTION—ANTECEDENT DEBTS.—It is a general rule that a judgment lien takes precedence of a subsequently acquired homestead right. See monographic note to *Vanstoy v. Thornton*, 34 Am. St. Rep. 496. A homestead is subject to a note given after its acquisition, but in renewal of a debt existing before that time, under a statute declaring a homestead to be subject to attachment and execution upon causes of action existing at the time it was acquired: *Robinson v. Leach*, 67 Vt. 128; 48 Am. St. Rep. 806. See monographic note to *Cusic v. Douglass*, 87 Am. Dec. 464.

PERRY v. GERMAN AMERICAN BANK.

[58 NEBRASKA, 80.]

TRIAL—LEADING QUESTIONS—DISCRETION OF COURT.

It is within the discretion of the trial court to allow leading questions, and its judgment in that regard is not, in the absence of abuse of discretion, the subject of review on appeal or proceeding in error.

EVIDENCE—PRESUMPTION OF DELIVERY OF TELEGRAM.—A similar presumption of delivery results from intrusting to a telegraph company for transmission a telegram properly addressed, as that which follows the posting of a letter duly stamped and addressed for transmission by means of the United States mail. Such presumption results from the relation of the telegraph company to the public, which is that of a public carrier of intelligence, with rights and duties analogous to those of a carrier of goods and passengers.

EVIDENCE—PRESUMPTION OF DELIVERY OF TELEGRAM.—If a telegraph company is intrusted with a telegram for transmission, properly addressed, a presumption arises that such message was duly delivered.

I. R. Andrews, for the appellants.

J. J. McCarthy, for the appellee.

⁸⁰ **POST, C. J.** The defendant in error, hereafter called the bank, on May 28, 1893, at the village of Emerson, advanced to one Johnson the sum of twelve hundred dollars, wherewith to purchase certain cattle. On the same day, the cattle above mentioned were, by Johnson, shipped to South Omaha, consigned to the plaintiffs in error, who were engaged in business as commission men and livestock brokers, and at the same time, as security for the money so advanced, Johnson drew against the proceeds of the said cattle a sight draft, of which the following is a copy:

⁸⁰ "German-American Bank.

"\$1,200.00.

Emerson, Neb., May 29, 1893.

"At sight pay to the order of German-American Bank twelve hundred and no 100 dollars, and charge to the account of

"G. G. JOHNSON.

"To Perry Bros. & Co., South Omaha, Neb."

On the upper margin of said draft was written the following words: "21 head cattle shipped May 28, 1893, from Emerson, Neb." It should in this connection be noted that May 28th, the day of the foregoing transactions, was Sunday; hence the draft was made to bear date of the 29th. On the 28th the bank, for its further protection, forwarded to plaintiff in error the following telegraphic message:

"Emerson, Neb., May 28, 1893.

"To Perry Bros. & Co.: We have draft on you from G. G. Johnson, twelve hundred dollars, for 21 head cattle shipped to-day.
German-American Bank."

The foregoing message was received at South Omaha at 3:50 P. M. on Sunday, the 28th, and delivered to plaintiffs in error on the day of its receipt or the following day. Johnson accompanied the cattle in question from Emerson to South Omaha, where he arrived Sunday night, and the next morning, about 7 o'clock, notified plaintiffs in error of the arrival of the cattle. He also at the same time, as appears from his testimony, personally notified plaintiffs in error that "there was a draft of twelve hundred dollars on the cattle," which he directed the latter to pay and place the balance of the proceeds of said consignment to his credit. Plaintiffs in error, in the course of their business, sold said cattle, and received the proceeds therefor about 3 o'clock P. M. on Monday, the 29th, but credited the entire amount thereof to Johnson upon an open account for advancements previously made, and refused payment of the draft of the bank when presented in due time. The bank, in an action for the refusal of plaintiffs in error to accept its said draft, and for the ²¹ conversion of its aforesaid security, recovered judgment in the district court for Douglas county, and which is presented for review by means of this proceeding.

It is first argued that the record fails to disclose a pledge of the cattle in controversy to the bank as security for the money advanced. That contention is without merit. Both Johnson and Moseman, the cashier, testified, in substance, that the bank was to have a lien upon the cattle and the proceeds thereof for the money advanced by it.

It is next complained that the court erred in permitting the bank, over the objection of plaintiffs in error, to ask the witnesses Johnson and Mead certain leading questions. The allowing of leading questions is, as a general rule, within the discretion of the trial court, and its judgment in that regard is not, in the absence of an abuse of discretion, the subject of review on appeal or proceedings in error: *St. Paul etc. Ins. Co. v. Gotthelf*, 35 Neb. 351.

Lastly, it is contended that the district court erred in giving instruction No. 6, relating to the presumption arising from the transmission of the telegram above mentioned. It was by the paragraph complained of in substance charged that the plaintiffs in error having themselves produced the message, which was

shown to have been received at South Omaha on the afternoon of the 28th, it is presumed to have been delivered in season, that is, previous to the sale of the cattle on the afternoon of the 29th, and that the burden is upon the plaintiffs in error of proving the contrary. There is certainly no error in the instruction of which plaintiffs in error can complain. There is, indeed, a decided preponderance of authority in favor of the proposition that a similar presumption of delivery results from the intrusting to a telegraph company for transmission of a message properly addressed as that which follows from the posting of a letter duly addressed and stamped for transmission by means of the United States mail: *Oregon* ⁹² *S. S. Co. v. Otis*, 100 N. Y. 446; 53 Am. Rep. 221; *Commonwealth v. Jeffries*, 7 Allen, 548; 83 Am. Dec. 712; *Wharton on Evidence*, sec. 76; *Gray on Communication by Telegraph*, sec. 136. Such presumption results naturally, if not necessarily, from the relation of telegraph companies to the public, which, in this state at least, is held to be that of public carriers of intelligence, with rights and duties analogous to those of carriers of goods and passengers: *Western Union Tel. Co. v. Call Pub. Co.*, 44 Neb. 326; 48 Am. St. Rep. 729. Plaintiffs in error, in appropriating the price of the cattle sold, claimed to act under and by virtue of a previous understanding with Johnson, whereby the proceeds of all stock consigned to them by the latter should be applied in satisfaction of the balance owing by him. But conceding the existence of an agreement such as alleged, the plaintiffs in error have, without objection, been permitted to retain the proceeds of the cattle over and above the claim of the bank. In other words, they have enforced their claim to the extent of Johnson's interest in the property, which, in view of the facts in evidence, is all they are entitled to demand. What would have been their rights in the premises had the sale and appropriation of the proceeds of the cattle been consummated by them in ignorance of the claim of the bank, we are not called upon to consider, since there is in this record abundant evidence to support the finding against them upon that issue.

The judgment is clearly right and must be affirmed.

APPEAL—ALLOWANCE OF LEADING QUESTIONS.—To allow leading questions is within the discretion of the trial court: *Krebs Mfg. Co. v. Brown*, 108 Ala. 508; 54 Am. St. Rep. 188. Rulings in respect to them are not the subject of exceptions unless there has been an improper exercise of such discretion: *Porath v. State*, 90 Wis. 527; 48 Am. St. Rep. 954, and note.

EVIDENCE—PRESUMPTION AS TO DELIVERY OF TELEGRAM.—The presumption is that letters properly directed and

mailed were received, and the same is true of telegrams given to a telegraph company for transmission and properly addressed, and the presumption becomes conclusive when not denied: Oregon S. R. Co. v. Otis, 100 N. Y. 446; 53 Am. Rep. 221. See Eppinger v. Scott, 112 Cal. 869; 53 Am. St. Rep. 220.

TOMBLIN v. HIGGINS.

[53 NEBRASKA, 92.]

USURY—NATIONAL BANKS.—The defense of usury is good in an action by a national bank to recover unpaid interest, when the contract rate exceeds that prescribed by the national banking act.

W. S. Morlan, for the appellant.

J. H. Broady, for the appellee.

⁹³ POST, C. J. This cause was commenced in the county court of Furnas county, where the plaintiff in error sued to recover from the defendant in error as maker of a promissory note for five hundred dollars, bearing date of March 14, 1891, and payable March 14, 1892, with interest from date, to the order of "J. W. Tomblin, Pt." A trial upon issue joined resulted in a judgment for the defendant, from which an appeal was prosecuted to the district court, where, to the petition in the usual form in like actions, an answer was interposed in which it was alleged that the First National Bank of Arapahoe was the real party in interest, and that in the execution and delivery of the note in suit, as well as in the several antecedent transactions furnishing the pretended consideration therefor, the plaintiff acted as the trustee for said bank. Said allegation was accompanied by a statement in detail of the transactions between the defendant and the bank, resulting in the execution of this note, which are in brief the loaning by the latter to the former of a large sum of money at a usurious rate of interest, the renewal from time to time of the notes given therefor at a usurious rate of interest, and the payment upon said notes and renewals thereof of a sum largely exceeding the money loaned. It was further expressly charged that the note in suit was given for usurious interest which had accrued on the original loan and renewal notes given therefor, and for no other or different consideration whatever. The plaintiff replied: 1. Denying the allegations of the answer except such as were therein confessed; 2. Alleging that the note in suit was given for a part of the balance found ⁹⁴ to

be due from defendant upon final settlement previously had of all matters of difference between the parties. A trial was had of the issues thus presented in the month of October, 1893, resulting in a verdict for the plaintiff, which was, however, set aside on motion of the defendant. Subsequently, the plaintiff, by leave of court, filed an amended petition alleging the execution of the note to him as agent and president of the bank above named and in its behalf. To this petition the defendant answered: 1. Admitting the execution of the note, and, in effect, denying the other allegations thereof; 2. Alleging the usury of the original loan and renewals thereof, including the note in suit; 3. Alleging that the bank, if the party in interest in said transaction, is now estopped to assert any right in that behalf, for the reason that said note was taken by said bank in the name of plaintiff with the fraudulent purpose of evading the penalty imposed by act of Congress for the taking or reserving of usurious interest by national banks. In the reply subsequently filed, after a denial of the new matter in the answer, it is alleged, in substance, that the security held by the bank for the indebtedness of defendant being deemed insufficient, an arrangement was made whereby the notes representing such indebtedness should be reduced to the extent of five hundred dollars, and a new and separate note executed for that amount; that pursuant to such agreement the note in suit was executed as payment pro tanto and the sum of five hundred dollars credited upon defendant's notes so held by the bank. A second trial was had to the court without the assistance of a jury, resulting in a finding and judgment for the defendant, from which the plaintiff prosecutes error to this court.

It is, in the view we take of the record, necessary to notice a single one of the several questions argued by counsel, viz., that of the consideration for the note which is the subject of this controversy. If, as contended by defendant, the sole and only consideration therefor is interest on his apparent indebtedness to the bank, being ⁹⁵ a balance of principal and interest of a loan confessedly usurious, it follows that the judgment should be affirmed, since the utmost that can be claimed in behalf of the plaintiff under the averments of his pleadings, is that he stands as the representative of the bank. It has been settled by repeated decisions of this court that the plea of usury is good in an action by a national bank as to unpaid interest where the contract rate exceeds that prescribed by the national banking act: *Hall v. First Nat. Bank*, 30 Neb. 99; *McGhee v. First Nat.*

Bank, 40 Neb. 92; Norfolk Nat. Bank v. Schwenk, 46 Neb. 381.

The evidence bearing upon the question under discussion is somewhat confusing, and involves transactions so numerous and intricate as to render even the briefest possible synopsis thereof impracticable in this connection. There certainly is evidence tending to sustain the contention that the note represents interest on the usurious loan, and positive proof that it is otherwise without any consideration whatever. We are unable to perceive any sufficient ground for interference with the finding of the district court.

Judgment affirmed.

USURY—EFFECT OF NATIONAL BANKING ACT.—A national bank discounting business paper at a greater rate than seven per cent is liable to the forfeiture of double the excess over seven per cent imposed by the national banking act, although the contract is not usurious under the state law: *Johnson v. National Bank of Gloversville*, 74 N. Y. 329; 30 Am. Rep. 302. Where a national bank makes to one of its directors loans of money, which, in amount and in rate of interest, are in contravention of the national banking act, the borrower is not estopped to defend against the recovery of interest: *Bank of Cadiz v. Slemmons*, 84 Ohio St. 142; 32 Am. Rep. 364. See monographic note to *Bank of Newport v. Cook*, 46 Am. St. Rep. 185.

COMMERCIAL INVESTMENT COMPANY v. PECK.

[53 NEBRASKA, 204.]

CLERKS OF COURTS—PAYMENT TO IN VACATION. Payment to the clerk of a court in vacation during the pendency of an action to foreclose a mortgage, before judgment and without an order of court, of the whole amount of the mortgage debt, with costs, does not extinguish the mortgage, as the clerk does not receive such money by virtue of his office, but in his individual capacity as agent of the mortgagor, who is still liable for the mortgage debt in case the clerk embezzles the money so received and absconds.

W. W. Wood, and Stewart & Munger, for the appellant.

C. H. Bane and D. B. Jenckes, for the appellee.

²⁰⁴ **NORVAL, J.** The action was to foreclose a real estate mortgage for the entire amount of the debt. The mortgagors, after the service of a summons upon them, in vacation, and without the knowledge and consent of the mortgagee or its attorney, paid to the clerk of the district court the full amount due on the mortgage, and all costs. No entry of such payment was en-

tered by the clerk upon the books of his office, nor did he pay the money to the plaintiff or its attorney, but embezzled the same and absconded. Subsequently, a decree of foreclosure was entered, the defendants being in default of an answer, an order of sale was issued, and the mortgaged premises were sold thereunder. Neither the plaintiff nor its attorney was apprised of the deposit with the clerk until after the sale, when, for the first time, the defendants ²⁰⁵ ascertained that the clerk had embezzled the money, and that a decree of foreclosure had been entered in the cause. At a term subsequent to the rendition of the decree, the court, on application of the defendants, vacated the decree and set aside the sale, which order is here for review.

We are unable to assent to the proposition that the clerk, by virtue of his office, was authorized to receive the money in this case, and that the payment thereof constituted a payment "into court" and extinguished the mortgage debt. The legislature of this state has provided (Code Civ. Proc., sec. 889): "The clerk of each of the courts shall exercise the powers and perform the duties conferred and imposed upon him by other provisions of this code, by other statutes, and by the common law. In the performance of his duties he shall be under the direction of his court." The clerk of the district court of Dawes county did not receive the money under and by virtue of any order of the court below requiring the payment to be made, for the very obvious reason no such order was ever entered. Moreover, the money was not received by the clerk during term time, or under such circumstances as to admit of an inference that the payment was made under the court's direction; but the clerk received the money in vacation and without the sanction of the court, either expressed or implied. At common law, payment to the clerk in vacation during the pendency of an action, before judgment and without an order of court, of the amount due plaintiff, was not authorized, and no statutory enactment in this state can be found which empowers a clerk of the district court to receive money under the circumstances disclosed by this record. The law did not constitute the clerk the agent of this plaintiff to receive the amount of its mortgage. After judgment, a clerk of court may receive payment, even in the absence of any express statute upon the subject: *McDonald v. Atkins*, 13 Neb. 568; *Moore v. Boyer*, 52 Neb. 446. The authority ²⁰⁶ of a clerk of a court to receive payment of a judgment in his office existed at common law, and has been recognized by long usage. The official power of the clerk is circumscribed by the extent of his duties, and he ceases

to act by virtue of his office whenever he steps beyond the boundary of his power. It was no part of the official duty of the clerk to receive the money from these mortgagors. He did not act officially, but in his individual capacity as the mere agent of those who intrusted him with the money: *Durant v. Gabby*, 2 Met. [Ky.] 91; *Baker v. Hunt*, 1 Wend. 103; *Currie v. Thomas*, 8 Port. 293; *Windom v. Coates*, 8 Ala. 285; *Ball v. Bank of Alabama*, 8 Ala. 590; 42 Am. Dec. 649; *Governor v. Read*, 38 Ala. 253; *Alexandria v. Saloy*, 14 La. Ann. 326; *Hammer v. Kaufman*, 39 Ill. 87.

In *Mazyck v. McEwen*, 2 Bail. 28, it was decided that where money is paid to a clerk of the court he receives it as the private agent of the party making the payment, unless accompanied by a plea of tender, or the deposit has been made in pursuance of an order of court to do so.

In *Keith v. Smith*, 1 Swan, 92, it was ruled that money paid into court is unavailing as a tender if not made upon an order of court authorizing it to be done.

In *Hammer v. Kaufman*, 39 Ill. 87, it was held that a clerk of court is not, by virtue of his office, authorized to receive money as a deposit, except by order of the court; that money paid to him without such order may be withdrawn by the depositor at any time before the other party has manifested a willingness to accept it, or the court has recognized it as a fund at its disposal, and that, in case the money is lost by the clerk, the one making the deposit must sustain the loss, instead of the person for whose benefit the money was received.

In *Levan v. Sternfeld*, 55 N. J. L. 41, it was decided that payment of money to a clerk of court after the commencement of an action and before judgment, without a rule, may be disregarded by the party for whom the same ²⁰⁷ was deposited. *Reed, J.*, in the course of his opinion, says: "Now the money paid into court in this case, so far as the record shows, was not paid in under any rule. The clerk has no authority to receive money without a rule of court: 1 Sellon on Practice, sec. 18, p. 277; *Baker v. Hunt*, 1 Wend. 103. The doctrine is obviously sound, therefore, which is said by Campbell in a note to *Rucker v. Palgrave*, 1 Camp. 557, to have been laid down by Lord Ellenborough, that if, after action brought, the moneys sought to be recovered are paid without a ruling of court, the plaintiff must have a verdict."

Currie v. Thomas, 8 Port. 293, was a suit upon a promissory note where the defendant pleaded that a prior suit had been

brought on the same note, and that he had paid the full amount due thereon to the clerk of the court. It was held that payment to the clerk did not prejudice the plaintiff. The court, in disposing of the question, observed: "There are several stages in the proceedings of a case, in which the clerk of a court is by law authorized to be the holder of the moneys which may be paid into court. Thus, on plea pleaded, when the cause of action is admitted to a partial extent, and denied as to the residue. So in the case of a tender. So, also, when money is paid into court in satisfaction of a judgment. In all these cases, however, the money is presumed to be brought before the court, and as it can have no custody of money, it of necessity remains with the clerk, as the fiduciary of the court. But, independent of statutory enactments, no case is remembered in which money can be lawfully paid to the clerk in vacation, or in any other manner than as the officer of the court in term time, and the receipt of which is always shown by some record of the court, or some proceeding yet on paper, but progressing to a record. To permit this officer to receive demands which have not been reduced to judgment would bring about consequences of a most mischievous tendency, unless received at a time when he ²⁰⁸ is presumed to be under the immediate control of the court—that is, in term time—and then only in those cases where the performance becomes a duty imposed by the peculiar organization of the court."

After diligent search we have been unable to find a single authority which sustains the proposition that the deposit of the money with the clerk under the admitted facts disclosed by this record extinguished the indebtedness, or that plaintiff must look to the clerk for its money.

Section 856 of the Code of Civil Procedure declares that "whenever a petition shall be filed for the satisfaction or foreclosure of any mortgage, upon which there shall be due any interest or any portion or installment of the principal, and there shall be other portions or installments to become due subsequently, the petition shall be dismissed upon the defendant bringing into court, at any time before the decree of sale, the principal and interest due, with costs." This section is not applicable here for more reasons than one. In the first place, the mortgage sought to be foreclosed herein is not embraced within the provisions of the law, since the whole indebtedness was past due, and no portion or installment could mature subsequent to the bringing of the suit. Again, the money was not paid "into court," but was deposited with the clerk, in vacation, without

any rule or order of court permitting it to be done, and payment was not accompanied by an answer pleading the same. Under the authorities already alluded to, such order or plea was necessary to make the payment available. The clerk, in receiving the deposit, was the private agent of the mortgagors, and the loss must fall upon them. It follows that the court below erred in treating the mortgage debt as paid, and in vacating the decree of foreclosure and setting aside the sale.

Decree reversed and action dismissed.

MORTGAGE—PAYMENT—TO WHOM MADE—CLERK OF COURT.—A mortgagor making a payment on a mortgage to one other than the mortgagee does so at his peril, and must assume the burden of proving that it was made to one clothed with power to receive it: *Crane v. Gruenewald*, 120 N. Y. 274; 17 Am. St. Rep. 643. A clerk of court has no authority to receive money in discharge of an action which is pending or which may probably be brought in the future: *Ball v. Bank of Alabama*, 8 Ala. 590; 42 Am. Dec. 649.

CHICAGO, BURLINGTON AND QUINCY R. R. COMPANY v. EMMERT.

[58 NEBRASKA, 257.]

RAILROAD'S NEGLIGENT CONSTRUCTION OF EMBANKMENT—ACCRUAL OF ACTION.—Cause of action against a railroad company for the negligent construction of an embankment arises when the injury sued for occurred, and not when the construction of the embankment was completed.

RAILROAD COMPANIES—NEGLIGENT CONSTRUCTION OF EMBANKMENT—TIME WHEN ACTION ACCRUES.—The cause of action for an injury to land and crops caused by the negligent construction of an embankment by a railroad company, whereby the flood waters of a natural stream are arrested and held upon such land, accrues at the date of the injury, and not at the time of the completion of such negligent construction.

RAILROAD COMPANIES—NEGLIGENT CONSTRUCTION OF EMBANKMENT.—MEASURE OF DAMAGES for injury to crops, caused by the negligent construction of a railway embankment, whereby land is flooded, is the fair value of such crops at the time of their destruction, and the measure of damages to the land thus flooded is the difference in its value immediately before and after such flooding.

WATERS AND WATERCOURSES—SURFACE WATER.—The flood waters or overflow of a natural stream or river when out of its banks and flowing from foothill to foothill is part of the natural stream, and not mere surface water.

WATERS AND WATERCOURSES.—SURFACE WATER is that which is diffused over the surface of the ground, derived from falling rains or melting snow, and it continues to be such until it reaches some well-defined channel in which it is accustomed to, and

does flow with other waters, whether derived from the surface or springs, and it then becomes a running water stream and ceases to be surface water.

DAMAGES—PLEADING.—An allegation in a complaint for damages, averring that plaintiff's farm has been damaged by the construction of a railway embankment, for the reason that such farm has thus come to be known in the neighborhood as one liable to overflow, does not state a cause of action.

DAMAGES.—SPECIAL DAMAGES to be recovered must be specially pleaded.

J. W. Deweese and F. E. Bishop, for the appellant.

Reavis & Reavis and C. Gillespie, for the appellee.

239 RAGAN, C. The Nemaha river is one of the natural watercourses of the state, and drains a large area of territory. When floods or freshets occur, the channel of this river overflows, and the stream then becomes very much widened, extending and flowing at such times from the foothills upon one side to the foothills upon the other side of the river's valley. In the valley of this river, in Richardson county, is situated the farm of Oliver Emmert. In 1883 ²⁴⁰ the Chicago, Burlington & Quincy Railroad Company, hereinafter called the railroad company, constructed a road at right angles across the valley of this river near said Emmert's farm. For the purpose of laying its ties and track thereon, the railroad company across this valley constructed an embankment of earth, and left no openings or culverts in the same through which the waters of this river, when out of its banks, might flow as they did prior to the construction of such embankment. In 1889 and 1892 freshets occurred, the channel of the river overflowed, and the waters spread out over the valley. The embankment arrested their progress, turned them back, and held them upon the lands of Emmert—situate just up the river from the embankment—and destroyed, as he alleges, his grass crops and pasture, a crop of standing corn, and permanently injured or depreciated in value his farm. To recover compensation for these injuries, he sued the railroad company in the district court of Richardson county, alleging that the railroad company, in omitting to construct culverts or openings in its embankment for the passage of the waters of the river in times of flood, had been guilty of negligence that had caused the injury to his property. The trial resulted in Emmert's obtaining a verdict and judgment, to review which the railroad company has instituted in this court error proceedings.

1. As already stated, the embankment was constructed in 1883. The injuries sued for occurred in 1889 and 1892, and one

proposition relied upon here for a reversal of the judgment of the district court is, that Emmert's cause of action arose at the time of the negligent construction of the embankment, or more than four years before the bringing of this action, and hence was barred when brought. This precise question was presented to this court in *Fremont etc. R. R. Co. v. Harlin*, 50 Neb. 698; 61 Am. St. Rep. 578, and we there held that the cause of action arose when the injury sued for occurred, and not at the time of the completion of the improvement negligently constructed ²⁴¹ which caused the injury. The authorities bearing upon the question under consideration are somewhat extensively examined in that case, and we see no reason for not adhering to the conclusion then reached.

2. Another contention of the railroad company is, that its embankment was properly constructed for railroad purposes; that the overflow or flood water of this river was surface water; and, if Emmert was damaged by the construction of the embankment at the place and in the manner that it did, the railroad company is not liable therefor, as it owed no duty to an adjoining proprietor as to the manner in which it should exercise its right to build its railroad and protect its property from such surface water. But is the assumption of the railroad company that the flood or overflow water of this river was surface water correct? It must be conceded that many cases hold the flood or overflow of a natural stream is surface water: See the rule stated and the authorities collated in 24 Am. & Eng. Ency. of Law, 1st ed., 903. But we are by no means satisfied with the doctrine of these cases nor with the reasoning on which they are based. Though they are in the majority, we do not think they are right. We shall not attempt to lay down a rule as a guide in all cases for determining whether waters are surface waters. Whether water is or is not surface water, within the meaning of that term, must be determined from the peculiar facts in the case in which the question is presented. But to say that the flood or overflow water of this Nemaha river, when out of its banks, and flowing from foothill to foothill, is not a part of the river itself, not part of the natural watercourse, but mere surface water, is to contradict ordinary common sense. In one sense of the word, all the water of this river was at one time, perhaps, surface water. When this water was falling upon the watershed of this stream, when it was millions of aqueous threads, flowing toward the stream covering the surface of the watershed, then it was surface water; but when ²⁴² it reached the stream, became a part there-

of, whether the stream was then flowing between its ordinary banks and in its ordinary channel, or whether it had extended beyond its channel, and was flowing from one foothill to the other, then this water ceased to be surface water and became a constituent part of the natural stream.

In *Crawford v. Rambo*, 44 Ohio St. 282, the supreme court of Ohio, in discussing the question under consideration, said: "It is difficult to see upon what principle the flood waters of a river can be likened to surface water. When it is said that a river is out of its banks, no more is implied than that its volume then exceeds what it ordinarily is. Whether high or low, the entire volume at any one time constitutes the water of the river at such time; and the land over which its current flows must be regarded as its channel, so that, when swollen by rains and melting snows, it extends and flows over the bottom along its course, that is, its flood channel, as when by drought it is reduced to its minimum, it is then in its low-water channel. Surface water is that which is diffused over the surface of the ground, derived from falling rains or melting snows, and continues to be such until it reaches some well-defined channel in which it is accustomed to, and does, flow with other waters, whether derived from the surface or springs; and it then becomes a running water stream and ceases to be surface water." To the same effect see *Byrne v. Minneapolis etc. Ry. Co.*, 38 Minn. 214; 8 Am. St. Rep. 668; *O'Connell v. East Tennessee etc. Ry. Co.*, 87 Ga. 246; 27 Am. St. Rep. 246; *Sullens v. Chicago etc. Ry. Co.*, 74 Iowa, 659; 7 Am. St. Rep. 501; *Moore v. Chicago etc. R. Co.*, 75 Iowa, 263. These cases express our views, and we cheerfully yield to them as authority on the subject under consideration.

But it is said that in *Morrissey v. Chicago etc. Ry. Co.*, 38 Neb. 406, this court committed itself to the doctrine that the flood or overflow water of a natural stream was surface water. But counsel are mistaken. Ryan, C., speaking for the court in that case, used this language: ²⁴³ "The evidence in the case under consideration fails to show that the water complained of was a part of Yankee creek before crossing the right of way now occupied by the defendant's embankment, though there is evidence from which it might be inferred. It seems, too, that it was ultimately discharged into the Nemaha river independently of Yankee creek. . . . It does not satisfactorily appear from the evidence that it was a part of the flood water of Yankee creek; neither is it shown that but for the railroad embankment it would have sought an outlet by way of that creek. This water, therefore,

under any of the definitions above given, was but surface water." Further, the commissioner says: "Our conclusions are that the district court correctly concluded from all the evidence adduced on the trial of this case that the water, the flow of which was interfered with by the railroad embankment, was surface water. It flowed in no defined watercourse, and overflowed only when there were extraordinary freshets. It was not shown that in its undiverted course it originated from or returned to the channel of Yankee creek. Its existence was directly traceable to falling rains. Its course was along the valley, but not as a part of the stream." We reach the conclusion, therefore, that the flood or overflow waters of the Nemaha river that were arrested and turned back in 1889 and 1892 by the embankment of the railroad company were not surface waters, but were a part of the water of the Nemaha river—a natural stream.

8. Another error assigned and argued by the railroad company here relates to the rule as to the measure of damages enforced by the trial court. Emmert's proper measure of damages under the issues made by the pleadings as to his crop of corn was the fair value of the corn destroyed at the time of its destruction. The measure of damages for the grass pasture destroyed was the fair value of the timothy and clover constituting the pasture at the time of its destruction; and the measure of his ²⁴⁴ damages as to the injury caused to his real estate by the embankment turning back and holding thereon the flood waters was the difference in the fair market value of his real estate immediately before and immediately after such event: See *Fremont etc. Ry. Co. v. Crum*, 30 Neb. 76; *Kansas City etc. R. Co. v. Rogers*, 48 Neb. 653; *Fremont etc. Ry. Co. v. Harlin*, 50 Neb. 698; 61 Am. St. Rep. 578.

On the trial Emmert was asked, and over the objections of the railway company, answered questions as follows: "Q. What was the use of that meadow—the pasture land—that year worth to you? State in round numbers what loss it was to you—the loss of your pasture that year." To which he answered that he was compelled to procure other pasture that year for his stock and that he considered the loss was at least one hundred and fifty dollars. "Q. In its matured state, as you had it before the fall of 1889, what was the actual value of that meadow to you?" To which he answered that it was worth ten dollars an acre. These questions all called for incompetent and irrelevant evidence under the issues. In his petition Emmert made no claim for any special damages, but claimed damages generally for the destruc-

tion of his corn and timothy and clover growing upon the lands on which the embankment of the railroad company held the flood waters of the river. The question was not what the use of the meadow or the value of the meadow was to Emmert, but the question was, What was the actual fair value of this crop of timothy and clover at the time it was destroyed, and what was the fair value of the crop of corn destroyed? As to the depreciation in value of the land caused by the embankment's arresting the flood waters of the river, the petition alleged "that said plaintiff has been further damaged in the sum of two thousand dollars by reason of the depreciation of the market value of said farm in this: that in consequence of such overflow in the year 1889, and the flooding of his farm by said railroad grade holding and damming the water back upon it, and by subsequent overflows of like character, his said farm has ²⁴⁵ come to be known in the neighborhood as one liable to overflow, and consequently has lessened the market value of the land two-fifths of its value before it was flooded by said negligently constructed railroad, in August, 1883." This allegation of the petition did not state a cause of action. Under this allegation Emmert was not entitled to introduce any evidence to show that his real estate had been damaged or depreciated in value by the construction of this embankment; yet Emmert was, on the trial, over the objection of the railway company, permitted to testify that, after the recession of the high waters, the land was left wet and in a bad condition to cultivate; that the use of it in the year following the flood was of less value by one-half than it was previous to the flood; that the crops grown on the premises in the year succeeding the flood were only half the value they would have been had the flood not been there; that this value amounted to five dollars an acre. The admission of all this evidence was error, as it violated the rule of damages applicable to the case. We cannot say that the admission of this evidence was not prejudicial to the railroad company, as under it the jury may have, and probably did, charge the railroad company with the sum of money which Emmert testified he was compelled to pay for having his cattle pastured during the autumn succeeding the flooding of his land in August, 1892. The jury may have and probably did estimate the value of the crop grown on the premises in the year succeeding the flood of 1892, and concluded that crop was not worth as much by five dollars an acre as it would have been had the lands of Emmert not been overflowed in that year. As already stated, Emmert was not suing for any of these things. He alleged gen-

erally in his petition his ownership of these lands; that on part of the land was a crop of growing corn, and on other parts of the land there was a pasture composed of timothy and clover, and that these grasses and this corn crop in 1889 were destroyed by the holding of the flood waters of the river on his ²⁴⁶ lands by the railroad company's embankment. What he had been compelled to pay or had paid for pasturing his cattle by reason of the presence of the water on his lands in 1889 was not an issue in the case. Whether the crop succeeding the flood of 1889 and 1892 was as good as it would have been had such an overflow not occurred was not an issue in the case. We are constrained to say that we think the admission of this evidence was prejudicially erroneous. The judgment is reversed and the cause remanded to the district court, with instructions to grant the railroad company a new trial.

Reversed and remanded.

RAILROAD COMPANIES—NEGLIGENT CONSTRUCTION—ACCRUAL OF ACTION.—In an action against a railroad company for obstructing water and overflowing land, the right of action does not necessarily accrue from the time the obstruction was first built: *Sullens v. Chicago etc. Ry. Co.*, 74 Iowa, 659; 7 Am. St. Rep. 501.

DAMAGES—MEASURE OF, FOR INJURY TO CROPS.—The proper measure of damages for the destruction or loss of growing crops is, in general, the value of the crops standing upon the ground, and not the loss as measured by the rental value of the land: *Byrne v. Minneapolis etc. Ry. Co.*, 38 Minn. 212; 8 Am. St. Rep. 668, and note.

WATERS AND WATERCOURSES—WATERCOURSE AND SURFACE WATER DISTINGUISHED.—Surface waters are such as lie upon, or spread over, the surface, or percolate the soil as in swamps, and do not flow in a particular direction: *Case v. Hoffman*, 84 Wis. 438; 36 Am. St. Rep. 937, and note. The surplus waters of a river or watercourse in time of flood do not cease to be part of the watercourse and become surface water when they naturally spread over the adjacent lowlands without well-defined banks or channels, so long as they eventually return to, and are discharged through, the channel of such watercourse: *O'Connell v. East Tenn. etc. Ry. Co.*, 87 Ga. 246; 27 Am. St. Rep. 246, and note.

MOTLEY v. MOTLEY.

[58 NEBRASKA, 376.]

DOWER—RIGHTS OF WIDOW.—Under the statutes of Nebraska, a widow cannot be deprived of dower, in the lands of which her husband dies seised, without her consent.

DOWER—HUSBAND'S DEBTS.—The dower of a widow in the lands of which her husband dies seised and intestate comes to her free of any charge for debts or claims against her husband.

DOWER—WHEN BECOMES ABSOLUTE.—On the death of her husband intestate, a widow's inchoate right of dower, which, up

to that time, was a mere lien, charge, or encumbrance upon the real estate of her husband, becomes her absolute estate, free from the payment of the ordinary unsecured debts of the intestate.

DOWER—SALE BY ADMINISTRATOR AS BAR.—A sale made by an administrator under order of court of his intestate's lands to pay ordinary unsecured debts proved against his estate does not bar the widow of the intestate from dower.

DOWER.—ADMINISTRATOR'S SALE—CAVEAT EMPTOR. A sale of lands by an administrator to pay the debts of his intestate is a judicial sale, and the doctrine of caveat emptor as to the widow's dower rights applies to the purchaser at such sale.

DOWER—ADMINISTRATOR'S SALE—NOTICE TO PURCHASER.—A purchaser at an administrator's sale of lands of his intestate to pay his debts is charged with notice disclosed by the record of the proceedings that the intestate's widow had a dower estate in the lands which were being sold.

DOWER—ESTOPPEL TO CLAIM.—A widow is not barred from prosecuting an action for the assignment of dower in lands, of which her husband died seised and which have been sold under judicial proceedings by her husband's administrator, to which she was a party, but made no appearance; nor is she estopped from claiming such dower merely because she was present at the administrator's sale and kept silent in regard to her dower estate in the lands being sold.

DOWER—ESTOPPEL TO CLAIM.—The receipt by the widow of part of the proceeds of a judicial sale of the lands of intestate husband by his administrator to pay his debts, such payment to the widow being made as the distributive share of her husband's estate and not in lieu of dower, does not estop her from claiming her dower in the lands sold.

Batty, Dungan & Burton, for the appellant.

Capps & Stevens, for the appellee.

³⁷⁶ RAGAN, C. John Motley died intestate in Adams county seised in fee simple of certain real estate situate therein, leaving a widow and four children. In pursuance of a license granted therefor by the district court of said county, Motley's administrator sold such real estate for the purpose of paying the unsecured debts of the intestate which had been proved and allowed against his estate in the county court of said county. Subsequently, Emily Motley, the widow, brought this proceeding, under the statute, in the county court of said county to have her dower assigned in the lands of which her husband died possessed. The county court rendered a judgment assigning ³⁷⁷ Mrs. Motley her dower, from which George Motley, the purchaser of the real estate at the administrator's sale, appealed to the district court. The action was there tried to the court without the intervention of a jury and resulted in a judgment dismissing Mrs. Motley's action. This judgment of the district court is now before us for review.

1. In support of the judgment of the district court, it is insisted that the sale of the lands to pay debts made by the administrator of itself divested the widow's dower. Section 1, chapter 23 of the Compiled Statutes, provides: "The widow of every deceased person shall be entitled to dower or the use during her natural life of one-third of all the lands whereof her husband was seised of all [an] estate of inheritance at any time during the marriage unless she is lawfully barred thereof." Other sections of this statute prescribe what causes shall operate to bar the widow of dower in the lands of which her husband was seised during the coverture. Section 2 of the chapter provides that if the husband exchange lands of which he is seised for other lands, his widow shall not have dower in both tracts, but may elect to take her dower out of either tract, provided she begins proceedings to have her dower assigned in one tract or the other within one year after her husband's death; and if such a proceeding is not brought within such time, she shall then have dower only in the land received by her husband in the exchange. Section 3 bars the widow of dower in lands mortgaged by her husband prior to the marriage as against the mortgagee and those claiming under him. Section 4 bars the widow of dower in lands purchased by the husband during coverture and mortgaged to secure the purchase money, as against such mortgagee and those claiming under him, even though she may not have united in such mortgage. Section 12 provides that a married woman residing in this state may bar her right of dower in the land of her husband by joining in a conveyance thereof and acknowledging the same. Section ³⁷⁸ 13 provides that a woman may be barred of her dower in the lands of her husband by a jointure settled on her with her consent before the marriage, provided such jointure consists of a freehold estate in lands for the life of the wife at least, to take effect in possession or profit immediately on the death of the husband. Section 15 provides that if any pecuniary provision shall be made for the benefit of an intended wife, and in lieu of dower, and assented to by her in the manner provided by statute, this shall bar her right of dower in the lands of her husband. Section 17 provides that if lands be devised to a wife, or other provision be made to her in the will of her husband, then she may elect to either take under the will or to claim her dower, but she cannot have both; and by accepting the benefits of the provisions of the will she forfeits her right of dower.

These statutes expressly provide how a widow may be lawfully barred of her dower; and it is to be observed that no one

of these provisions deprives a widow, against her consent, of dower in the lands of which her husband died seised; but her loss of dower is made to depend upon her voluntary act. The statute does not prescribe, either expressly or by implication, that the sale by an administrator of his intestate's lands for the payment of his debts shall have the effect of divesting the widow's dower in such lands; and while the lands of an intestate descend to his heirs subject to his debts (Comp. Stats., c. 23, sec. 30), and the title which the heirs take to such lands may be divested by a sale thereof for the payment of the debts of the intestate allowed against his estate by the county court, the dower of the widow in such lands does not come to her charged or encumbered with such debts or claims. On the death of her husband, her inchoate right of dower, which up to that time was a mere lien charge or encumbrance upon the real estate of the husband, ceased to be such lien or charge, and became an estate, carved out of the lands of the intestate and exempted during her life from the payment of the ³⁷⁹ ordinary unsecured debts of the intestate. This dower estate, the moment it existed, became the widow's property; it was not liable for, and could not be sold without her consent for, the payment of her husband's debts. The language of our statute is, not that a widow shall be entitled to dower in the lands of which her husband died seised, but that she shall have dower in all the lands of which her husband was seised as an estate of inheritance at any time during the coverture. This is the law of most of the state of the Union, and in construing this statute the courts are all agreed that, when the lawful marriage of a man and woman and the ownership of real estate by the former concur, an inchoate dower right at once attaches; that this is in the nature of a charge or encumbrance upon the real estate; and, when such right has once attached, it remains and continues a charge upon the real estate, unless released by the voluntary act of the wife or be extinguished by operation of law; and upon the death of the husband the inchoate right is merged into a dower estate. And the authorities are agreed that a judicial sale made of the husband's real estate during his lifetime for some obligation of his not secured by a lien upon the real estate in which the wife had joined does not extinguish the wife's inchoate dower, and upon the death of her husband the widow is entitled to her dower estate in the lands so sold: *Sisk v. Smith*, 6 Ill. 503; *Grady v. McCorkle*, 57 Mo. 172; 17 Am. Rep. 676; *Blevins v. Smith*, 104 Mo. 583; *Willson v. Gentry* (Ky. 1891), 21 S. W.

Rep. 578; Porter v. Lazear, 109 U. S. 84; Butler v. Fitzgerald, 43 Neb. 192; 47 Am. St. Rep. 741. Had the lands involved in this action been sold on execution during the life of the intestate to satisfy the debts for which his administrator sold, such a sale would not have divested the wife's inchoate dower rights nor barred the widow's dower in the lands. How, then, can it be said that the sale of these lands by the intestate's administrator to pay the latter's debts, of itself, took away the widow's dower in such lands? It is true that the administrator was licensed by ³⁸⁰ the district court to sell the land of the intestate to pay his debts, but the district court by this license or order did not attempt to authorize the administrator to sell the dower estate of the widow in said lands. We need not inquire whether the district court had such authority; it is sufficient that nowhere in any paper in the proceedings of the administrator's sale is the dower estate of the widow referred to.

As we have already seen, the dower estate of the widow was not liable for the debts of the husband which had been allowed against his estate by the county court; and no statute of the state authorizes the district courts, when granting a license to sell the real estate of the intestate to pay his debts, to include therein the widow's dower. Indeed, it is clear from a reading of the statute on the subject of the sale of lands for the payment of the debts of an intestate (Comp. Stats., c. 23) that these statutes contemplate only the sale of the intestate's interest in the lands of which he died seised. But his interest in those lands, even during his lifetime, was subject to his wife's inchoate right of dower, and, at the instant of his death, the law transmuted the inchoate dower lien into an absolute dower estate, subtracted it from the lands of the intestate, and vested the right thereto in his widow. By section 82 of said chapter it is provided that such a license may be so framed as to authorize the sale of the reversion of the dower of the widow, and if not so framed, that such reversion may be sold after the expiration of the widow's life estate. In the case at bar, the administrator described the lands of which the intestate died seised, procured a license for their sale to pay his debts and sold them without any more specific description. Nowhere in the proceedings was it stated, in so many words, that he was selling merely the interests of the intestate in those lands; that he was or was not attempting to sell the dower estate of the widow in those lands, nor that he was or was not selling or attempting to sell the reversion of the dower of ³⁸¹ the widow. We are not called upon at this

time to say whether the purchaser at this administrator's sale acquired the fee simple title to all these lands subject to the dower estate of the widow therein, or whether such purchaser acquired the fee simple title to only two-thirds of such lands; but we are quite clear that the administrator was not authorized by the district court to sell the dower estate of the widow in the lands of his intestate, and that the widow's dower in these lands was not affected by that sale. We have not been cited to any case, nor have we been able to find one, which holds that a sale made by an administrator of his intestate's lands to pay ordinary unsecured debts proved against his estate bars the widow of the intestate from dower. So far as we have examined the cases, the uniform holding is the other way: See, among others, *Kent v. Taggart*, 68 Ind. 163; *Elliott v. Frakes*, 71 Ind. 412; *Armstrong v. Cavitt*, 78 Ind. 476; *Compton v. Pruitt*, 88 Ind. 171; *House v. Fowle*, 22 Or. 303; *Whiteaker v. Belt*, 25 Or. 490; *Toledo etc. R. Co. v. Curtenius*, 65 Ill. 120.

2. A second argument of the purchaser at the administrator's sale in support of the judgment of the district court is, that he is an innocent purchaser of this real estate without notice of the rights of the widow to a dower estate in these lands; that when he purchased them at the administrator's sale he believed he was acquiring a perfect title to all the lands described in the license granted by the district court to the administrator. But the administrator's sale was a judicial sale. It was made and approved by authority of the district court of the county where the lands were situate, and the doctrine of caveat emptor applies to a purchaser of lands at a judicial sale. The purchaser was bound to take notice of the authority of the administrator, and this authority was to sell only the interest which the intestate had at his death in the lands sold. He was purchasing real estate, and it was his duty to examine the title, and he had no right to rely upon statements of the administrator, ³⁸² if any were made, as to the character of the title which he was selling. But the record of the proceedings under which the administrator sold disclosed upon its face that John Motley had died intestate, seised of certain lands in Adams county; that he left a widow and certain children, and that the administrator was making the sale of these lands to pay debts allowed by the county court of Adams county against the intestate's estate. The purchaser at this administrator's sale was charged with notice of all that this record discloses, and it was of itself notice that this widow had a dower estate in the lands which were being sold: See Nor-

ton v. Nebraska Loan etc. Co., 35 Neb. 466; 37 Am. St. Rep. 441; Butler v. Fitzgerald, 43 Neb. 192; 47 Am. St. Rep. 741; Whiteaker v. Belt, 25 Or. 490.

3. The widow of the intestate was made a party to the proceedings of the administrator for the sale of these lands. Notice, as required by the statute, was served upon her to appear and show cause, if any she had, why such license should not be granted, but she made no appearance whatever to that proceeding. Another argument of the purchaser at this administrator's sale in support of the judgment of the district court is, that the widow cannot now maintain this action to have her dower assigned, inasmuch as she neglected to appear in the district court in the proceeding by the administrator to sell the lands of her husband and set up her dower estate in that proceeding. We do not think any adjudicated case can be found which will sustain this contention. The writer at least, after a patient and protracted search, has been unable to find any such case. Whether the district court is invested with jurisdiction to assign dower in any case we do not determine, but certainly that was not the object of the proceedings by the administrator in seeking a license to sell the real estate of his intestate. The application of the administrator in that proceeding alleged the death of his intestate, described certain lands of which he died seised, that certain claims had been proved against his estate in the county court, ³⁸³ and that the personal estate of the intestate was insufficient to pay these allowed claims and the expenses of administration, and prayed the district court for a license to sell the intestate's real estate to pay those claims. If the widow had appeared in that proceeding, it would have been no defense to the application for her to allege that she had a dower estate in those lands. Such an answer would have stated no defense to the application of the administrator. The only defense that could have been made to the application would have been one which traversed some of its allegations; and, if we consider that the widow, by not appearing, confessed the allegations of the administrator's petition, it was not a confession that she had no dower estate in this real estate, but a confession that she had no cause to urge why the license should not be granted as prayed. And when the district court found that the allegations of the application of the administrator were true and adjudged that the license should be granted as prayed, he neither found nor adjudged that the widow of the intestate had no dower estate in the lands licensed to be sold. On the other hand, the ap-

plication of the administrator and the evidence introduced by him in support of it informed the district court that the intestate had left a widow, and that was of itself notice to the court granting the license to sell that the widow had a dower estate in these lands; and it would be doing an injustice to the intelligence of the court to indulge the presumption that by granting the license to sell he adjudged that the widow had no dower estate therein or that he intended to include in such license the widow's dower estate.

The question as to whether a widow is barred from prosecuting an action for the assignment of dower in lands which had been sold under a judicial proceeding to which she was a party, but made no appearance, was presented to the supreme court of Illinois in *Shaeffer v. Weed*, 8 Ill. 511, in 1846, Abraham Lincoln appearing for the widow. Shaeffer had furnished material and labor ³⁸⁴ toward the erection of an improvement on the husband's real estate during the latter's lifetime. After the husband's death, he brought suit to have established and foreclosed a mechanic's lien upon the real estate for the labor and material furnished the husband. To this proceeding the widow was made a party, but she did not appear in the action; and it was insisted that the judgment rendered in that proceeding upon her default estopped or barred her right of dower in the lands involved in that proceeding. The contention, however, was overruled.

A statute of the state of Illinois provided that one who had mortgaged his real estate should be deemed to have waived or released his homestead right in the real estate therein if there was inserted in the mortgage the following: "Hereby releasing and waiving all rights under and by virtue of the homestead exemption laws of this state." A man and his wife executed a mortgage upon their homestead, but the mortgage did not contain the release of the homestead right as provided by statute. Suit was brought to foreclose this mortgage. The husband and wife were made parties and duly served with process, but made default. A decree of foreclosure was entered, the real estate sold, and the sale confirmed. In *Hoskins v. Litchfield*, 31 Ill. 137, 83 Am. Dec. 215, the supreme court of Illinois held that the husband and wife were not barred from asserting their homestead rights in the mortgaged premises because of their failure to appear and set up that right in the foreclosure proceeding, and that the decree pronounced in that action did not have the effect to take away the homestead right of the husband and wife.

The court said: "This mortgage as to homestead right is like a mortgage in which the wife has not released her right of dower, when sought to be enforced in defiance of that right. Suppose in such a case the wife were made a party to a bill to foreclose a mortgage, without any averment that any right of dower existed, or that the wife had released her dower, and a decree passed ³³⁵ against the husband and wife, foreclosing the mortgage and ordering a sale of the premises. No one would contend that the right of dower would be affected by such decree, or that a sale under it could convey the premises freed from the right of dower, for the simple reason that the law has provided a different and an only mode for the release of dower." To the same effect see *Moore v. Titman*, 33 Ill. 357, where it was held that the right secured by the homestead act can only be lost by release or abandonment in the mode pointed out by statute. A mere failure to claim the right by answer or cross-bill in a suit to foreclose a mortgage wherein the right is not released will not have the effect to bar the right or be considered as a relinquishment of the benefits of the statute. A decree by default and a sale thereunder will not operate to bar the right. To the same effect see *Moore v. Dixon*, 35 Ill. 208; *Wing v. Cropper*, 35 Ill. 256.

In *Grady v. McCorkle*, 57 Mo. 172, 17 Am. Rep. 676, the owner of real estate entered into a contract to convey the same and died. After his death the contractee brought suit against his widow and heirs for the specific performance of this contract. The widow was duly served with process in that suit, but made no appearance therein, and a decree of specific performance was entered as prayed by the contractee. Subsequently, the widow instituted a proceeding to have her dower assigned in this real estate and the contractee interposed the decree entered in the specific performance suit as a bar to the widow's claim for dower; but the court held: "In a suit for specific performance of a contract to convey land, brought against the widow and heirs of the owner, where the dower of the widow is not in any manner determined or litigated, or drawn in question by the proceedings, a decree for plaintiff will not estop the widow from afterward recovering her dower." The statute of Missouri, like ours, provided that the widow should be endowed with a third part of all the lands whereof her husband was seised of an estate of inheritance at any time during the ³³⁶ marriage. Construing this statute the court said: "The right of dower attaches whenever there is a seisin by the hus-

band during the marriage, and, unless it is relinquished by the wife in the manner prescribed by law, it becomes absolute at the husband's death. After the right of dower has once attached, it is not in the power of the husband alone to defeat it by any act in the nature of an alienation or charge. It is a right in law, fixed from the moment the facts of marriage and seisin concur, and becomes a title paramount to that of any person claiming under the husband by subsequent act." Discussing the effect of the decree in the specific performance suit the court said: "The whole object, extent, and scope of that proceeding was to have the agreement and undertaking of William Grady specifically performed. The rights against the widow and heirs were precisely the same as they would have been against William Grady, had he been alive and made a party to the suit. But a suit against him would not have affected his wife's right to dower without any concurring act on her part. . . . The question of the plaintiff's right of dower was neither raised nor decided, and was not made a subject of adjudication in the suit for specific performance. The plaintiff did not answer, and although she was, perhaps, properly made a party, my conclusion is, that she is not barred from claiming her dower interest in the land—she having done nothing to relinquish the same."

A case exactly in point here is *Compton v. Pruitt*, 88 Ind. 171. In that case, an administrator was licensed to sell the lands of his intestate to pay debts proved against his estate. His widow was made a party to this proceeding, but did not appear therein. The widow then brought suit to have her dower assigned and the proceedings of the administrator by which the lands of the intestate were sold and conveyed were pleaded in bar of the widow's action; but the court overruled the plea and summed up its conclusion in the syllabus as follows: "An administrator cannot, without a widow's consent, ³⁸⁷ sell her interest in lands of which her husband died seised, to make assets to pay debts. If a widow be made defendant to a proper petition to sell such lands, her default gives no power to sell her interest, and a purchaser does not acquire even color of title against her, and any attempt to sell her interest is a nullity." The court said: "In this case, the petition [that is, of the administrator for leave to sell to pay debts] stated that the decedent died seised of the land, et cetera, leaving a widow. That was equivalent to a statement that only two-thirds of it was liable to be made assets. It notified the court and all parties in interest to that effect as

fully as if the language stated expressly that the land to be sold was two-thirds of the land described. So the notice of the application to sell stated that the administrators had filed their petition to sell the real estate of the decedent, nothing more. Such a petition and notice did not inform the widow of an intended attack upon her rights, and she was guilty of no laches in failing to appear in the proceeding. She had a right to presume that the land liable to be made assets was the only subject of the petition and against such a petition she had no defense." To the same effect see *Elliott v. Frakes*, 71 Ind. 412.

In *Merchants Bank v. Thomson*, 55 N. Y. 7, it was held: "Where the wife of a mortgagor has not joined in the mortgage and has an inchoate right of dower in the mortgaged premises, the making of her a party to an action of foreclosure without allegations in the complaint that the mortgage is prior, superior, or hostile to her interest does not affect that interest, nor does the general clause in the judgment foreclosing defendants of all right in the premises."

In *Parmenter v. Binkley*, 28 Ohio St. 32, D. and M. instituted proceedings to foreclose a mortgage executed by B. alone, making B.'s wife a party. The wife did not answer or appear in the case. A decree of foreclosure was rendered and the land sold, and the court held that the foreclosure proceeding did not bar B.'s wife of her right of dower in the land sold.

²⁸⁸ *Hooper v. Castetter*, 45 Neb. 67, was a suit brought to foreclose a mortgage executed by both husband and wife. The mortgagor and his wife were made parties and duly served with process, but made no appearance to the action. Certain judgment creditors of the mortgagor were also made parties. They filed answers setting up their judgments and claiming that they were liens upon the mortgaged real estate subject to the mortgage. The court so found and decreed. The land was sold, and after the mortgage was discharged there was a surplus paid into court. The judgment creditors claimed that this surplus should be applied on their judgments. The mortgagor and his wife claimed that they were entitled to the surplus in lieu of their homestead. It was contended in that case that the mortgagor and his wife were estopped from claiming the surplus proceeds of the sale because of their failure to set up their homestead rights in the foreclosure suit; but this contention was by this court overruled, and it was held that the question of the homestead rights of the mortgagor was not involved nor litigated in the foreclosure suit, and that the decree rendered in

that suit was not a bar to the mortgagor's application to have the surplus paid to him in lieu of the homestead.

4. A fourth argument of the purchaser is, that the widow has estopped herself by her conduct from now claiming her dower estate in the lands in controversy. The averment of the purchaser's answer on this subject is as follows: "That said plaintiff [that is, the widow] was present in person and attended the sale of said real estate and heard the bids made therefor, and knew what said real estate sold at and never at any time made any objections thereto." The evidence sustains this averment of the answer. But the widow has not estopped herself from claiming her dower estate, because she attended the administrator's sale and made no objections thereto. The administrator was not selling or attempting to sell her property. She had no objection to the ~~389~~ sale of her husband's interest in the lands of which he died seised, and therefore she kept silent. It was not her duty to speak and advise the bidders at that sale of the laws of the state. The bidders, as well as the widow, were bound to know those laws. The answer of the purchaser does not allege, nor do the proofs show, that he was induced to purchase this real estate because of anything done or omitted to be done by the widow. His sole complaint is that she kept silent. But a complete answer to this is that she did not keep silent under circumstances when it was her duty to speak.

Scribner, discussing the question under consideration and citing the authorities, says: "Where the widow has done nothing to mislead the purchaser, and the circumstances are such that she is not required by good faith to disclose her claim, her mere silence in regard to it does not affect her right. Thus, her failure to give notice of her claim when the land in which she has dower is advertised for sale is no bar to her recovery. So, where lands are sold by a commissioner under an order of court, obtained by the widow as administratrix, but nothing is said or done to induce the belief that she will waive her dower, a simple omission on her part to announce at the sale that the land will be sold subject to her dower will not estop her from asserting that right. . . . In order to constitute an estoppel in pais, not only must the widow by her words or conduct have caused the purchaser to believe that he would acquire a title discharged from dower, but he must also have acted upon that belief in making his purchase and paying the purchase money": 2 Scribner on Dower, 2d ed., 271.

The same question was presented in *House v. Fowle*, 22 Or.

803, and there the court said: "A widow is not estopped to assert her dower in land sold by order of court to satisfy decedent's debts because she assured the purchaser that the title was good and did not intimate her intention to claim the same—her dower. . . . The defendant's next contention is, that under the particular ³⁹⁰ facts in this case the plaintiff is estopped from claiming her dower. The facts relied upon to create the estoppel are fully set out in the defendant's answer, but we think they are entirely insufficient. It may be conceded, and no doubt is true, that the defendant acted in the most perfect good faith. There is nothing shown indicating bad faith on either side. The defendant was chargeable with notice of what the statutes contain and of the nature of the title he would acquire at such sale. In addition to this, the rule of caveat emptor applies to all judicial sales in this state. It was the defendant's privilege and his duty to investigate the title before the sale, and for that purpose to employ such assistance as he might deem necessary; but he did not resort to the usual methods to ascertain the state of the title. An unlearned woman, unacquainted with the forms of conveyancing or the methods of business, could not be regarded as a safe guide or source of information from whom the true state of the title could be learned. It will be noticed that the defendant did not ask the plaintiff at either of the conversations he had with her whether she had or claimed any interest in the lands as dower or otherwise. What she told him was that the title was good. That statement was literally true, but it is not equivalent to the statement that she had no dower in the land, and that if he would purchase at the sale he would acquire a fee simple title free from all encumbrances. It does not anywhere appear that the defendant relied upon the statements or representations of the plaintiff and was thereby induced to make the purchase." To the same effect is *Whiteaker v. Belt*, 25 Or. 490.

The question under consideration was presented to the supreme court of Illinois in *Toledo etc. Ry. Co. v. Curtinius*, 65 Ill. 120, and the court said that a widow was not estopped from asserting her claim for dower because she had consented to and advised a guardian's sale of the real estate of which her husband died seised.

³⁹¹ The cases cited by the purchaser here do not sustain his contention that the widow in this action by her conduct has estopped herself from claiming her dower estate. In the first case, *Smiley v. Wright*, 2 Ohio. 506, the widow was not only

present at the administrator's sale, but she expressly and publicly asserted that the sale of the lands about to be made would include her dower interest. The license to sell in that case provided that the lands should be sold subject to her dower estate, and after the sale had begun she caused it to be suspended in order that the administrator might announce her agreement that the sale should include her dower estate. The sale was then resumed, and, in consequence of this agreement upon her part, the bids for the real estate were largely increased, and the administrator, with the consent of the widow, then and there attempted to sell, and did sell, her dower interest in her presence; and under these circumstances the court held that she could not afterward claim her dower in the lands as against the purchaser at that sale. The other case cited by the purchaser here is *Pepper v. Zahnsinger*, 94 Ind. 88. In that case the administrator, who had been licensed to sell the real estate of his intestate to pay debts, was requested, in writing, by the widow to sell her dower estate at the same time that he sold the estate of his intestate. He did so, and then paid to the widow in lieu of dower one-third of the entire proceeds of the sale, and the court held that the widow was estopped from afterward claiming her dower estate. But the facts of these two cases are far away from the facts of the case at bar. They were doubtless correctly decided, but they do not support the contention here that the widow has estopped herself from claiming dower solely because she was present at the administrator's sale and kept silent in regard to her dower estate in the lands being sold.

5. The final contention of the purchaser here is, that the widow is estopped from claiming her dower estate because she received a part of the proceeds of the land ³⁰² sold by the administrator in lieu of her dower estate. This is the allegation of the answer, but it is wholly unsustained by the proofs. The only evidence offered to sustain this allegation is, that the administrator, on a final settlement and distribution of the assets of the estate, paid to the widow, by order of the county court, one hundred and seventeen dollars and one and a third cents, and that this sum was receipted for by the widow as her distributive share of her husband's estate. There is not a word in the record which shows that this money was paid to this widow in lieu of her dower estate, or that she accepted it as such. On the contrary, the undisputed evidence is, that this payment was made to and received by the widow in full of her distributive share of her husband's estate, not in lieu of her (dower) estate,

or in consideration of her release or conveyance of her (dower) estate. On the coming into the county court of the administrator's final report, it appeared that, after the payment of all the claims allowed against the estate of the intestate, and the costs and expenses of administration, there remained in his hands a small sum of money. It was out of this residue that the administrator paid, by order of the county court, the one hundred and seventeen dollars to the widow. With the question as to whether this payment was legally made we are not concerned, as we are not reviewing the judgment of the county court. If that tribunal regarded the surplus in the administrator's hands as part of the personal effects of the intestate, though it arose from the sale of his real estate, and considered that the widow was entitled to a child's share of such residue, the county court may have been mistaken, as the intestate's real estate belonged to his heirs, subject to his debts, and after they had been discharged by sale of the real estate, the surplus remaining from the proceeds of such sale may have belonged to the heirs and not to the widow; but that is a matter between the heirs and the widow. The fact that the widow received a part of the residue of the proceeds of the sale of her husband's real estate is no defense to the purchaser here ³⁹³ against the widow's claim for her own estate. Furthermore, this payment to the widow was made long after the purchase of the real estate at the administrator's sale, and we are not informed by the record, nor are we able to conjecture, how the purchaser was induced to change his status and buy this land by a payment made to, and accepted by, the widow after the purchase. In order to estop the widow from claiming her dower estate as against the purchaser he must show that he was induced to change his status by something that she did or omitted to do. If the county court, the administrator, and the heirs erroneously supposed, on final settlement of the estate, that the widow was entitled to part of the money remaining in the administrator's hands, and on that supposition that money was paid to her, how can the purchaser claim that he was induced to make the purchase he did by this conduct of the widow, administrator, heirs, and county court after he made his purchase? The precise question under consideration was presented to the supreme court of Indiana in *Compton v. Pruitt*, 88 Ind. 171, and the court held that the receipt by the widow of part of the proceeds of the sale of lands made by the administrator to pay the debts of the intestate, such payment to the widow having been made as her distributive share of her hus-

band's estate, did not estop her from claiming her dower in the lands sold.

We reach the conclusion that in the case at bar the widow has been illegally and unjustly denied her dower estate in the lands of her deceased husband. The judgment of the district court is reversed and the cause remanded for further proceedings in accordance with this opinion.

DOWER—NATURE OF ESTATE—WHEN BARRED.—Dower, until the death of the husband, is merely an inchoate interest: *McCraney v. McCraney*, 5 Iowa, 232; 68 Am. Dec. 702, and note. The inchoate right, once vested in a wife, cannot be divested except by her own voluntary act performed in the mode prescribed by law: *Nicoll v. Ogden*, 29 Ill. 323; 81 Am. Dec. 311. It is paramount to all conveyances, contracts, encumbrances, debts, or liabilities of the husband executed or incurred by him during coverture: *Higginbotham v. Cornwell*, 8 Gratt. 83; 56 Am. Dec. 130. A widow may take under her deceased husband's will without losing her right of dower: *Sutherland v. Sutherland*, 102 Iowa, 535; 63 Am. St. Rep. 477; *Hatch's Estate*, 62 Vt. 300; 22 Am. St. Rep. 109, and note.

EXECUTORS AND ADMINISTRATORS—SALES BY—CAVEAT EMPTOR—WIDOW'S DOWER RIGHT.—The rule of caveat emptor applies in its utmost rigor and strictness to an administrator's sale: *Lindsay v. Cooper*, 94 Ala. 170; 33 Am. St. Rep. 105; *Smith v. Wildman*, 178 Pa. St. 245; 56 Am. St. Rep. 760. Dower is not barred where an administrator sells the land of his intestate, and out of the proceeds pays off a mortgage made by the intestate in which the wife joined, relinquishing dower. In such a case, the purchaser cannot use the mortgage to defeat the widow's right of dower: *Jones v. Bragg*, 83 Mo. 337; 84 Am. Dec. 49, and note.

HORKEY v. KENDALL.

[58 NEBRASKA, 522.]

AFFIDAVITS—ATTORNEYS PROHIBITED FROM TAKING.—Under the Nebraska statutes, an attorney for either party is prohibited from taking, as a notary public, the affidavit whereby a provisional remedy, such as an attachment, is obtained.

CONSTITUTIONAL LAW—AMENDATORY STATUTES. An act, not complete in itself, and, in effect, amendatory of other acts, must expressly recite and repeal the acts amended. Otherwise it is void.

ATTACHMENT—AFFIDAVIT—COLLATERAL ATTACK. An affidavit to procure an attachment taken before a notary public, who is also the attorney for one of the parties, is merely irregular, and not a nullity, and cannot be collaterally attacked.

ATTACHMENT—JUSTIFICATION.—The rule that an officer attaching property in the possession of a stranger claiming title must, in order to justify, not only prove that the attachment defendant was indebted to the attachment plaintiff, but also that the attachment was regularly issued, only requires such a substantial compliance with every essential requirement of the attachment pro-

ceedings as creates a valid lien. Irregularities not going to the existence and validity of such lien are immaterial.

ATTACHMENT—REPLEVIN—EVIDENCE.—An officer, from whom property held under attachment has been replevied, may prove all of the attachments under a general denial, although he adds to such denial a special plea of one particular attachment. The special matter may be proved under the general denial, and the officer cannot be compelled to elect under which plea he will introduce proof.

T. T. Bell and H. Nunn, for the appellant.

F. J. Taylor and T. H. Woods, for the appellee.

522 IRVINE, C. This was an action of replevin by Horkey against Kendall, who was sheriff of Howard county, for certain chattels, part of which Horkey claimed to own absolutely, **523** and part under a chattel mortgage from one Dobry, the general owner. As to the first portion he was successful; as to the mortgaged chattels there was a judgment against him for their return or their value, and of the latter portion of the judgment he complains.

The district court received in evidence, over the objection of the plaintiff, an affidavit filed by the Western Manufacturing Company to procure an attachment against Dobry. The defendant justified under the writ issued thereon. By other documents offered in evidence at the same time it appeared that Frank J. Taylor, the notary public before whom the affidavit was made, also appeared in the attachment suit as the attorney of record of the plaintiff. The objection was based on that fact. Section 370 of the Code of Civil Procedure prescribes the purposes for which an affidavit may be used, among them the obtaining of a provisional remedy. Section 371 prescribes what officers may take such affidavits; to wit, "any person authorized to take depositions." Immediately following are certain sections with reference to depositions. Sections 374 and 375 designate the officers who may take them, among them notaries public. Section 376 is as follows: "The officer before whom depositions are taken must not be a relative or attorney of either party, or otherwise interested in the event of the action or proceeding." These sections must be construed together, and their joint effect is to prohibit the attorney for either party from taking the affidavit whereby a provisional remedy is obtained. It is claimed, however, that section 118, as amended in 1887, has modified the foregoing provisions. Prior to 1887 the material portion of section 118 was as follows: "The affidavit verifying pleadings may be made before any person before whom a deposi-

tion might be taken." Chapter 93 of the Laws of 1887, is entitled, "An act to amend section 118 of title 7 entitled 'Pleadings in Civil Actions' of the Code of Civil Procedure of the state of Nebraska, and repeal said original section." By this act the material ⁵²⁴ portions of section 118 are amended to read as follows: "The affidavit verifying pleadings may be made before any notary public or other officer authorized to administer oaths, . . . and nothing herein shall be construed to prohibit an attorney at law, who is a notary public, from swearing a client to any pleading or other paper or affidavit in any proceeding in the courts of the state." As indicated by the title to the act of 1887, title 7 of the code, of which section 118 forms a part, is entitled, "Pleadings in Civil Actions." Section 91 enacts that the only pleadings allowed are the petition of the plaintiff, the answer or demurrer of the defendant, the demurrer or reply of the plaintiff, and the demurrer of the defendant to the reply. Subsequently come the well-known requirements as to verification of pleadings of fact, and section 118 appears in that connection. The pleadings therein referred to were evidently pleadings in the specific, technical sense, as defined by section 91. We refer to this because it is asserted that this court, in *Jordan v. Dewey*, 40 Neb. 639, has declared such affidavits as the one in question to be pleadings. In that case the court was dealing with the method of trying motions to dissolve attachments, and stated that on the trial of such motions the affidavit for the attachment and that traversing the averments of that affidavit constitute the pleadings on which such motion is to be tried. That is, the issues of fact are to be found from an inspection of these two affidavits. The word "pleading" was not there used in its specific or technical sense, and the court was not attempting to amend section 91 or section 118. In *Payne v. Briggs*, 8 Neb. 75, Judge Cobb, speaking for the court, criticised quite severely the practice of taking depositions in the office of an attorney in the case, and sometimes before a notary who is his clerk. In *Collins v. Stewart*, 16 Neb. 52, the court had reversed a judgment because the trial court had refused to strike from the files certain affidavits offered as evidence on a motion to dissolve an attachment, but sworn to before one of the attorneys. ⁵²⁵ In the light of those decisions it is not improbable that the legislature intended, by the last clause of the amendment of 1887, to entirely remove the disability resting on an attorney who happens also to be a notary public, at least so far as it prevented him from taking his own client's affidavit in any pro-

ceeding. But, if that was the object of the legislature, it endeavored to effect it by unconstitutional means. The constitution provides (Const., art. 3, sec. 11) that no bill shall contain more than one subject, which shall be expressed in its title, and no law shall be amended unless the new act contains the section or sections so amended, and the section or sections so amended shall be repealed. This requires that an act, not complete in itself, and being in effect amendatory of other acts, shall expressly recite and repeal the sections amended: *Smails v. White*, 4 Neb. 353; *Sovereign v. State*, 7 Neb. 409; *Holmberg v. Hauck*, 16 Neb. 337; *State v. Lancaster County*, 17 Neb. 85; *Touzalín v. Omaha*, 25 Neb. 817; *Stricklett v. State*, 31 Neb. 674; *Trumble v. Trumble*, 37 Neb. 340; *South Omaha v. Taxpayers' League*, 42 Neb. 671. And, although the title of "an act to amend" a certain other act is sufficient for the purpose indicated by that title, it does not indicate the purpose of engrafting by amendment upon that act provisions not germane to its original subject: *Tecumseh v. Phillips*, 5 Neb. 305; *White v. Lincoln*, 5 Neb. 505; *Burlington etc. R. R. Co. v. Saunders County*, 9 Neb. 507; *Miller v. Hurford*, 11 Neb. 377; *State v. Pierce County*, 10 Neb. 476; *Trumble v. Trumble*, 37 Neb. 340; *State v. Tibbets*, 52 Neb. 228; 66 Am. St. Rep. 492. Applying these tests to the act of 1887, the scope claimed for it, and perhaps indicated by its text, would make it operate as an amendment of section 371, as explained by sections 374, 375, and 376. It does not refer to, recite, or repeal any of those sections. Its title indicates only a purpose to amend section 118, which embraced only the subject of verifying pleadings. We cannot, without permitting a violation of the constitution, give it any broader effect as amended.

528 But it does not follow because the affidavit was irregular, and might have been quashed on motion for that purpose in the attachment suit, that the plaintiff in this case can avail himself of the defect. In *Oberfelder v. Kavanaugh*, 21 Neb. 483, this court laid down the following rule: "When an officer attaches property found in the possession of a stranger claiming title, in an action for such taking, the officer, in order to justify it, must not only prove that the attachment defendant was indebted to the attachment plaintiff, but that the attachment was regularly issued." Several times since has this language been repeated with approval; but in each case with regard to a substantial defect in the proof of the attachment, one that would not only lead to a reversal on petition in error by the attachment defend-

ant, but one reaching to the very validity of the lien acquired or sought to be acquired. Thus in the leading case there was no proof of any affidavit. An attachment without an affidavit would be void. In *Williams v. Eikenberry*, 22 Neb. 210, and in *Paxton v. Moravek*, 31 Neb. 305, the writ of attachment itself was not offered in evidence. In *Williams v. Eikenberry*, 25 Neb. 721, 13 Am. St. Rep. 517, the pendency of the action to which the attachment was ancillary was not proved. In *Bartlett v. Cheesebrough*, 32 Neb. 339, the debt was not proved. In *Spaulding v. Overmire*, 40 Neb. 21, there was no competent evidence of any of the proceedings. The court did not, in any of the cases, hold or intend that there could be no justification if some inconsequential irregularity was made to appear. On the contrary, the object is to establish an interest founded on a valid lien, and the proof is sufficient if this be shown. Irregularities not going to the existence and validity of the lien are not open to such a collateral attack: *Scrivener v. Dietz*, 68 Cal. 1. The provisions of our code as to the competency of officers administering oaths to affiants are substantially declaratory of the common law, and both at the common law and under statutes like ours it is very generally held that the making of an affidavit ⁵³⁷ before an attorney in the case, if he be an officer generally authorized to take affidavits, is an irregularity merely, which must be attacked at once by motion, or it will be waived; and that such an affidavit is not a nullity: *Gilmore v. Hempstead*, 4 How. Pr. 153; *Smith v. Ponath*, 17 Mo. App. 262; *Linck v. Litchfield*, 141 Ill. 469; *Swearingen v. Howser*, 37 Kan. 126; *Haward v. Nalder*, Barnes, 60. In *Wilkowski v. Halle*, 37 Ga. 678, 95 Am. Dec. 374, an attachment was held void where the affidavit was made before one of the attorneys who was a notary, but in that state notaries not only take the affidavit, but they approve the bond and issue the writ. This attorney had done all three acts, and the reasoning of the court was entirely directed against permitting him to approve the bond and issue the writ. In *Owens v. Johns*, 59 Mo. 89, the clerk of the court was plaintiff and made the affidavit before his own deputy. This was held void. It was the same as if he had taken his own affidavit. In *Greenvault v. Farmers' etc. Bank*, 2 Doug. (Mich.) 498, the affidavit was taken before an officer not authorized to take any affidavits. As pointed out in *Swearingen v. Howser*, 37 Kan. 126, there is a clear distinction between the administration of an oath by one not authorized to administer oaths, and the administration of an oath by one generally authorized, but

forbidden to do so in a particular case. In the first case no power exists, and the act is a nullity; in the other the power exists, but it has been wrongfully exercised. We have found no cases other than the three commented upon which tend to support the theory that the affidavit was void. We are convinced that it was not, and that it was properly received in evidence.

The defendant in his answer pleaded specially a justification under a writ of attachment sued out by the Continental National Bank. He also pleaded by general denial, and offered in evidence the attachment at the suit of the Western Manufacturing Company. It is argued that the court erred in receiving this evidence. It is admitted that the evidence would generally be relevant ⁵²⁸ under a general denial, but it is asserted that the defendant having elected to plead specially, should be restricted to the special matter pleaded. *Westover v. Vandoran*, 29 Neb. 652, is cited as supporting that contention. In the case cited there was no general denial, and the question was as to the necessity of replying to the special matter pleaded. In *Williams v. Eikenberry*, 23 Neb. 210, it was held that the general denial and special plea of justification were not inconsistent, and that an election between them could not be required, although the special matter might be proved under the general denial. That case rules this. Although the special plea was here superfluous, it did not render irrelevant to the general denial matter which would have been relevant in the absence of the special plea.

There are a few other assignments of error, but they are not discussed in the briefs.

Affirmed.

ATTACHMENT—AFFIDAVIT BY ATTORNEY.—If an affidavit for an attachment is made by plaintiff's attorney without stating that the applicant is absent, it is merely irregular and not void: *Note to Simpson v. McCarty*, 12 Am. St. Rep. 41.

REPLEVIN—PLEADING.—Any defense to an action of replevin may be proved under a general denial: *White v. Gemery*, 47 Kan. 741; 27 Am. St. Rep. 320.

STATUTES—VALIDITY—AMENDATORY ACTS.—No amendment can be enacted under the title of an act to amend a certain other act, which is not germane to the subject of the original act: See monographic notes to *Bobel v. People*, 64 Am. St. Rep. 79, and *People v. Starne*, 85 Am. Dec. 362. An act not complete in itself, but which is clearly amendatory in its character and scope, must set forth the section or sections as amended and repeal the original section or sections: *State v. Tibbetta*, 62 Neb. 228; 66 Am. St. Rep. 492.

STATE v. CORNELL.

[53 NEBRASKA, 556.]

TAXATION FOR PUBLIC PURPOSE.—The legislature may authorize taxation for a public purpose, but a tax imposed for an object in its nature essentially private is void.

TAXATION—PUBLIC PURPOSE.—It is for the legislature in the first instance to decide whether the object for which a tax is to be used or raised is a public purpose; but its determination of the question is not conclusive.

TAXATION—PUBLIC PURPOSE—VALIDITY.—In order to declare a tax invalid on the ground that it is not imposed for the benefit of the public, the absence of a public interest in the purpose for which the money is raised by taxation must be so clear and palpable as to be immediately perceptible to every mind.

TAXATION—INTERSTATE EXPOSITIONS—PUBLIC PURPOSE.—A statute authorizing counties to participate in interstate expositions, to issue bonds for that purpose, and to provide for the levy of a tax for their payment, is not unconstitutional as authorizing taxation for a private interest and not for a public purpose, and an appropriation of the money arising from the sale of such bonds for the erection and maintenance of suitable buildings and for county exhibits at such expositions, is also for a public purpose and not unconstitutional.

STATUTES—CONFLICT—CONSTRUCTION.—Special provisions in a statute relating to a particular subject matter must prevail over general provisions in other statutes in conflict therewith.

STATUTES—CONFLICT—CONSTRUCTION.—If a statute relates specifically to the subject of issuing bonds to enable counties to participate in interstate expositions, the provisions therein as to the vote necessary to carry that class of bonds prevails over provisions of general statutes in conflict therewith, for the reason that it is a special law in relation to a particular subject.

H. H. Baldrige, H. L. Day, and Montgomery & Hall, for the relator.

J. C. Smyth, attorney general, and E. P. Smith, deputy attorney general, for the respondent.

557 NORVAL, J. This was an original application to this court for a peremptory writ of mandamus, on the relation of Douglas county, to compel the respondent, as auditor of public accounts, to register in his office one hundred certain coupon bonds of said county, aggregating one hundred thousand dollars, voted for the purpose of raising money to enable it to participate in the Trans-Mississippi and International Exposition to be held in the city of Omaha during the year 1898. In 1897, the legislature of this state passed an act entitled, "An act to authorize counties to participate in interstate expositions, to issue bonds for such purpose, and to provide for a tax for the payment of

such bonds": *Sess. Laws 1897, c. 24, p. 192.* The first three sections of said law are here reproduced:

"Section 1. Whenever one thousand (1,000) voters of any county in the state of Nebraska having over one hundred thousand population shall petition the board of county commissioners or the board of supervisors to that end, any such county shall be and hereby is authorized to issue the bonds of such county, to become due twenty (20) years from the date thereof, and to bear interest at the rate not to exceed five (5) per cent per annum, to provide for the expenses of promoting the interests of such county by participating in any interstate exposition held in the state of Nebraska and making at such exposition a county exhibit, improving or beautifying the grounds, and erecting or aiding in the erection of a suitable building or buildings therefor, and maintaining the same during such exposition, to an amount to be determined by the board of county commissioners or board of supervisors, not exceeding one hundred thousand dollars ⁵⁵⁸ (\$100,000); provided, the board of county commissioners or board of supervisors shall first submit the question of the issuing of such bonds to a vote of the legal voters of such county at a general or special election, such question to be submitted entire after notice to such voters published in any newspaper of general circulation in such county for four (4) weeks next prior to such election; and provided, that such interstate exposition shall first have been recognized by the Congress of the United States by an appropriation of a sum not less than one hundred thousand dollars (\$100,000).

"Sec. 2. The proposition, when submitted, shall contain a statement of the amount necessary to be raised each year for the payment of the interest of said bonds and for the payment of the principal thereof at maturity.

"Sec. 3. If two-thirds ($\frac{2}{3}$) of the votes cast on such proposition at any such election be in favor thereof, the said bonds shall be authorized and the proper officers of the county shall thereupon issue said bonds and the same shall be and continue a subsisting debt against such county until they are paid for."

Section 4 of said act provides for the levying of a sufficient tax by the proper county officers upon all of the taxable property of the county to pay the principal and interest upon said bonds as the same become due and payable.

The relation shows that the proposition to issue the bonds in question was submitted to the electors of the county, and the same was adopted by them in strict conformity to the provisions

of the said legislative enactment. The respondent has declined to register the bonds, for the reason their legality is questioned; but he has not, by answer or otherwise, advised the court of the particular grounds upon which their validity is assailed, nor has he submitted any authorities in opposition to the issuance of the writ. Counsel for relator, in the briefs and at the bar, have argued two propositions, to which attention will be given, namely: 1. ⁵⁵⁹ Whether the bonds were voted for a lawful object or purpose. 2. Did the proposition to issue them receive the requisite affirmative vote of the electors of the county?

The following principles are too well established by the authorities to require discussion at this time: 1. The legislature may authorize taxation for a public purpose, but a tax imposed for an object in its nature essentially private is void: 1 Dillon on Municipal Corporations, sec. 508; Cooley on Taxation, 2d ed., 55, 103; 25 Am. & Eng. Ency. of Law, 87, and the numerous cases cited in note 2 on said page; 2. It is for the legislature in the first instance to decide whether the object for which a tax is to be used or raised is a public purpose, but its determination of the question is not conclusive: Citations supra; 3. To justify a court in declaring a tax invalid on the ground that it was not imposed for the benefit of the public, the absence of a public interest in the purpose for which the money is raised by taxation must be so clear and palpable as to be immediately perceptible to every mind: *Turner v. Althaus*, 6 Neb. 54; *Board of Directors v. Collins*, 46 Neb. 411; *Brodhead v. Milwaukee*, 19 Wis. 658; 88 Am. Dec. 711; *Sharpless v. Mayor*, 21 Pa. St. 150; 59 Am. Dec. 759; *People v. Common Council*, 33 Mich. 164; *Walker v. Cincinnati*, 21 Ohio St. 14; 8 Am. Rep. 24; *Stockton etc. Ry. Co. v. Stockton*, 41 Cal. 147; *Weismer v. Douglas*, 64 N. Y. 91; 21 Am. Rep. 586; *Loan Assn. v. Topeka*, 20 Wall. 664.

In the last case, it was said: "It is undoubtedly the duty of the legislature which imposes or authorizes municipalities to impose a tax to see that it is not to be used for purposes of private interest instead of public use, and the courts can only be justified in interposing when the violation of this principle is clear and the reason for interference cogent. And in deciding whether in a given case the object for which the taxes are ⁵⁶⁰ assessed falls upon the one side or the other of this line, they must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and

by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether state or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation."

The language of Folger, J., in his opinion in *Weismer v. Douglas*, 64 N. Y. 99, 21 Am. Rep. 586, deserves to be reproduced here: "It is a general rule that the legitimate object of raising money by taxation is for public purposes and the proper needs of government, general and local, state and municipal. When we come to ask, in any case, what is a public purpose, the answer is not always ready, nor easily to be found. It is to be conceded that no pinched or meager sense may be put upon the words, and that if the purpose designated by the legislature lies so near the border line that it may be doubtful on which side of it it is to be domiciled, the courts may not set their judgment against that of the lawmakers."

In *Board of Directors v. Collins*, 46 Neb. 420, occurs this language: "While all agree that the legislature cannot, without the consent of the owner, appropriate private property to purposes which in no way subserve public interests, the rule is quite as firmly settled that the courts will not interfere by declaring acts invalid simply because they may differ with the law-making power respecting the wisdom or necessity thereof. For if, by any reasonable construction, a designated use may be held to be public in a constitutional sense, the will of the legislature should prevail over any mere doubt of the court."

In the light of the principles already stated, is the ⁵⁶¹ legislation, under which the bonds in question were voted, illegal on the ground that it authorized the imposing of burdens upon the public, by way of taxation, in aid of a private enterprise, and not in furtherance of an object which is public in its character? The answer must be in the negative. The statute under review does not attempt, or purport, to authorize the issuance or donation of the bonds to private individuals, or the corporation under whose auspices the exposition is to be held. Nor does the act contemplate that the money derived from the sale of the bonds shall be devoted to promote the interest of a few; but the intention of the law was to enable any county availing itself of its provisions to raise the means with which to meet the expenses of erecting a suitable building or buildings, and

maintaining the same, and an exhibit of the resources of the county at the Trans-Mississippi and International Exposition to be held in the city of Omaha in 1898. The proceeds of the bonds are to be disbursed, for the purpose mentioned in the law, by Douglas county, through its officers and agents. We cannot determine judicially that such an object is purely private, and not public in its character, especially in view of the legislation and adjudication in this state now to be mentioned. The legislature in 1891 appropriated fifty thousand dollars "to provide for a presentation of the products, resources, and possibilities of the state of Nebraska at the World's Columbian Exposition": Sess. Laws 1891, c. 57, p. 395. An additional appropriation of thirty-five thousand dollars was subsequently made for the same purpose: Sess. Laws 1893, c. 41, p. 380. Both of those amounts were paid by the state treasurer, and the money was expended without anyone challenging the legality of the appropriations on the ground that they were not made for the public good. Our legislature appropriated one hundred thousand dollars at the last session for the purpose of defraying the expenses of the state in making a proper exhibit of its resources and products in the said Trans-Mississippi and International Exposition: ⁵⁶²Sess. Laws 1897, c. 88, sec. 4, p. 369. Section 3, article 1, chapter 2, of the Compiled Statutes, provides that two thousand dollars shall be paid annually out of the state treasury to the state board of agriculture to be used in payment of premiums awarded by said board at the state fair; and section 10 of the same article and chapter authorizes the payment to the state horticultural society of one thousand dollars annually for the use of and benefit of said society. The legislature has each session made the appropriation required by said sections, for the purpose therein indicated, and the same have been paid, without a suggestion from any source that the money was not devoted to a public use. Section 16 of the same article and chapter authorizes a county, under certain restrictions, to appropriate and pay to the county agricultural society not exceeding one hundred dollars for every thousand inhabitants in the county, "to be expended by such society in fitting up such fair grounds, but for no other purpose." This section has never been assailed as being invalid, although it has remained upon the statute books for nearly twenty years. Section 12, article 1, of said chapter 2 authorizes the payment by county boards, to agricultural societies complying with the provisions thereof, of a sum equal to three cents for each inhabitant in the county from the county general fund. In *State v.*

Robinson, 35 Neb. 401, it was ruled that this section authorized the appropriation of money for a public purpose, and the expenditure was permissible under the constitution. That case is not distinguishable in principle from the one at bar. The adjudication of other courts fully sustains the same doctrine.

The city of Philadelphia appropriated fifty thousand dollars to meet the official contingent expenses incidental to the Centennial Exposition. It was held that this appropriation was valid: *Tatham v. Philadelphia*, 11 Phila. 276.

An appropriation by a town made in pursuance of a statute to celebrate the centennial anniversary of its incorporation has been upheld: *Hill v. Easthampton*, 140 Mass. 381. Likewise an appropriation of money by a ⁵⁶³ city for the celebration of holidays is held to be for a public purpose: *Hubbard v. Taunton*, 140 Mass. 467.

The legislature of California made an appropriation of three hundred thousand dollars for the purpose of making a state exhibit at the World's Fair Columbian Exposition. The supreme court of that state, in *Daggett v. Colgan*, 92 Cal. 53, 27 Am. St. Rep. 95, held the appropriation was for public use, and was constitutional.

In *Norman v. Kentucky Board of Managers*, 93 Ky. 537, it was decided that an appropriation of one hundred thousand dollars to enable the state to participate in the World's Fair at Chicago was a valid exercise of legislative power under a constitution which provided that "taxes shall be levied and collected for public purposes only."

The legislature of the state of Tennessee, in 1895, passed an act authorizing the several counties of the state to appropriate money to provide for an exhibit of the resources at the Tennessee Centennial Exposition to be held at Nashville. The county of Shelby, in that state, appropriated twenty-five thousand dollars in pursuance of said act, but the proper county officer refused to issue a warrant against said appropriation, claiming that the act was invalid. On an application for a writ of mandamus the supreme court, in *Shelby County v. Exposition Co.*, 96 Tenn. 653, overruled the contention, saying: "To our minds, it is entirely clear that an exhibition of the resources of Shelby county at the approaching State Centennial Exposition is a county purpose. In view of the fact that the event to be celebrated is one of no less note and importance than the birth of a great state into the American Union, and of the further fact that the exposition is reasonably expected to attract great and favorable

attention throughout the country, and be participated in and largely attended by intelligent and enterprising citizens of numerous other states at least, it is beyond plausible debate that such an exhibition is well calculated to advance the material interests and promote the general ⁵⁶⁴ welfare of the people of the county making it. It will excite industry, thrift, development, and worthy emulation in different avenues of commerce, agriculture, manufacture, art, and education within the county, thereby tending to the permanent betterment and prosperity of her whole people. In short, it will encourage progress, and progress will insure increased intelligence, wealth, and happiness for her people, individually and collectively. Undeniably, that which promotes such an object and facilitates such a result in any county is, to that county, a county purpose in the truest sense."

No case in conflict with the foregoing has come under the observation of the writer. Decisions, however, are to be found in the books holding the appropriation of moneys for celebrations of public events to be invalid, but such decisions turn on the question of statutory authority rather than on the right of the legislature to confer such power: See *Hood v. Mayor*, 1 Allen, 103; *Tash v. Adams*, 10 Cush. 252; *New London v. Brainard*, 22 Conn. 552.

In *Hayes v. Douglas County*, 92 Wis. 429, 53 Am. St. Rep. 926, it was ruled that a county tax levied for the purpose of defraying the expenses of placing blocks of stones from the county in the Wisconsin state building at the Columbian World's Fair was unauthorized and void. The ground for this holding does not appear in the report of the case, as the only reference to the subject in the body of the opinion is in the language following: "The Columbian Fair stone tax was altogether unauthorized and void." We presume that the power to impose the tax in that case was not conferred by statute. Upon principle and authority, we are constrained to hold that the bonds were voted for a public purpose, one for which the money of the county may be lawfully devoted.

Attention will now be given to the question whether the proposition to issue these bonds received the requisite number of affirmative votes. Sections 27 to 30, inclusive, of article 1, chapter 18, of the Compiled Statutes, relate ⁵⁶⁵ generally to the submission of questions to a vote of the electors of the county. Said section 30 declares: "If it appears that two-thirds of the votes cast are in favor of the proposition, and the requirements

of the law have been fully complied with, the same shall be entered at large by the county board upon the book containing the record of their proceedings, and they shall then have power to levy and collect the special tax in the same manner that the other county taxes are collected." This section has been construed as requiring, to adopt a proposition involving the issuance of bonds, an affirmative vote of two-thirds of the electors participating at the election at which the same is submitted: *State v. Anderson*, 26 Neb. 517; *Stenberg v. State*, 50 Neb. 127. So that if the provisions of said section 30 apply to the bonds in question, they failed to carry, since they did not receive two-thirds of the votes cast at the election, although more than two-thirds of those voting on the proposition were in favor of the bonds. It is very evidence that said section 30 cannot be invoked here, because it is embraced in the statute which provides generally for the submission of questions to a vote of the county, and must give way to any special act upon the same subject. The law under which the bonds in controversy were voted relates specifically to the subject of issuing bonds to enable counties to participate in interstate expositions, and the provision therein as to the vote necessary to carry that class of bonds governs and controls, for the obvious reason it is a special law in relation to a particular subject. This principle has been recognized by a long line of decisions in this state: *McCann v. McLennan*, 2 Neb. 286; *People v. Gosper*, 3 Neb. 310; *Albertson v. State*, 9 Neb. 429; *Richardson County v. Miles*, 14 Neb. 311; *Fenton v. Yule*, 27 Neb. 758; *State v. Benton*, 33 Neb. 823, 834; *Richards v. Clay County Commrs.*, 40 Neb. 51; 42 Am. St. Rep. 650; *Merrick v. Kennedy*, 46 Neb. 264; *Van Horn v. State*, 46 Neb. 62; *State v. Moore*, 48 Neb. 870. It follows that these bonds were carried by the requisite vote, and no valid objection having been urged against ~~see~~ their registration, a peremptory writ of mandamus is ordered as prayed.

TAXATION—PRIVATE AND PUBLIC PURPOSE—HOW DISTINGUISHED.—A tax can be levied for a public purpose only, and never for private objects or purposes: *State v. Switzler*, 143 Mo. 287; 65 Am. St. Rep. 653. It is for the legislature to determine for itself in every case whether a particular purpose is, or is not, one which so far concerns the public as to render taxation admissible: See monographic notes to *Zigler v. Menges*, 16 Am. St. Rep. 367, and *New Orleans v. Telephone etc. Co.*, 8 Am. St. Rep. 510. A tax levied by a county to pay the expenses of placing stones in the state building at the Columbian World's Fair Exposition is unauthorized and void: *Hayes v. Douglas County*, 92 Wis. 429; 53 Am. St. Rep. 926.

STATUTES—INTERPRETATION—CONFLICTING PROVISIONS.—A special provision in a statute relating to a specific subject matter controls general provisions therein: *Richards v. Commrs. of Clay County*, 40 Neb. 45; 42 Am. St. Rep. 650; *People v. Richards*, 108 N. Y. 187; 2 Am. St. Rep. 378.

PHENIX INSURANCE COMPANY v. FULLER.

[53 NEBRASKA, 811.]

INSURANCE—WAIVER OF CONDITION AS TO ENCUMBRANCES.—If no inquiries are made of an insured as to the condition of his title to property insured, or as to encumbrances thereon, and he does not intentionally conceal the existence of an encumbrance, and does not keep silent in regard thereto from any sinister motive, while he has an insurable interest in the property, and the premium is paid, accepted, and retained, the insurance company is conclusively presumed to have insured such insurable interest, and to have waived a condition in the policy providing for its forfeiture by reason of an encumbrance upon the property. In case of loss, the insurer cannot avoid liability by reason of such encumbrance.

APPELLATE PRACTICE—OPINION OF TRIAL COURT—RECORD ON APPEAL.—The opinion of the trial court is not an essential part of the record on appeal. The judgment of such court must stand or fall upon the statutory record, the pleadings, findings, judgment, and bill of exceptions.

APPELLATE PRACTICE—PRESUMPTIONS—OPINION OF TRIAL COURT.—If general findings are made by the trial court and a judgment pronounced thereon, it must be conclusively presumed on appeal that the trial court considered all the competent evidence before it, and determined all the material and necessary issues presented by the pleadings, although from the language of the opinion the contrary should appear.

J. Fawcett and Greene & Breckinridge, for the appellant.

G. W. Shields, for the appellee.

⁵¹³ **RAGAN, C.** Fred A. Fuller sued the Phenix Insurance Company of Brooklyn, New York, in the district court of Douglas county, to recover the value of certain property of his destroyed by fire, which property the insurance company had insured against loss or damage by fire. Fuller had a verdict and judgment, and the insurance company has filed here a petition in error to review such judgment.

1. The policy contained this provision: "If the interest of the assured in the property be other than an unconditional ⁸¹³ exclusive ownership, or if any other person or persons have any interest whatever in the property described, whether it be real estate or personal property, or if there be a mortgage or other encumbrance thereon, whether inquired about or not, it must

be so notified to the company, and be so expressed in the written part of this policy, otherwise this policy shall be void." At the time of the issuance of the policy in suit the personal property of the insured was encumbered by a chattel mortgage. The insured did not notify the company of the existence of this mortgage, and no memorandum of its existence was written in the policy. The insurance company interposed as a defense to the action in the district court the existence of this chattel mortgage upon the insured property; and the first argument here is that the judgment of the district court is contrary to law, because the undisputed evidence shows that such a mortgage existed upon the insured property at the date of the issuance of the policy, and that the insurance company was not notified of the existence of such mortgage, and no memorandum of its existence was written in the policy. The evidence on behalf of the insured tends to show that the agent of the insurance company solicited this insurance. At the time the agent had no actual knowledge of the existence of the chattel mortgage upon the property, but made no inquiries of the insured as to whether the property was encumbered. In fact, the subject of an encumbrance upon the property about to be insured was not mentioned by either party, and while the insured kept silent upon the subject of the encumbrance, he did not do so with any sinister motive. In other words, the subject of the encumbrance upon the property was not mentioned, because it seems not to have been thought of either by the insured or the insurer. The premium for the insurance was paid by the insured, and accepted and retained by the insurer. The evidence further shows that the value of the property at the date of its insurance exceeded the encumbrance thereon, and ^{\$14} at the date of the destruction of the property by fire the encumbrance had been so reduced that the property destroyed exceeded in value both the insurance and the encumbrance thereon. In *Insurance Co. of North America v. Bachler*, 44 Neb. 549, it was held that where the insured was not questioned as to encumbrances on his property, and did not intentionally conceal the existence of an encumbrance and did not keep silent in regard to the encumbrance from any sinister motive, the existence of a mortgage upon the property did not invalidate the policy. And in *German Ins. Co. v. Kline*, 44 Neb. 395, it was held that where the application for insurance is oral, and no inquiry made as to the condition of the title of the property, the insured in fact had an insurable interest in the property, the premium paid and accepted and retained, the

insurance company would be conclusively presumed to have insured the insurable interest which the owner had in the property and to have waived the provision in the policy providing for its forfeiture by reason of the existence of an encumbrance upon the property. These cases control the case at bar.

2. This case was tried to the court without a jury, and the court found generally in favor of the insured and against the insurance company, and entered an ordinary money judgment on such finding; but the learned district judge also wrote an opinion in the case, and in this opinion he states that he did not deem it necessary to pass upon the merits of the defense just considered, and reserved the question presented by that defense. A second argument here is, that the judgment must be reversed because the only issue in the case has not been passed upon or decided by the district court; but this argument assumes that the opinion of the district judge is an essential part of the record of the case brought here; but it is not. In reviewing a case brought here, either on error or appeal, while this court is always pleased to have the benefit of the written opinion of the trial judge, still the judgment of the district court must stand or fall upon the ⁸¹⁵ statutory record of the case—that is, the pleadings, the finding and judgment of the district court, and the bill of exceptions made a part of the record; and where general findings are made by a court and a judgment pronounced thereon, we must conclusively presume that the trial court considered all the competent evidence before it, and decided all the material and necessary issues presented by the pleadings, though from the language of the opinion the contrary should be made to appear.

The judgment of the district court is affirmed.

INSURANCE—CONDITION AS TO ENCUMBRANCES—WAIVER.—If an insured is not questioned concerning encumbrances on his property or other facts material to the insurance, and does not intentionally conceal them, their existence does not invalidate the policy: *Dooly v. Hanover Fire Ins. Co.*, 16 Wash. 155; 58 Am. St. Rep. 23, and note; *Hanover Fire Ins. Co. v. Bohn*, 48 Neb. 743; 58 Am. St. Rep. 719, and note; *Hall v. Niagara etc. Ins. Co.*, 83 Mich. 184; 32 Am. St. Rep. 497.

APPEAL—RECORD ON—PRESUMPTIONS IN FAVOR OF JUDGMENT.—The opinion of the lower court is no part of the record on appeal, and without some bill of exceptions or other aid, it is not a subject matter for review: *Tinges v. Moale*, 25 Md. 480; 30 Am. Dec. 73, and note. The rulings and judgment of the trial court are presumed correct, and every material fact not found by the court below must be presumed in favor of the judgment: Note to *Searls v. Knapp*, 49 Am. St. Rep. 875.

CASES
IN THE
SUPREME COURT
OF
NEW HAMPSHIRE.

LEAVITT v. DOVER.

[67 NEW HAMPSHIRE, 94.]

CONTRACTS TO DO WORK FOR FIXED SUM—EXTRA COMPENSATION FOR FAULT OF SPECIFICATIONS.—One who voluntarily enters into an absolute contract, without qualification or exception, to construct certain work according to certain specifications at a stipulated price must abide by his contract and perform his undertaking no matter at what cost, if performance is not absolutely impossible, and cannot recover compensation for extra work made necessary by a fault in the specifications.

J. A. Edgerly and J. H. Worcester, for the plaintiff.

W. F. Nason and J. Kivel, for the defendants.

vs **BLODGETT, J.** July 17, 1888, the parties executed a contract, under seal, by which the plaintiff agreed to construct two wells for the defendants, in accordance with the specifications annexed to and made a part of the contract, for the sum of ten thousand five hundred dollars. As a means of constructing each of these wells, it was necessary first to put in a curb, made of timber and plank, of sufficient size and strength to allow the stone and brickwork of the well to be built within it, and which was to be removed as soon as its object was accomplished. The curb shown upon the plan accompanying the specifications was octagonal in form, and the specifications also prescribed the size and quantity of timber and planking to be used in making it.

In constructing the upper of the two wells, the plaintiff attempted to use such a curb, but after the well had been sunk to the depth required, which was accomplished with difficulty,

on account of quicksand a short distance below the surface of the ground, as well as the moist condition of the ground itself, the curb gave way and the ground caved in, which rendered valueless all that had been done up to that time. The plaintiff claimed, and the defendant denied, that this resulted from inherent defects in the curb specified; that it should have been circular in form, instead of octagonal. This issue was specially submitted to the jury, and they disagreed upon it. The plaintiff subsequently constructed the two wells, and has been paid the full contract price.

In this action he seeks to recover compensation for the labor, materials, and use of tools and machinery furnished by him in constructing the well that caved in; and the question transferred is, whether he is entitled to recover therefor if he shows that the caving in of the well resulted in whole or in part from inherent defects in the curb described in the specifications and plan.

This question has no materiality. If it had been decided by the jury in the plaintiff's favor, no verdict could have been predicated upon it. Whether the prescribed curb would prove adequate to its intended object was a matter of more or less uncertainty, as to which it was the plaintiff's duty to form his own conclusion. If he entertained doubts as to its sufficiency, he should have provided against the contingency in his contract; and for his neglect to do so the law affords no relief. Having voluntarily entered into an absolute contract, without any qualification or exception ^{or} to construct the wells for the defendant at a stipulated price, which he has received, he must abide by his contract and perform his undertaking. The caving in of the earth did not render performance impossible, but simply made it more expensive; and no principle is better settled than that where a party by his own contract creates a duty or charge upon himself, he is bound to make it good, no matter what the cost or difficulty, if performance be not absolutely impossible: *Walton v. Waterhouse*, 2 Saund. 420, 422 a, note 2; *Brecknock etc. Co. v. Pritchard*, 6 Term. Rep. 750; *Atkinson v. Ritchie*, 10 East, 530, 533; *Maryon v. Carter*, 4 Cal. & P. 295; *Beale v. Thompson*, 3 Bos. & P. 405, 420; *Phillips v. Stevens*, 16 Mass. 238, 240; *Adams v. Nichols*, 19 Pick. 275, 276; 31 Am. Dec. 137; *Boyle v. Agawam Canal Co.*, 22 Pick. 381; 33 Am. Dec. 749; *Beebe v. Johnson*, 19 Wend. 500; 32 Am. Dec. 518, 519, and note; *School Trustees v. Bennett*, 27 N. J. L. 513; 72 Am. Dec. 373, 374; *Bacon v. Cobb*, 45 Ill. 47, 52; *Steele v. Buck*, 61

Ill. 343, 346; 14 Am. Rep. 60; *Janes v. Scott*, 59 Pa. St. 178; 98 Am. Dec. 328; *Union v. Smith*, 39 Iowa, 9, 11; 18 Am. Rep. 39; *Dermott v. Jones*, 2 Wall. 1, 8. And in this view of the law the plaintiff is also barred from a recovery by his express stipulation in the contract "that no claim or demand for extra labor or materials of any kind whatever shall be presented by him at any time during the progress of the work or after its completion."

For the other items in his specification he is to have judgment agreeably to the provisions of the reserved case.

Judgment accordingly.

Chase, J., did not sit; the others concurred.

CONTRACTS—PERFORMANCE—STRICTNESS REQUIRED.—If a party by his positive contract creates a duty or charge upon himself, he becomes an insurer, and must make his contract good, either by performance or the payment of damages, and inevitable accident affords him no relief: *Summers v. Hibbard*, 153 Ill. 102; 46 Am. St. Rep. 872. A party cannot repudiate a contract or compromise so far as its terms are unfavorable to him, and claim the benefit of the residue: *King v. Mason*, 42 Ill. 223; 89 Am. Dec. 426. A party for whom services are to be performed under a contract is not bound to pay for them until they are rendered: *Pennsylvania etc. Nav. Co. v. Dandridge*, 8 Gill & J. 248; 29 Am. Dec. 542.

READY v. MANCHESTER GAS LIGHT COMPANY.

[67 NEW HAMPSHIRE, 147.]

NEW TRIAL—RELATIONSHIP OF JUROR.—One party to an action is not entitled to a new trial on account of the relationship of a juror to the other, if the former might, by the exercise of diligence, have discovered the relationship before trial.

G. W. Prescott and O. E. Branch, for the plaintiff.

Clough & Hale, E. M. Topliff, and H. E. Barnham, for the defendants.

¹⁴⁷ *ALLEN, J.* After the verdict was returned, the plaintiff's counsel moved to set the same aside and for a new trial, because one of the jurors at the trial was the son of a stockholder of the defendant corporation, and furnished evidence that neither they nor the plaintiff were aware of the juror's relationship to the defendants' stockholder until after the trial. The court found that the plaintiff, by the exercise of diligence, might have ascertained the relationship of the juror to a stockholder before trial and denied the motion.

The fact that the plaintiff had sufficient time and opportunity to make the necessary inquiry as to the juror's qualifications before the trial, and did not do it, is evidence to support the finding of the court that there was a want of diligence on the part of the plaintiff in not making seasonable inquiry.

A verdict will not be disturbed by reason of the relationship of one of the jurors to a party in interest, when the party moving ¹⁴⁸ for a new trial might, by the exercise of diligence, have discovered the relationship before trial: *Harrington v. Manchester etc. R. R. Co.*, 62 N. H. 77 and cases cited; *Quinebaug Bank v. Leavens*, 20 Conn. 87, 89; 50 Am. Dec. 272; *Woodward v. Dean*, 113 Mass. 297.

Motion denied.

Clark, J., did not sit; the others concurred.

NEW TRIAL—DISQUALIFICATION OF JUROR.—An exception to a juror will not avail a party after verdict if he was aware of it when the jury was impaneled: *Parmelee v. Guthery*, 2 Root, 185; 1 Am. Dec. 65, and note. There are many cases to the effect that a party is bound to avail himself of the means provided by statute for ascertaining the competency of jurors, and to use due diligence in that behalf, or he will have been deemed to have waived all objections which he might have discovered: *Extended note to Rollins v. Ames*, 9 Am. Dec. 82.

CAOQUETTE v. YOUNG.

[67 NEW HAMPSHIRE, 189.]

JUDGMENTS—PLEA OF NUL TIEL RECORD.—Under the plea of nul tiel record to an action on a judgment the plaintiff cannot recover, if, upon the production of the record, the judgment upon its face appears to be void, but he may recover if the judgment, though erroneous, is merely voidable, and has not been set aside or reversed.

JUDGMENTS—ERRONEOUS.—A judgment for a sum larger than the ad damnum in the writ is erroneous, though not a nullity; and in an action thereon a continuance should be granted to enable the defendant to secure a reversal of the judgment.

Debt upon a judgment. Plea, nul tiel record.

A. C. Osgood, for the plaintiff.

Burnham, Braun & Warren, for the defendant.

¹⁰⁰ **BLODGETT, J.** The plea of nul tiel record merely puts in issue the existence of the record as stated: 1 Chitty on Pleadings, 485. Under this plea to debt on a judgment, the plaintiff

cannot recover, if upon the production of the record the judgment upon its face appears to be void; but he may recover if the judgment, though erroneous, is merely voidable, and has not been set aside or reversed: *Bruce v. Cloutman*, 45 N. H. 37; 84 Am. Dec. 111.

The record in this case shows due legal notice of the original suit to the principal debtor and the trustee; that neither of them appeared, and that both were defaulted; and that judgment was rendered for the full amount of the plaintiff's specification. Thus far the record discloses no error. Suffering himself to be defaulted was an admission by the trustee of his indebtedness to the debtor, and of his liability to be charged for the amount specified in the writ (*Drew v. Towle*, 27 N. H. 412; 59 Am. Dec. 380; Gen. Stats., c. 230, sec. 11), and if so charged, he would have no apparent ground of complaint, provided there was no defect or irregularity in the proceedings which would afford a sufficient cause for the reversal of the judgment.

The existence of such a defect is, however, disclosed by a ¹⁰¹ further inspection of the record, which shows that while the ad damnum in the writ was for only thirteen dollars, the judgment rendered was for more than three times that amount. This afforded sufficient cause for the reversal of the judgment on error, but did not make it a nullity: *Jarvis v. Brooks*, 27 N. H. 37, 68; 59 Am. Dec. 359; and as the judgment has not been reversed or set aside, it follows that the plaintiff is entitled to recover as the case now stands. Nevertheless, we think, upon the facts found at the hearing, that the case should be discharged and remanded to the trial term, and there be continued, to enable either party to have the original action brought forward in the police court for such proceedings in that court as justice may require; or, upon the refusal of that court to take action in the premises, that a writ of error, or some other process, may be issued by this court upon petition and notice.

The lapse of time which has intervened between the judgment and its attempted enforcement against the estate of the deceased trustee, who, it is found, "was a man of large property," is sufficient evidence of itself, if unexplained by the plaintiff, that a wrong has been committed which entitles the defendant to relief.

Case discharged.

Smith, J., did not sit; the others concurred.

JUDGMENTS — ACTIONS UPON — PLEA OF NUL TIEL RECORD.—Under the plea of nul tiel record to an action of debt

on a judgment, the validity of the declaration is not involved; the only inquiry is, whether or not the judgment sued on was correctly set forth and described by the plaintiff: *Dudley v. Lindsey*, 9 B. Mon. 486; 50 Am. Dec. 522. Upon such a plea the justness of the judgment cannot be inquired into: *Gay v. Lloyd*, 1 G. Greene, 78; 46 Am. Dec. 499. See *Cannon v. Cooper*, 39 Miss. 784; 80 Am. Dec. 101.

GILLIS v. CHASE.

[67 NEW HAMPSHIRE, 151.]

A RIPARIAN OWNER is entitled to a reasonable use of the water passing through his land, either for his own purposes, or for sale to others, or both. The reasonableness of such use is a question of fact for the jury.

The plaintiff, Gillis, and one Winn are riparian owners, the land of the latter being above that of plaintiff. Winn built a dam to hold back the water flowing through his land, thus forming a reservoir, from which, by means of an aqueduct, he supplied his farm, and sold water for domestic purposes to the other defendants who are not riparian owners. This action was brought to recover for diverting the water and diminishing the flow upon plaintiff's land.

H. B. Atherton, for the plaintiff.

C. H. Burns, for the defendants.

¹⁸⁹¹ **BLODGETT, J.** The case finds that "the defendants all claim the right to take the water from the reservoir under J. S. Winn, the owner of the land where the reservoir is located, and the owner of a part of the meadow from which the water is collected."

In virtue of this ownership, Winn's right to divert the water for use to a reasonable extent was incident to the land; and, as the plaintiff has failed to show any actual damage, it is only for an unreasonable and unauthorized diversion that the law will imply damage to him, because each riparian proprietor having the right to a just and reasonable use of the water as it passes through and along his land, it is only when he transcends his right by an unreasonable and unauthorized use of it that an action will lie against him by another proprietor whose common and equal right to the flow and enjoyment of the water is thereby injuriously affected. And as the reasonableness of the use is, to a considerable extent, a question of degree, and largely dependent on the circumstances of each case, it is to be judged

of by the jury, and must be determined at the trial term as a mixed question of law and fact: *Jones v. Portsmouth Aqueduct*, 62 N. H. 488, 490; *Rindge v. Sargent*, 64 N. H. 294, 295. This question having been found adversely to the plaintiff by the trial court, the finding is conclusive against him (*Jones v. Portsmouth Aqueduct*, 62 N. H. 488), and consequently the only question now open to him is as to the right of Winn, in his character as a riparian proprietor, to sell the nonriparian defendants any of the water belonging to him as incident to his land.

The English rule is understood to be, that "A riparian owner cannot, except as against himself, confer on one who is not a riparian owner any right to use the water of the stream, and any user by a nonriparian proprietor, even under a grant from a riparian owner, is wrongful": *Ormerod v. Todmorden etc. Mill Co.*, L. R. 11 Q. B. Div. 155; *Swindon Water Works Co. v. Wilts etc. Canal Nav. Co.*, L. R. 7 H. L. 697; *Nuttall v. Bracewell*, L. R. 2 Ex. 1. But the rule is otherwise in this jurisdiction, for it is held here to be a ¹⁶³ question of fact whether the use of the water made by a riparian owner for his own purposes, or for sale to others, is, under all the circumstances, a reasonable use: *Jones v. Portsmouth Aqueduct*, 62 N. H. 488, and *Rindge v. Sargent*, 64 N. H. 294. And in view of the finding that the sale of the water to the defendants by Winn is a reasonable use of his right as a riparian owner, the plaintiff has no standing on this branch of the case.

Judgment for the defendants.

Clark, J., did not sit; the others concurred.

WATERS AND WATERCOURSES—DIVERSION BY RIPARIAN PROPRIETOR—REASONABLE USE.—The right of a riparian proprietor to the use of the water as it is accustomed to flow, without diminution or alteration, is subject to the well-recognized limitation that each owner may make a reasonable use of the water for domestic, agricultural, and manufacturing purposes: Note to *Gehlen v. Knorr*, 63 Am. St. Rep. 424. What is a reasonable use plainly depends upon the subject matter of the use itself, upon the circumstances of the case, and is a question for the jury: See monographic note to *Davis v. Getchell*, 79 Am. Dec. 641, 644; also monographic note to *Heath v. Williams*, 43 Am. Dec. 275. A riparian proprietor cannot authorize a corporation to take water from a stream to be conducted to a distance and sold, as against a lower proprietor: *Hellbron v. Fowler Switch Canal Co.*, 75 Cal. 426; 7 Am. St. Rep. 183. Compare *Combs v. Agricultural Ditch Co.*, 17 Colo. 146; 31 Am. St. Rep. 275, and note.

NUTTER v. TUCKER.

[67 NEW HAMPSHIRE, 186.]

BOUNDARIES.—**DECLARATIONS OF A DECEASED OWNER** of land, made while in possession, are competent evidence upon the question of its boundaries, in favor of, as well as against, one claiming under him.

Trespass to try a dispute concerning the true boundary lines of adjoining tracts of land owned by plaintiff and defendant, respectively. Both claim under one Emery. Plaintiff testified that while Emery was the owner of both tracts, and when negotiating for the sale of the northerly tract to plaintiff, the parties went upon the land, and Emery pointed out to plaintiff a line, which he now claims as his southerly boundary, as one of the boundaries of the tract on the south. Emery died before the trial, and the defendant objected and excepted to the admission of such evidence on the part of plaintiff.

C. Page and S. W. Emery, for the plaintiff.

Frink & Batchelder, for the defendant.

¹⁸⁶ SMITH, J. The declaration of Emery as to the location of his southerly line was not rendered inadmissible by the fact that it was a statement such as his interest might induce him to make. The reasons for a contrary holding (*Shepherd v. Thompson*, 4 N. H. 213; *Smith v. Powers*, 15 N. H. 546, 563; *Morrill v. Foster*, 33 N. H. 379, 386) have been removed by the statutory changes in the law of evidence, by which parties and persons interested are no longer excluded as witnesses. The objection of interest is held to go to the weight of the evidence merely, and not to its competency: *Lawrence v. Tenant*, 64 N. H. 532, 541. Nor does the fact that the predecessors in title of both parties occupied the disputed tract prior to March, 1871, render the evidence inadmissible. The declarations of a former deceased owner of land, made while in possession, are competent upon the question of its boundaries in favor of as well as against one claiming under him: *South Hampton v. Fowler*, 54 N. H. 197, 200; *Wood v. Fiske*, 62 N. H. 173. Either party may put in the declarations of a deceased former owner on the question of boundaries, but on the question of the weight of the evidence it is much stronger for the party who puts them in when they are against the interest of the person who made them. "The true rule admits this traditionary evidence, not as a mere

disclaimer or disparagement of title, but on the broader ground of the nature and necessity of a class of cases in which great difficulty in proving original landmarks is likely to arise from lapse of time": *Lawrence v. Tennant*, 64 N. H. 541.

Exception overruled.

Carpenter, J., dissented.

Chase, J., did not sit; the others concurred.

EVIDENCE—DECLARATIONS OF DECEASED PERSONS—BOUNDARIES.—Declarations of a deceased person, who was in a situation to possess the information, are admissible on questions of boundary if made before the commencement of the suit: *Coate v. Speer*, 3 McCord, 227; 15 Am. Dec. 627, and extended note. But it has been held that declarations of a deceased owner of land as to the lines of his ownership are inadmissible when favorable to his interest: *Corbleys v. Ripley*, 22 W. Va. 154; 46 Am. Rep. 502. See extended notes to *Putnam v. Fisher*, 36 Am. Rep. 749, and *Curtis v. Aaronson*, 60 Am. Rep. 589.

STATE v. BARNARD.

[67 NEW HAMPSHIRE, 222.]

OFFICERS DE FACTO—COLLATERAL ATTACK.—The title to office of an officer de facto cannot be collaterally attacked.

OFFICERS DE FACTO—COLLATERAL ATTACK.—If the face of the commission under which an officer is appointed and the statute under which the commission is issued show no defect in his title, apparent to the people in general, such title and his acts done by virtue thereof, in good faith, cannot be collaterally attacked.

Indictment alleging that defendants, on July 4, 1889, assaulted A. C. Carroll, a police officer of the town of Warren. Carroll was acting as a police officer under an appointment by the selectmen of such town.

W. C. Harriman, and S. K. Paige, for the defendants.

R. E. Walker, solicitor, for the state.

223 CARPENTER, J. In some form of action the question whether Carroll was a police officer de jure in July, 1889, might be raised: Gen. Laws, c. 253, secs. 1, 3, 4. In this suit the question need not be considered. He was de facto an officer. His appointment to hold during the pleasure of the selectmen (Gen. Laws, c. 253, sec. 1) gave him color of office until they revoked the appointment or removed him from office. It does not appear that he acted as an officer on any occasion except the

one in question, nor is it essential that such action be shown: *Jewell v. Gilbert*, 64 N. H. 13; 10 Am. St. Rep. 357. In that case the question was upon the validity of an attachment made by one Graham, appointed a special deputy by the sheriff's warrant indorsed on the writ, but not under seal, as required by the statute: Gen. Laws, c. 216, secs. 1, 2. The warrant upon its face was void. It did not appear that Graham acted as a deputy sheriff on any other occasion. It was held that he was a deputy *de facto* and that the attachment was valid. The court says: "An office may be held *de facto* by a person whose legal incapacity to hold it is imposed upon him by a prohibitory provision of the constitution. His disability may arise from a fact that is not apparent. But the principle that forbids a collateral inquiry into the validity of an appointment or election has a broader foundation than a latent defect discoverable only in extraneous evidence. A colorable appointment may be made by a body or person whose total lack of appointing power is matter of law. An unconstitutional statute, void on its face, can give color of official title. A person called in on a single occasion to exercise a power which the void statute purports to confer upon him may be an officer *de facto* whose title cannot be assailed collaterally. If the appointment of Graham to the constitutional office of special deputy had been ²²⁴ under seal, but the statutory provision under which it was made had been unconstitutional and void, he would have been a deputy *de facto*, and his authority could not have been questioned in this suit; and for the purposes of this suit, whatever may be the efficacy of a seal, a failure to comply with a statute requiring it would not be a greater flaw than the invalidity of the statute. If the law required a seal, the want of it is a legal and technical defect that would be no more apparent to people in general than the unconstitutionality of the law.

"By the general rule, official title is not triable collaterally, a colorable title is indisputable when it ought not to be disputed, and it ought not to be attacked except in an appropriate action brought for the special purpose of establishing the legal title, in which action the officer *de facto*, being a party, will be bound by the judgment. The impracticability of preventing the service of this plaintiff's writ by judgment of ouster in a *quo warranto* against Graham is no cause for trying the validity of his appointment in this suit. . . . Graham's official claim having begun and ended with the service of this writ, there is now no need of an opportunity to contest his claim in a *quo*

warranto. . . . Without a seal his appointment was apparent authority within the meaning of the de facto rule. That rule, being a law of justice and reason, and not an arbitrary ordinance enacted by a court, does not exclude the learned or the unlearned from its protection, and did not require the plaintiff to try Graham's appointment by the test of such authority as would be apparent to the few who enjoy the advantage of a legal education."

It is impossible to distinguish Carroll's case from that of Graham—impossible to hold that Graham was and that Carroll was not an officer de facto. Carroll, by the terms of his commission, framed in exact conformity with the letter of the statute, held his office till the selectmen should see fit to terminate his authority. Neither he nor they doubted that he was at the time of the assault a police officer de jure. Had the question been raised and carefully considered on the spot, the defendants, in the absence of legal advice, would not have doubted—no one but a lawyer, and not all lawyers, would have doubted—his legal title to the office. On the face of his commission and of the statute under which it was issued there was no defect in his title apparent to people in general: *Ball v. United States*, 140 U. S. 118.

Case discharged.

Allen, J., did not sit; the others concurred.

OFFICERS DE FACTO—TITLE AND ACTS OF—COLLATERAL ATTACK.—The validity of the acts of a de facto officer cannot be collaterally attacked: *Cleveland v. McCanna*, 7 N. Dak. 455; 66 Am. St. Rep. 670, and note. Likewise, official title is not triable collaterally, and cannot be attacked except in an appropriate action brought for the special purpose of establishing the legal title, in which the officer de facto, being a party, will be bound by the judgment: *Jewell v. Gilbert*, 64 N. H. 18; 10 Am. St. Rep. 357, and note.

JONES v. CONCORD AND MONTREAL RAILROAD.

[67 NEW HAMPSHIRE, 234.]

CORPORATIONS—RIGHT TO NEW STOCK.—The right to take new stock issued by a corporation belongs to the shareholders therein in all the classes constituting such shareholders, in proportion to the number of shares held by each.

CORPORATIONS.—DISTRIBUTION OF NEW STOCK issued by a corporation is a partial division of capital.

CORPORATIONS.—A SHARE OF STOCK is the right which the owner has in the management, profits, and ultimate assets of the corporation.

CORPORATIONS.—BY PREFERRED STOCK in a corporation is understood stock which gives the holders a priority of dividends, but no priority of assets or capital unless expressly stipulated for.

CORPORATIONS—DISTRIBUTION OF NEW STOCK.—The right to an unequal distribution of new stock issued by a corporation among the stockholders is not established by the fact that different classes of stockholders under the corporate charter share unequally in the dividends derived from the net earnings.

CORPORATIONS—ISSUE OF NEW STOCK—REPEAL OF FORMER STATUTE.—A legislative grant of power to a corporation to increase its capital, in conflict with an earlier statute prohibiting such increase without the consent of the legislature, acts as a repeal of the latter so far as it would apply to such corporation if not repealed.

CORPORATIONS—DISTRIBUTION OF NEW STOCK.—If a statute authorizing a corporation to increase its capital stock contains no express provision as to the distribution of the new stock, the corporation may authorize any legal disposition of the new shares that it may elect. The general and valid custom is to compel the stockholders to buy the new stock at par, or to sell the right to buy it at that price in order to save their corporate interests.

CORPORATIONS—MEETING OF STOCKHOLDERS—NOTICE.—A notice of a meeting of the stockholders of a corporation, to the effect that it is called to ascertain whether the corporation will adopt a statute authorizing an increase of its capital stock, and vote to increase such capital stock to an amount within the limits authorized by existing laws, and to pass such other votes relating to the increase of the capital stock as the stockholders may desire, is legal and sufficient.

CORPORATIONS—NEW STOCK—INJUNCTION TO RESTRAIN ISSUE OF.—The issue of new stock by a corporation authorized by statute cannot be restrained by injunction, when it is not shown that such stock is a dividend of earnings belonging to different classes of shareholders, or a violation of some provision of the charter relating to dividends.

CORPORATIONS—INCREASE IN CAPITAL STOCK.—If a corporation has legislative authority to increase its capital stock for certain defined purposes, and the question of the necessity of such increase has not been submitted to the court by the legislature, evidence that no increase in capital is necessary is not admissible in an action to restrain the issue of new stock.

CORPORATIONS—ISSUE OF NEW STOCK—INJUNCTION. Stockholders in a corporation who join in procuring a legislative grant of power to increase the capital stock for certain defined purposes, and allow money to be expended therefor without objection, are not entitled to an injunction to restrain the corporation from issuing new stock.

INJUNCTION—REMEDY AT LAW.—An injunction cannot issue when it would be an excessive redress for a technical wrong, for which there is an ample remedy at law.

RAILROAD COMPANIES—POWERS.—Corporate power of a railway company to hire a road includes the power to make an executory contract for a lease of a road to be constructed within a time, or in a place or manner or form prescribed by the contract.

Prayer for an injunction to restrain the defendant company and its directors from issuing new shares of capital stock.

O. E. Branch and C. B. Gafney, for the plaintiffs.

Bingham & Mitchell and F. S. Streeter, for the defendants.

²³⁰⁶ SMITH, J. By an act of the legislature (Laws 1891, c. 3) the Concord & Montreal Railroad was authorized to "increase its capital not exceeding three million dollars, to be issued from time to time for the purpose of aiding an extension of the Whitefield & Jefferson Railroad, and of such other branches or leased roads of the Concord & Montreal Railroad as it is or may be authorized to construct, and for the purpose of providing additional depots, yards, and other terminal facilities at Nashua, Manchester, Portsmouth, Concord, Laconia, Lake Village, and elsewhere on the lines of its railroad; of providing additional tracks, wharves, and coal, and other storage facilities, at tide-water in Portsmouth; of changing the line and improving the terminal facilities at Groveton village; and for providing additional equipment for its railroad, and for the improvement of its railroad and other property owned or leased by it."

At a meeting of the corporation held May 19, 1892, the stockholders voted to accept the act of 1891; also to increase the capital stock one million two hundred thousand dollars, and to authorize the directors to issue the same at such times as in their judgment may be needed to meet the expenditures for which new capital was authorized by law, and that all classes of stockholders should have the right to subscribe for and take the new stock at par, in proportion to their respective holdings.

At the same meeting the stockholders voted to ratify a lease of the New Boston Railroad Company to the Concord & Montreal Railroad for a period of ninety-nine years, the terms of which had been previously agreed upon and signed by the directors of the respective companies.

The plaintiffs, stockholders in the defendant company, allege that the proposed increase of capital is to be used for illegal purposes (named in the bill), and to be illegally distributed to holders of stock in classes 1, 2, and 3, as well as to those in class 4, in violation of the charter contract, and that the proposed lease is illegal. They pray that the Concord & Montreal company may be enjoined from issuing any part of the twelve thousand shares of new stock—also from distributing the same among the holders of classes ²³³⁷ 1, 2, and 3, and from carrying out the terms of the New Boston company lease. There is also a prayer for general relief.

1. In the former case (*Jones v. Concord etc. R. R. Co.*, 67

N. H. 119) it was held that the right to take new stock belongs to the shareholders in all the classes, in proportion to the number of shares held by each shareholder. The decision went upon the ground that the distribution of new stock is a partial division of capital; that there is no legal distinction between a total and partial distribution; and that, on a division of the capital or the entire property of the corporation, the shareowners in each of the four classes having contributed to it the sum of one hundred dollars per share, were, in the absence of any stipulation for a different division, entitled each to his proportionate share. He is entitled to this "not merely because the issue may affect his right to dividends, but also because the new stock includes an undivided part of the road, of every part of which he is an owner, and because every shred of his title is as indefeasible as the whole of it would be if he were the sole unincorporated owner of the road." Every shareholder's proportional ownership is fixed with exactness in the charter contract; and we said that the fact that it "does not expressly provide for a transfer of any part of his share to his partners, on a total or partial division of capital, is evidence tending to show that no such transfer was intended; and the weight of this evidence can hardly be overestimated." If each shareowner is not entitled to a proportionate share of the new stock, the difficulty of determining what part of his share should be transferred to others was found to be insuperable. In this connection we said: "It certainly was not understood that on a sale of the road all the proceeds would be paid to stockholders of class 4, and that the entire property of class 1 (entitled to six per cent dividends before any are paid to class 4) would be extinguished. A contract by which the former owners of the [Boston, Concord &] Montreal would lose its whole value by the union with the Concord, followed by a sale of the Concord & Montreal (under eminent domain or other legal compulsion), cannot be implied."

The answer to the plaintiff's contention is readily seen when we inquire as to the meaning of the word "dividends," as used in the charter contract. "The agreement that class 1 shall be entitled to six per cent 'dividends from net earnings . . . and shall never be entitled to greater dividends,' and that 'classes 2 and 3 shall not be entitled to dividends from any source except that resulting from a saving of interest,' is a restriction of the described earnings and savings, and not of the right to dividends of capital": Jones v. Concord etc. R. R. Co., 67 N. H. 119; Cook on Stocks and Stockholders, sec. 278.

The charter contract contains no stipulation for any distinction in the four classes of stock, except in respect to dividends of net ~~xxx~~ earnings and savings. A share of stock is "a right which the owner has in the management, profits, and ultimate assets of the corporation": Cook on Stocks and Stockholders, sec. 5; Pierce on Railroads, 110. If the construction of the charter contract is, as the plaintiffs contend, that the shareholders in class 4 only are entitled to the increase when capital is enlarged, it follows that the only rights of shareholders in classes 1, 2, and 3, are to the dividends of profits and savings contracted for. But by preferred stock is understood stock which gives the holders a priority of dividends, and no priority of assets or capital unless expressly stipulated for. As to those, they rank with ordinary holders: Green's Brice on Ultra Vires, 172. They have the right to vote, and to exercise the various rights of shareholders: Cook on Stocks and Stockholders, sec. 269.

The assets, upon the dissolution of a corporation, being distributed equally among all classes (Cook on Stocks and Stockholders, secs. 278, 537), the same result must follow as to stock in classes 2 and 3. The authorities referred to by counsel for the plaintiffs, so far as we have had access to them, are not in hostility to these views. The reasons urged on the rehearing of this question have satisfied us that the decision of this point in the former case was correct.

2. The plaintiffs contend that section 10, chapter 5, of the Laws of 1889, by which the defendant company was authorized to increase its capital for the purpose of facilitating the purchase of the twelve other roads, is null and void, because in conflict with sections 8 and 9, chapter 158, of the General Laws.

By section 10 of the act of 1889 the defendant company was authorized to buy the Whitefield & Jefferson and eleven other roads. For the purpose of facilitating the purchase and to carry into effect agreements for their purchase, the defendant company was authorized to "increase its capital stock to such amount as may be requisite." There is also a stipulation in section 10, that after the purchase of either of the twelve roads the Concord & Montreal shall "have and enjoy all the rights, privileges, and franchises theretofore had and enjoyed by the selling" corporation. Section 8, chapter 158, of the General Laws prohibits the increasing of the capital stock of any railroad corporation without the consent of the legislature first had and obtained; and section 9 prohibits the issuing of certificates after

the number of shares specifically limited in the charter shall have been issued, unless authorized by the legislature after its charter and before the issue.

The grant of corporate power to increase capital, in section 10 of the act of 1889, is valid. It is a part of the charter of the defendant company which it accepted, and which the plaintiffs accepted by becoming members of the new company. So far as it is consistent with laws previously enacted, it is open to no objection. If it is in any respect repugnant to those laws, it is a repeal of them so far as they would apply to this company if not repealed (*State v. Otis*, 42 N. H. 71, 73; *Eaton v. Burke*, 66 N. H. 306, 312; *French v. Mascoma Flannel Co.*, 66 N. H. 90, 92; *Comyn's Digest*, "Parliament," R. 9), and the repeal is a part of the new charter which the plaintiffs and other stockholders have accepted. But if the grant were void, as the plaintiffs contend, its invalidity would not sustain their bill, because of the right to increase the capital stock under the act of 1891, and for other reasons to be hereafter mentioned.

3. The plaintiffs inquire, "If the stock may lawfully be increased, should all classes of stockholders be permitted to subscribe for a proportionate share thereof at par, or should they pay its market value, which, of course cannot be less than par; or, under all the facts of the case, should it be sold at public sale?"

If the new shares could be legally disposed of at auction, or by selling them to the stockholders at their market value, the legislature could have required such a course to be taken: *Attorney General v. Boston etc. R. R. Co.*, 109 Mass. 99; *Stats. of Massachusetts*, 1871, c. 392.

As the act of 1889, section 10, and the acts of 1891, chapters 3 and 4, contain no express provision on the subject, they authorize any legal disposition of the new shares that the company may elect. No illegality is shown in the distribution voted by the stockholders. The original charters of the Concord (*Laws 1835, Private Acts*, c. 1, sec. 3), the Boston, Concord & Montreal (*Laws 1844*, c. 191, sec. 5), and other companies, provided for an increase of capital by issuing new shares, and giving the stockholders the right to take them in proportion to their old stock. These provisions were repealed by the act of 1870, chapter 17, section 1 (*General Laws*, c. 158, sec. 9); but the universal understanding, probably derived from and strongly supported by the general practice of the country, has been and is, that in the absence of express statutory regulation such a dis-

tribution at par of an authorized increase may be legally made. If there are other legal methods, the legislature has not submitted a choice of methods to the court.

4. The plaintiffs further contend that "if the issue of new stock be authorized, and it be offered to all stockholders at par under the vote [of May 19], the legal and equitable validity of the right of each stockholder to his pro rata proportion under the contract is tested by considering what kind of stock it becomes at the distribution." And the plaintiffs argue, "If an increase of stock is, in effect, a redivision or redistribution of the entire property and capital of the corporation, so that, in order to preserve his share in it, each stockholder is obliged to take and pay for a share of the new stock for each share he holds of the old, there has been wrought a fundamental change in the [charter] agreement, and so fundamental that if the stockholder were unwilling or unable to take the new stock, he should be compensated for his loss, as in the case of leases and consolidation of railroads."

Class 1 is preferred stock. It seems to be immaterial whether ~~240~~ classes 2 and 3 are called preferred or deferred. Class 4 is the common stock, and in the absence of any stipulation of law or contract that the new stock shall be of class 1, 2, or 3, the natural inference is that it is to be of class 4. If the plaintiffs were unwilling or unable to pay one hundred dollars a share for their proportions of the new stock, it does not follow that they would lose anything. An increase of capital is a common occurrence in this country, and the rights of stockholders to take new shares are not an uncommon article of property sold in the broker's market. Considering how habitual is the method of distribution that compels stockholders to buy new stock at par, or sell their right to buy it at that price in order to save their corporate interests, it must be regarded as settled by general opinion and custom that this method is not an infringement of the stockholders' titles or rights. We are unable to discover any error of law in the method of distribution adopted in the vote of the stockholders.

5. It is contended that the notice for the meeting of May 19th was insufficient, because there was not inserted in it a specification of the objects or purposes of the proposed increase of stock. The notice was as follows: "1. To see if the stockholders will adopt chapter 3 of the Laws of 1891 authorizing an increase of the capital stock of the corporation, and vote to increase the capital stock to an amount within the limits authorized by ex-

isting laws, and to pass such other votes relating to the increase of capital stock as the stockholders may desire." Whatever power the stockholders may have to determine the use to be made of money obtained by an increase of capital, in the absence of any direction given them on the subject the money may be applied by the directors to lawful uses. The directors have ample power for that purpose: Laws 1835, Private Acts, c. 1, sec. 3 (Concord Railroad charter); Laws 1844, c. 191, sec. 5 (Boston, Concord & Montreal charter); Pub. Stats., c. 149, sec. 3.

There is no law requiring the stockholders to pass on this question, or requiring the question to be presented in the notice of a stockholders' meeting called for the purpose of deciding whether the capital shall be increased. In this respect a railroad company differs materially from a town, which has no officers clothed with such powers over corporate property and business as are vested in the directors of corporations having for their object a dividend of profits.

The notice in this case was, to see if the stockholders would adopt the act of 1891, and vote to increase the capital to an amount within the limits authorized by law, and to pass such other votes relating to the increase as the stockholders might desire. They were fully informed by the notice what statute was meant. The year it was passed, its number (3) as a chapter in the laws of that year, and the general purport of the act, were given. There was no possibility that the stockholders, on referring²⁴¹ to the laws of 1889 and 1891 for further information, if any was needed, could be misled. The notice was sufficient.

6. The plaintiffs contend that "whatever the stock of the Concord & Montreal company is worth above par represents surplus earnings or undivided profits—dividends which might be distributed to class 4," and that the right to its distribution belongs exclusively to the stockholders in that class.

The act authorizing the union of the Concord and the Boston, Concord & Montreal companies was approved July 24, 1889: Laws, 1889, c. 5. In the former bill it is alleged that the contract of union is dated September 19, 1889. By the express terms of the contract, the stock of the new company was received by the stockholders in full payment for the stock of the old companies. The earnings and capital stocks of the old companies ceased to exist as separate funds, were blended in a single fund as the capital stock of the new company, and one forty-

eight thousandth of that fund became one share of the new capital. It does not appear what the new company has earned, or what disposition has been made of its earnings. They may have been properly paid out in dividends, or to creditors of the Montreal, or properly expended in the maintenance or improvement of the road. The excess of the value of the new stock above par may be a consequence of the union. It may arise from a recent, or an old and long-continued, advance in the value of the corporate plant. It may be due to a permanent capacity of the road to produce an invariable or increasing income from tolls, while the rate of interest obtainable on new investments has been falling. The facts stated in the case do not show that the proposed issue of new stock is a dividend of earnings, or a violation of any provision of the contract of union relating to dividends.

7. At the hearing the plaintiffs offered to prove that no increase of capital is necessary. The act of 1889, chapter 5, section 10, empowered the Boston & Maine and the Concord & Montreal corporations to purchase certain roads, and to increase their capital stock "to such amount as may be requisite." Under this act the companies could increase their capital to an amount equal to the price paid for the property they were empowered to buy. The acts of 1891, chapters 3 and 4, empowered the Boston & Maine and the Concord & Montreal corporations to increase their capital to a certain amount for certain purposes. The necessity of the increase or of the prescribed uses of the new capital under these acts was not submitted to the court by the legislature, and there is no occasion for a trial of the question of necessity.

8. The plaintiffs further contend that there has been no agreement to purchase the roads, or any of them, named in section 10 of the act of 1889, and until they have in fact been purchased, no right to issue stock for that purpose, or for the extension of the Whitefield & Jefferson road, can be exercised by the defendant company, ²⁴² although it appears that the defendant company has purchased and now owns all the capital stock of the Whitefield & Jefferson, Lake Shore, Franklin & Tilton, and Suncook Valley Extension roads.

If the act of 1891 (chapter 3), granting power to increase the capital "for the purpose of aiding an extension of the Whitefield & Jefferson Railroad," is an alteration of the charter of 1889 and of the partnership contract of the stockholders, and is a grant of power to make a fundamental change in the business

of the company, this ground of objection is not open to the plaintiffs. They joined the defendants in procuring the grant, with good reason to believe that the defendants would rely (as they did) upon the grant in building the extension. They allowed large sums to be expended on the extension to Berlin before applying for an injunction. They are bound by their assent to and acquiescence in the power to increase the capital for the purpose of building that extension, as they would be if they had voted with all other members of the corporation to accept the grant of power: *Cook on Stocks and Stockholders*, c. 41. They have waived the objection, if any, which they might have made, and the question which they might have raised if they had taken a different course.

9. This branch of the case might, perhaps, be dismissed without further remark. But there is another reason why the plaintiffs cannot maintain their bill.

Although some other distribution of the new stock would be more profitable for the plaintiffs, the one which has been adopted is beneficial to them as members of the Concord & Montreal company, and it is their interest in this company alone that can be protected by a decree in this suit. If the increase of capital is an infringement of their legal rights as members of this company, they have an adequate remedy in a suit at law for a breach of the partnership contract: *Eckstein v. Downing*, 64 N. H. 248, 259; 10 Am. St. Rep. 404; *Boston etc. R. R. Co. v. Boston etc. R. R.*, 65 N. H. 393, 401.

In *Felker v. Dover*, decided at nisi prius in Strafford in April, 1889, the plaintiff, a citizen and taxpayer of Rochester and a taxpayer of Dover, applied for a preliminary injunction to restrain Dover, which had voted to pay more than its share of the expense of building a courthouse in that city, from assessing and collecting a tax for that purpose. The real object of the bill was to prevent the building of a courthouse at Dover, in the hope that it might be located at Rochester. The purpose of the bill being inequitable, the injunction was denied.

In *Johnson v. Conant*, 64 N. H. 109, 136, three suits in trespass *quare clausum* were tried together. In rebuilding a flume, the defendants of the third suit improved the plaintiff's land at their own expense; and the gratuitous improvement having been made without his consent, he was entitled to nominal damages. In this case, the plaintiffs stand in a similar legal position in reference to the increase ²⁴³ of capital, if the increase is a violation of their legal rights. The violation, if it is one, is

an improvement of their interest in the Concord & Montreal property, for which the nominal damages recoverable in a suit at law are an ample remedy. An injunction against the improvement of their property would be a specific enforcement of the partnership contract, which cannot be decreed because it would be an excessive redress for a technical wrong, and an inequitable damage to their interest in this company for the benefit of their interest in another company.

10. So much of the case as relates to the lease of the New Boston Railroad remains to be considered.

"Any railroad corporation may lease its road, railroad property, and interests to any other railroad corporation upon such terms and for such time as may be or may have been agreed to by the directors, and as may be or may have been approved by two-thirds of all the votes cast on the subject by the stockholders of such corporation voting according to law thereon at meetings of said stockholders properly notified and held for that purpose": Laws 1883, c. 100, sec. 17. In the Public Statutes, chapter 156, sec. 21, the agreement of the directors is dispensed with. If their agreement were still required, the power of a corporation to take a lease might not be destroyed or suspended by the inability of directors to make a contract with themselves. The unanimous assent of the directors might not be invalidated by the incapacity of some of them to transact that business. If all the directors were disabled to act, it might not follow that the stockholders could not take a lease. But however this may be, no action of the directors was necessary in this case, and the unnecessary and inoperative agreement did not deprive the stockholders of their contracting power. It does not appear that a contract has been or will be made by the exercise of a controlling power held by the New Boston company's stockholders over the Concord & Montreal company. Whatever may be the practical effect of a conveyance or lease of a building or a road that does not exist, the corporate power of hiring a road, like the power of hiring a passenger or freight station, includes the power of making an executory contract for a lease of a road or building to be constructed within a time, or in a place, or manner, or form, prescribed by the contract.

Bill dismissed.

Allen, Clark, and Carpenter, JJ., concurred.

Doe, C. J., and Blodgett and Chase, JJ., did not sit.

•CORPORATIONS—INCREASE OF CAPITAL STOCK—RIGHTS OF STOCKHOLDERS—STATUTORY REQUIREMENTS.—A corporation organized under a statute can increase its capital stock only in the mode prescribed by such statute: *McNulta v. Corn Belt Bank*, 164 Ill. 427; 56 Am. St. Rep. 203. The right to increase the capital stock of a corporation is intended for the benefit of the joint owners, and can be exercised only by the corporation itself; and, in the absence of stipulations in the charter to the contrary, the original stockholders have a right to subscribe for and hold the new stock: *Humboldt etc. Park Assn. v. Stevens*, 34 Neb. 523; 33 Am. St. Rep. 654, and note. They should be allowed to subscribe for, and hold, such stock according to their respective shares, and a refusal on the part of the corporation to permit any of them to subscribe for the stock to which he is so entitled, renders it liable in damages: *Gray v. Portland Bank*, 3 Mass. 364; 3 Am. Dec. 156, and note. The power to order such an increase is in the stockholders and not in the directors: *Eldman v. Bowman*, 58 Ill. 444; 11 Am. Rep. 90.

CORPORATIONS—PREFERRED STOCK—RIGHT TO DIVIDENDS.—Rights of preferred stockholders are enforceable against the corporation according to the terms of the contract made by them: *Hazeltine v. Belfast etc. R. R. Co.*, 79 Me. 411; 1 Am. St. Rep. 330, and note.

INJUNCTION—WHEN GRANTED.—Injunctions will not be granted when against good conscience or productive of hardship, oppression, injustice, or public or private mischief: *Sheldon v. Rockwell*, 9 Wis. 166; 76 Am. Dec. 265; *Fisk v. Hartford*, 70 Conn. 720; 66 Am. St. Rep. 147; nor where there is a plain and adequate remedy at law: *Welton v. Dickson*, 38 Neb. 767; 41 Am. St. Rep. 771, and note.

HODGMAN v. KITTREDGE.

[67 NEW HAMPSHIRE, 254.]

WILLS—HUSBAND OF DEVISEE AS WITNESS.—A beneficial devise in a will to the wife of one of the three subscribing witnesses renders her husband incompetent as such witness, and makes the will invalid.

Contest of a will by which the testator bequeathed to Katie L. Hodgman, the wife of the defendant, certain woodland and buildings and the remainder in certain other property. The plaintiffs claim that the husband of Katie L. Hodgman was not competent as an attesting witness, and that the will is void because not attested by three other competent witnesses. The probate court admitted the will to probate.

R. M. Wallace, for the plaintiffs.

D. Cross, for the defendant.

MR. CARPENTER, J. A will must be "attested and subscribed . . . by three or more credible witnesses"—that is to

say, by witnesses competent at the time the will is executed to testify in a court of justice to its execution: Gen. Laws, c. 193, sec. 6; *Carlton v. Carlton*, 40 N. H. 14; *Frink v. Pond*, 46 N. H. 125; *Lord v. Lord*, 58 N. H. 7; 42 Am. Rep. 565. The object of the statute is "to prevent frauds as well as perjuries. Wills are frequently made by a testator in extremis, or when he is greatly debilitated by age or infirmity, when frauds may be practiced upon him with facility by the crafty and designing; and it was the intention of the statute to guard against such practices, and to protect the testator by surrounding him with disinterested witnesses at the critical and important moment when he is about to execute his will. They are to be disinterested and credible also at the time of attestation, because in some sense they are made the judges of the testator's sanity: *Hawes v. Humphrey*, 9 Pick. 350, 356, 357; 20 Am. Dec. 486; 2 Greenleaf on Evidence, sec. 691; *Holdfast v. Dowsing*, 2 Strange, 1253, 1255. They are to be not only without pecuniary interest, but also so far as practicable without other motive to sustain the will. For these reasons, among, perhaps, others, the legislature has expressly excepted attesting witnesses from the operation of the statutes, removing various disabilities to testify, and left the question of their competency to be determined by the rules of the common law: Gen. Laws, c. 228, sec. 22.

Hodgman was not rendered an incompetent attesting witness by his nomination and appointment as executor of the will (*Stewart v. Harriman*, 56 N. H. 25; 22 Am. Rep. 408), nor by the devise to him. The statute provides that "any beneficial devise or legacy made or given in any will to a subscribing witness thereto shall be void as to such witness and those claiming under him, unless there are three other subscribing witnesses, and he shall be a competent witness thereto": Gen. Laws, c. 193, sec. 8. Was he made incompetent by the devise to his wife? At common law, the husband or wife could not testify in a cause in which the other was interested, nor was either a competent witness to the other's will: 1 Greenleaf on Evidence, secs. 334, 343, 344; *Pease v. Allis*, 110 Mass. 157; 14 Am. Rep. 591; *Dickinson v. Dickinson*, ²⁵⁶ 61 Pa. St. 401. If the devise to his wife is valid and beneficial, Hodgman is not a credible witness within the meaning of the statute, and the will is invalid. It is urged that the gift to the wife should be held void under the statute above quoted; and *Jackson v. Woods*, 1 Johns. Cas. 163, adjudged in 1799, *Jackson v. Durland*; 2 Johns. Cas. 314, in 1801, and *Winslow v. Kimball*, 25 Me. 493, on their authority

in 1846, are cited in support of the position. It was held in these cases, under a similar statute, that a devise to the husband or wife of an attesting witness was void, mainly, if not entirely, on the ground that husband and wife were, in legal intendment, one person, and that a gift to one was a gift to both. In *Jackson v. Durland*, 2 Johns. Cas. 314, the court says: "It was decided in that case [*Jackson v. Woods*, 1 Johns. Cas. 163] that a devise to the husband, in a will to which the wife was a subscribing witness, was void by the statute equally as if the husband himself had attested the will; and that this arose from the unity of husband and wife, who were regarded in law as one person; and a devise to the one was considered in respect to the competency to attest, as a devise to the other. . . . So, in the present case, a devise to Martha, the niece, her husband being a witness, is void, and her husband a competent witness to the will." Although at common law the husband took, by virtue of his marital rights, an immediate beneficial interest in every devise or legacy to his wife, in a devise or legacy to the husband the wife took no interest except a possibility of dower—an interest so remote and contingent that it would not disqualify a witness: *Smith v. Blackham*, 1 Salk. 283. It would seem, therefore, that if, within the meaning of the statute, a devise to the wife could properly be regarded as a devise to the husband, a devise to the husband could not be deemed a devise to the wife. But the reason of the judgments, whether sound or unsound, has now no foundation here. In this state the common-law unity of husband and wife no longer exists. Neither has any legal interest in a devise or legacy to the other: Gen. Laws, c. 183, sec. 1; *Clark v. Clark*, 56 N. H. 105, 113; *Harris v. Webster*, 58 N. H. 481; *Jones v. Roberts*, 60 N. H. 216; *Laton v. Balcom*, 64 N. H. 92, 95; 10 Am. St. Rep. 381. In *Rucker v. Lambdin* (1849), 12 Smedes & M. 230, 257, *Sullivan v. Sullivan* (1871), 106 Mass. 474, 8 Am. Rep. 356, and *Giddings v. Turgeon* (1886), 58 Vt. 106, in each of which the New York and Maine cases were cited, considered, and disapproved, and in *Hatfield v. Thorp* (1822), 5 Barn. & Ald. 589, it was held that a devise to the husband or wife of an attesting witness was not made void by the statute.

The intention of the legislature to make void a devise or legacy to an attesting witness in order that the will may not entirely fail is clearly expressed. There is no evidence upon which it can be found that the legislature intended to make competent a witness incompetent at common law for any reason other than his pecuniary interest in the maintenance of the will, or that

a witness who ²⁵⁷ takes nothing under a will should be regarded as a devisee or legatee. The appeal is sustained and the decree of the probate court reversed.

Chase, J., did not sit; the others concurred.

WILLS—HUSBAND OR WIFE OF DEVISEE AS WITNESS.—The husband or wife of one named as devisee or legatee in a will is not a competent witness to prove the execution of the will even as to devisees and bequests made to persons other than the wife or husband of such witness: *Fisher v. Spence*, 150 Ill. 253; 41 Am. St. Rep. 360; note to *In re Will of Lyon*, 65 Am. St. Rep. 54.

CUMMINGS v. BLANCHARD.

[67 NEW HAMPSHIRE, 263.]

WATERS—MODE OF MEASUREMENT.—The grantee of a right to take from a "bulkhead and flume the quantity of water which shall be discharged therefrom through an aperture of two hundred square inches at the gate, under fifteen feet head," is entitled to the constant flow of exactly that quantity at all stages of the water, and the size of the aperture must be increased or diminished accordingly as the head rises or falls, above or below, fifteen feet.

USAGE IS NOT ADMISSIBLE TO CONTRADICT a written agreement unambiguous in its terms.

WATERS—MODE OF MEASUREMENT.—The grantee of a right to take from a "bulkhead and flume the quantity of water which shall be discharged therefrom through an aperture of two hundred square inches at the gate, under a fifteen feet head," may be required to construct a gate at the aperture with a gauge thereon, showing at any given head an infringement of the grantor's rights.

WATERS—MODE OF MEASUREMENT.—Under a grant of the right to take from a "bulkhead and flume the quantity of water which shall be discharged therefrom through an aperture of two hundred square inches at the gate, under fifteen feet head," such head is to be measured with the water at rest in the flume.

Bill in equity in aid of a suit at law, to establish the respective rights of the parties to the use of a water power.

E. Aldrich and H. M. Morse, for the plaintiffs.

Chase & Streeter, for the defendant.

²⁷¹ SMITH, J. Under the deed from Bowles and Atwood to Howe and Martin the defendant has the right to take from the "bulkhead and flume the quantity of water which shall be discharged therefrom through an aperture of two hundred square inches at the gate under fifteen feet head."

Reported cases upon conveyances of water power show great numbers of controversies arising from the methods adopted by grantors and grantees for ascertaining the quantity of water or power conveyed. The quantity is often described as a capacity to do specified work, or is to be found by tests otherwise open to contention: *Johnson v. Rand*, 6 N. H. 22; *Whittier v. Cocheco Mfg. Co.*, 9 N. H. 454; 32 Am. Dec. 382; *Dewey v. Williams*, 40 N. H. 222; 77 Am. Dec. 708; *Bullen v. Runnels*, 2 N. H. 255, 262; 9 Am. Dec. 55; *Loverin v. Walker*, 44 N. H. 489, 491; *Saunders v. Newman*, 1 Barn. & Ald. 258. A great variety of phrases are used in such conveyances, that leave the amount of granted or reserved power to be ascertained by experiment or scientific computation. In many cases the quantity of water actually taken at any one time is not apparent upon inspection, and can only be determined by measurements together with difficult and laborious calculations.

All difficulties of this kind the parties to the deed of 1866 attempted to avoid by precise and carefully selected language²⁷² intended to preclude doubt and litigation. They used expressions that required the construction, maintenance, and use of a conduit and gauge, with a necessary and incidental right of reasonable inspection that would render an infringement of the grantors' rights visible without measurement or computation.

If the height of the water in the plaintiffs' bulkhead and flume were uniform at all seasons, the apparent intention of the parties could easily be carried into effect. "The quantity of water which shall be discharged therefrom through an aperture of two hundred square inches at the gate, under fifteen feet head," would not be the quantity that could be discharged through more than one aperture, nor through a larger aperture than two hundred square inches, nor under a greater head than fifteen feet. And the plaintiffs would be entitled to a decree requiring the defendant to construct his works in a form that would give him no means of drawing water through a larger aperture or under a greater head. But the height of water in the bulkhead and the flume is not uniform. It varies as the amount of rainfall varies in wet and dry seasons. An aperture of exactly two hundred square inches in fifteen feet head in low water would in high water give the defendant more power than was granted by the deed. So an aperture of that size under fifteen feet head in time of flood would give him in time of drought less than was granted. Because the head varies from time to time, a fixed aperture of exactly two hundred square

inches will give the defendant more or less than the granted quantity, according as the head is greater or less than fifteen feet. Hence, in order that the defendant may at all times have a power equivalent to a stream of water discharged through an aperture of two hundred square inches under fifteen feet head, the aperture must be enlarged as the head falls, and diminished as it rises.

At the hearing evidence was received on the irrelevant issue of the local meaning of the words "at the gate." Incompetent evidence was received of the uses to which the parties understood the premises were to be put. Usage is admissible to explain what is doubtful, but not to contradict what is plain: 1 Greenleaf on Evidence, sec. 292. It is not admissible to control a written contract unambiguous in its terms: *Potter v. Smith*, 103 Mass. 68; *Davis v. Galloupe*, 111 Mass. 121; *Hedden v. Roberts*, 134 Mass. 38; 45 Am. Rep. 276. At the date of the deed there was no mill on the factory site, and had been none for seventeen years; and the only gate was in the bulkhead or flume.

The deed of 1866 provides for a gate at the aperture, but does not restrict the size of the gate or the size of the wheel. It is for the defendant to determine how large the gate and wheel shall be, how many apertures there shall be in the wheel, and their size, and all details of the structure of the wheel. The essential limitation is, that the water he uses shall be discharged, before he uses it, through an orifice not larger than two hundred square inches ²⁷³ under a head of fifteen feet, or its equivalent under a greater or less head. With all the water so obtained he can do what work he pleases in his own way. All the power he loses through wasteful wheels is his loss; all of it that he saves by improved wheels is his gain: *Bullen v. Runnels*, 2 N. H. 255, 266; 9 Am. Dec. 55; *Dewey v. Williams*, 40 N. H. 222; 77 Am. Dec. 708; *Saunders v. Newman*, 1 Barn. & Ald. 258. He has every inducement to adopt the mechanical inventions that will obtain the greatest power from a stream discharged through an orifice of the size and under the head fixed in the deed, or its equivalent.

Counsel have argued the question whether fifteen feet head means with the water at rest at the bulkhead, or in motion through the defendant's penstock. From the terms of the deed, executed when there was no mill or penstock on the premises, we infer the parties meant that the grantee's power should be ascertained and set out by measuring from the top of the water

at the bulkhead, at rest, till they had a difference of level of fifteen feet.

No evidence was offered to show a latent ambiguity in "head," to be removed by parol evidence; and without any parol evidence on that subject (on the competency of which we express no opinion) we think the parties meant to measure the head when the water was not running through the grantee's penstock, and when there was no penstock there, taking the measure to determine where the penstock should be built and where the aperture should be located. One reason for inferring that this was the intention is, that the water at rest might give a more certain and easily ascertained point to measure from than the uneven surface of the water at the upper end of the penstock when the water is in motion.

At the trial term a commissioner, expert in such matters, must be appointed to determine the location and size of the aperture, and the height to which the gate must be raised at different stages of the water to give the defendant the quantity of water to which he is entitled under the deed. The height to which the gate shall be raised as the level of the water varies should be plainly indicated by marks or figures upon some permanent part of the gate fixtures, open at all times to the inspection of the plaintiffs, that they may readily determine by observation or mere inspection whether the defendant is drawing the quantity of water to which he is entitled, and no more.

The plaintiffs are technically the prevailing party in the equity suit; but as the defendant with his present wheel has not used more water, including the leakages of the penstock, than he would or could have used if it had been drawn through an aperture of two hundred square inches under fifteen feet head before it was used to turn his wheel, no damages can be recovered on that account; nor can the plaintiffs recover damages for his allowing ²⁷⁴ the water to go to waste at night. Neither party is entitled to costs.

Case discharged.

Carpenter and Chase, JJ., did not sit; the others concurred.

CUSTOM—WHEN INADMISSIBLE TO INTERPRET CONTRACT.—A usage inconsistent with a contract cannot be given in evidence to affect it: *Baltimore Baseball Club v. Pickett*, 78 Md. 375; 44 Am. St. Rep. 804, and note. Usage or custom cannot be proved to alter or contradict the express or implied terms of a contract free from ambiguity: *Hopper v. Sage*, 112 N. Y. 530; 8 Am. St. Rep. 771.

PERRY v. DWELLING HOUSE INSURANCE COMPANY.

[67 NEW HAMPSHIRE, 291.]

AGENCY.—EVIDENCE of the previous course of dealing between parties is admissible to show that at a certain time one was agent for the other.

CONTRACTS—WHEN COMPLETED.—A proposition does not become a contract until the maker or his agent is notified of its acceptance.

INSURANCE—PLACE OF CONTRACT.—If an application for insurance is made in one state to an agent therein, and forwarded by him to the insurer in another state, where the policy is executed, and sent to such agent and by him delivered to the insured in the former state, the contract must be regarded as made in the state where delivered, and as subject to its laws.

INSURANCE—KNOWLEDGE OF AGENT—APPLICATION OF STATUTE.—Under a statute relating to insurance companies, and providing that "if any company shall issue any policy upon an application prepared by a third person assuming to act as their agent, or otherwise, they shall be affected by his knowledge of any facts relating to the property insured as if they were stated in the application," an agreement by the insured that his statements in the application for insurance "shall be deemed and taken to be promissory warranties," and that the insurer "shall not be bound by any act done or statement made by or to any agent or other person which is not contained in the application," is invalid and has no legal effect.

INSURANCE—MISSTATEMENT AS TO TITLE.—A policy of insurance is not avoided by an innocent mistake or error on the part of the applicant as to his title.

INSURANCE—PROOF OF LOSS—WAIVER.—An insurer cannot avail himself of the omission of the insured to make proof of loss which the former has induced the latter to abstain from making.

INSURANCE—ACTION—PARTIES.—Although a policy of insurance is made payable in case of loss to the mortgagee to the extent of the mortgage debt, an action to recover such debt is properly brought in the name of the mortgagor who takes out the policy.

Action to recover for a loss under a policy of insurance. *G. M. Stevens & Sons*, insurance agents at Lancaster, New Hampshire, prepared the application for the insurance, and sent it to the home office of the insurer, at Boston, Massachusetts, from which they subsequently received the policy, delivered it to the plaintiff, and received the premium. The application showed a mortgage in favor of one *Mary Simpson*, and the policy provided that the loss, if any, should be paid to her as mortgagee. A second mortgage, not disclosed by the application or policy, existed in favor of one *Berry*. Plaintiff, at the time that he made the application for the insurance, informed *Stevens & Sons* of the *Berry* mortgage, and they told him to pay no attention to it, and the insurer made no claim that the failure to note it in the application was due to fraud. Verdict for the plaintiff.

Drew & Jordan, W. P. Buckley, and Bingham & Bingham, for the plaintiff.

E. Fletcher and O. Ray, for the defendants.

²⁰⁴ CARPENTER, J. On the question of agency, the defendants' previous course of dealing with Stevens & Son was competent evidence: *Kent v. Tyson*, 20 N. H. 121; *State v. Foster*, 23 N. H. 348, 353; 55 Am. Dec. 191; *Prescott v. Flinn*, 9 Bing. 19. It is established by the verdict that Stevens & Son, in preparing and forwarding the application, in delivering the policy to the plaintiff and receiving the premium, were the defendants' agents. The defendants approved the application, executed a policy, and sent it to Stevens & Son with instructions, express or implied, to deliver it to the plaintiff and collect the premium. There was no evidence that prior to its delivery the plaintiff had notice, by mail or otherwise, that his application for insurance was accepted. Upon these facts, the contract was made, and concluded by the delivery and acceptance of the policy—not because of its delivery, but because until that moment the plaintiff had no notice of the acceptance of his application. Prior to that time the plaintiff was at liberty to revoke his application, and the defendants to withdraw their acceptance ²⁰⁵ and countermand their instructions for the delivery of the policy. A proposition does not become a contract until the maker or his agent is notified of its acceptance: *Beckwith v. Cheever*, 21 N. H. 41; *Stebbins v. Lancashire Ins. Co.*, 60 N. H. 65, 70; *Dickinson v. Dodds*, L. R. 2 Ch. Div. 463.

It being determined that Stevens & Son were the defendants' agents, there was no evidence tending to show that the contract was made in Massachusetts; it is therefore not necessary to consider whether the court erred in instructing the jury, or in denying the instructions requested on the question whether the contract was completed in that state or in New Hampshire. The validity, construction, and effect of the contract, and the rights of the parties under it, are to be determined by the laws of this state. "Chapter 172 of the General Laws shall be a part of every contract of insurance to which said chapter is applicable, and said chapter and this act shall be plainly printed in every such contract. No waiver of any part of said chapter or of this act shall be set up by the insurer, and any stipulation of the contract in conflict with this act shall be void": *Laws 1879, c. 13, sec. 1*. Chapter 172, as amended, provides, among other things, that: "No policy of insurance shall be avoided by reason of mis-

take or misrepresentation, unless it appears to have been intentionally and fraudulently made"; that "all statements of description or value in an application or policy of insurance are representations and not warranties; erroneous descriptions or statements of value or title by the insured do not prevent his recovering on his policy unless the jury find that the difference between the property as described and as it really existed contributed to the loss or materially increased the risk, . . . nor shall any misrepresentation of the title or interest of the insured in the whole or a part of the property insured, real or personal, unless material or fraudulent, prevent his recovering on his policy to the extent of his insurable interest"; that "if any company shall issue any policy upon an application prepared by a third person assuming to act as their agent or otherwise, they shall be affected by his knowledge of any facts relating to the property insured as if they were stated in the application": Gen. Laws, c. 172, secs. 2, 3; Laws of 1885, c. 73, sec. 1.

By the statute, the plaintiff's agreement that his statements in the application "shall be deemed and taken to be promissory warranties," and that the defendants "shall not be bound by any act done or statement made by or to any agent or other person which is not contained in the application," is made invalid; it has no legal effect. The jury found that the plaintiff at the time of the application informed Stevens & Son of the Berry mortgage. The defendants are chargeable under the statute, and would be if there were no statute, with their agents' knowledge of its existence as if the fact were stated in the application. The statute is in this respect merely declaratory of the common law: *Marshall v. 296* *Columbian etc. Ins. Co.*, 27 N. H. 157; *Campbell v. Merchants' etc. Ins. Co.*, 37 N. H. 35; 72 Am. Dec. 324; *Clark v. Union etc. Ins. Co.*, 40 N. H. 333; 77 Am. Dec. 721; *Patten v. Merchants' etc. Ins. Co.*, 40 N. H. 375, 381-383; *Leach v. Republic etc. Ins. Co.*, 58 N. H. 245; *Eastman v. Provident etc. Assn.*, 65 N. H. 176; 23 Am. St. Rep. 29.

But the issue submitted to the jury, whether the plaintiff at the time of the application informed Stevens & Son of the mortgage, was immaterial. Had the jury found the other way on that question, the result would be the same. "The defendants made no claim that the plaintiff failed to have the existence of the Berry mortgage noted in the application and policy by reason of fraud"; in other words, they conceded that the omission was an innocent mistake. Under the statute, a policy is not avoided by such an error in the applicant's statement of his title:

Tuck v. Hartford etc. Ins. Co., 56 N. H. 326, 331; Leach v. Republic etc. Ins. Co., 58 N. H. 245.

There was competent evidence tending to show that the defendants waived the proofs of loss required by the policy, and the question was properly submitted to the jury. The instructions given them were correct. To permit the defendants to avail themselves of the plaintiff's omission to make the proofs of loss which they had induced him to abstain from furnishing would do him a great wrong, and it was not improper so to inform the jury.

Although the policy was payable in case of loss to the mortgagee, Mary Simpson, to the extent of her mortgage debt, the action was properly brought in the name of the plaintiff: Folsom v. Orient etc. Ins. Co., 59 N. H. 54; Hall v. Fire Assn., 61 N. H. 405.

Judgment on the verdict.

Chase, J., did not sit; the others concurred.

CONTRACTS—WHEN COMPLETED.—A contract is complete when nothing further remains to be done to give either party a right to have it carried into effect: Note to Barrett v. Kelley, 44 Am. St. Rep. 863.

INSURANCE—PLACE OF CONTRACT.—In the absence of a contrary stipulation, a contract of insurance is deemed to be a contract of the place where the last act was done, or assent given necessary for it to become a binding and operative contract: See monographic note to McGarry v. Nicklin, 55 Am. St. Rep. 51; Daggs v. Orient Ins. Co., 136 Mo. 382; 58 Am. St. Rep. 638. Compare State Mut. Fire Ins. Assn. v. Brinkley Stave etc. Co., 61 Ark. 1; 54 Am. St. Rep. 191, and note.

INSURANCE—MISSTATEMENT AS TO TITLE.—Failure of the assured to disclose the nature and extent of his interest in the property insured will not avoid the policy in the absence of fraud: Note to Hall v. Niagara Fire Ins. Co., 32 Am. St. Rep. 506. See Dooley v. Hanover Fire Ins. Co., 16 Wash. 155; 58 Am. St. Rep. 26, and note.

INSURANCE—WAIVER OF PROOFS OF LOSS.—An insurance company, by refusing to pay a loss and defending on the ground that the policy was not in force at the time of the loss, thereby waives the right to be furnished with any proof of loss as required by the policy: Notes to Continental Ins. Co. v. Chew, 54 Am. St. Rep. 510, and California Ins. Co. v. Gracey, 22 Am. St. Rep. 381.

INSURANCE IN FAVOR OF MORTGAGOR—ACTION ON POLICY—PROPER PARTIES.—If a policy of insurance against loss by fire is issued to an owner of real property, payable in case of loss to a designated mortgagee as his interest may appear, he is entitled to maintain, in his own name, an action upon the policy, without joining his mortgagor: Palmer Sav. Bank v. Insurance Co. of N. A., 166 Mass. 189; 55 Am. St. Rep. 387, and note.

MORSE v. PEARL.

(87 NEW HAMPSHIRE, 317.)

JUDGMENTS—ACTIONS ON—EXECUTION AS BAR.—A creditor may sue upon his judgment as soon as it is rendered. His right to do so is neither barred nor suspended by the issuing of an execution.

JUDGMENTS—ACTIONS ON AFTER ISSUANCE OF EXECUTION.—An action upon a judgment may be maintained, although execution has issued thereon and has not been returned, and property may be attached in such action which could not be taken under execution, notwithstanding the existence of other visible property which might be taken under execution.

Debt on a judgment. At the time when the action was commenced an execution had issued on the judgment, but had not been returned, and the officer afterward made return of a levy in part satisfaction. Process of foreign attachment issued in the action on the judgment and the trustees appeared by their disclosures to be chargeable. The defendants maintained that the action should be dismissed because prematurely brought.

S. S. Parker, for the plaintiffs.

Felker & Pearl, for the defendants.

SIB BLODGETT, J. The action was not prematurely brought. A judgment creditor has a common-law right to sue upon his judgment as soon as it is rendered, and this right is neither barred nor suspended by the issuing of an execution: *Hale v. Angel*, 20 Johns. 342; *Smith v. Mumford*, 9 Cow. 26; *Ives v. Finch*, 28 Conn. 112; *Clark v. Goodwin*, 14 Mass. 237; *Headley v. Roby*, 6 Ohio 521; *Albin v. People*, 46 Ill. 372; *Stewart v. Peterson*, 63 Pa. St. 230; *Ames v. Hoy*, 12 Cal. 11; *Kingsland v. Forrest*, 18 Ala. 519; 52 Am Dec. 232; *Freeman on Judgments*, sec. 432. Nor is it otherwise under our statutes. "Actions of debt upon judgments . . . may be brought within twenty years after the cause of action accrued, and not afterward": Pub. Stats., c. 217, sec. 4. And even if an execution had been issued and not returned, an action may be maintained upon a judgment, in the absence of plea or proof of satisfaction: *Linton v. Hurley*, 114 Mass. 76; *Wilson v. Hatfield*, 121 Mass. 551.

The suing out of the plaintiffs' writ was not an abuse of the process of this court. It gave the plaintiffs a new remedy, of which they could not avail themselves by their execution; and

there can be no reason why a judgment creditor who discovers property of his debtor which may be secured by foreign attachment, and which cannot be touched by execution, may not properly avail himself of that remedy. Indeed, this is so even where the doctrine prevails that an action on a judgment cannot be maintained while the judgment is enforceable by execution: *Shooter v. McDuffie*, 5 Rich. 61, 66; *Lee v. Giles*, 21 Am. Dec. 479, note.

It is not material to show whether the defendant had visible property that could have been seized and applied on the execution. It was the right of the plaintiffs to determine what legal process would be most for their advantage for the better recovery of their debt (*Clark v. Goodwin*, 14 Mass. 237), and the fact that the one adopted by them proved to be efficacious affords the defendants no reasonable cause for complaint.

Exception overruled.

Smith, J., did not sit; the others concurred.

JUDGMENTS—ACTIONS UPON AFTER ISSUANCE OF EXECUTION.—Action may be maintained upon a judgment in the court in which it was rendered while it is in full force and effect, although at the time of bringing his action plaintiff was entitled to an execution on the judgment: *Simpson v. Cochran*, 23 Iowa, 81; 92 Am. Dec. 410. A judgment is not affected by an execution sale that passes no title, and after such a sale may be the subject of an action of debt, without a scire facias to revive it: *Townsend v. Smith*, 20 Tex. 465; 70 Am. Dec. 400. Compare *Cowles v. Bacon*, 21 Conn. 451; 56 Am. Dec. 371. At common law, a party has a right of action upon his judgment as soon as it is recovered. This right is neither barred nor suspended by the issuing of an execution: *Note to Kingsland v. Forrest*, 52 Am. Dec. 234.

HERVEY v. DIMOND.

[57 NEW HAMPSHIRE, 342.]

ATTACHMENT OF RIGHT TO PURCHASE GOODS—CONDITIONAL SALES.—The interest of a vendee in a conditional sale of goods is attachable, and the attaching creditor can hold the goods, as against the vendor, by seasonably tendering him the amount due on the purchase price.

Replevin of household furniture delivered by plaintiffs to one Story under a written contract, stipulating that he had hired and received the property from plaintiffs, and would pay them for the rent and use thereof a certain sum per month until the purchase price agreed upon should be paid, that the

plaintiffs were to remain the absolute owners of the property until such price was paid. On August 14, 1891, after Story had paid about one-half of the purchase price of the goods, they were attached as his property by the defendant, Dimond, as a deputy sheriff, while the goods were awaiting shipment to Boston, under a writ in favor of one Whitaker. In answer to a letter from defendant to plaintiffs, inquiring the amount of the purchase price due under the contract, the plaintiffs informed him of the amount then due, and on September 8, 1891, they made a demand for the goods. On that day the defendant refused the demand and tendered the amount due on the purchase price. On September 12, 1891, plaintiffs replevied the goods and took them to Boston.

Streeter, Walker & Chase, for the plaintiffs.

Albin & Martin, for the defendant.

³⁴³ SMITH, J. The contract (called a lease) does not, in legal effect, differ materially from a conditional sale. Although by the contract it was stipulated that the plaintiffs should remain absolute owners of the goods until the full price should be paid, it does not follow that Story had no interest in the property. He had the right to pay the balance due and become the owner of the property. While the plaintiffs remained the general owners until the full price should be paid, Story's interest was that of a special owner, which the law recognizes and protects. It was an ³⁴⁴ assignable and attachable interest, his assignee or attaching creditor acquiring the same rights as he had. If Story failed to make the monthly payments according to the contract and the plaintiffs might for that cause have asserted a forfeiture, they waived the default by accepting an installment August 14th.

Although the attachment was nominally of the property, yet it plainly appears that Whitaker did not intend to attach in disregard of the plaintiffs' rights, and he fully recognized them by tendering the amount due. If necessary, the officer's return can be amended to conform to the fact. By the tender of the amount due the plaintiffs, their title to the goods became vested in Story, subject to Whitaker's attachment. As Whitaker seasonably tendered the amount of their claim, the defendant is entitled to judgment for the value of the property and for his costs. A few of the authorities in support of these views are *Sargent v. Gile*, 8 N. H. 325; *Porter v. Pettengill*, 12 N. H. 299; *Bailey v. Colby*, 34 N. H. 29; 66 Am. Dec. 752; *McFarland v. Farmer*, 42 N. H. 386; *Partridge v. Philbrick*, 60 N. H. 556.

There is no clause in the contract that Story, by suffering the property to be attached, would forfeit all right to and use of the goods. It does not appear that Story procured or advised the attachment to be made. Whether he can be said to have "suffered" the attachment to be made when it was not made by his procurement or with his consent, and when, so far as appears, he could not prevent it, is a question not made. The plaintiffs have not contended or suggested that Story's interest in the goods was terminated by the attachment.

Case discharged.

All concurred.

ATTACHMENT—PROPERTY HELD UNDER CONDITIONAL SALE.—Where there was a sale of groceries, which were to remain the property of the seller until paid for, it was held that creditors of the buyer could not attach them: *Note to Winchester Wagon etc. Mfg. Co. v. Carman*, 58 Am. Rep. 386. Similarly held as to a piano, in *Goodell v. Fairbrother*, 12 R. I. 233; 34 Am. Rep. 631.

CLEVELAND MACHINE WORKS v. LANG.

[67 NEW HAMPSHIRE, 318.]

CONFLICT OF LAWS—CONDITIONAL SALES.—A contract for the conditional sale of chattels in one state, negotiated and completed therein and valid by the law thereof, is valid in another state to which the property is subsequently removed, although not executed according to the law of the latter state, unless its enforcement therein would be in contravention of positive law and public interests.

CONFLICT OF LAWS—ATTACHMENT—CONDITIONAL SALES.—A contract for a conditional sale of chattels in one state, executed therein and valid by its laws, is valid as against the attaching creditors of the vendee in another state, to which the property has subsequently been removed.

CONFLICT OF LAWS—CONDITIONAL SALES.—The laws of a state respecting conditional sales have no extraterritorial force, and do not apply to such sales made out of the state, when neither the parties nor the subject matters of the contract are within the operation of its laws.

ATTACHMENT—BONA FIDE PURCHASER.—Neither an attaching creditor nor officer is in the position of a bona fide purchaser for value without notice of defects in the title of the property attached.

Replevin for two machines, attached as both real and personal estate by the defendant, Lang, a deputy sheriff, on a writ against one Parsons, who had possession of the property under a contract of conditional sale.

E. A. & C. B. Hibbard and C. C. Rogers, for the plaintiffs.

F. N. Parsons and W. B. Fellows, for the defendant.

²⁸⁵ CLARK, J. By the terms of the contract the machines were to remain the property of the Cleveland Machine Works until paid for. The contract was negotiated in Massachusetts, by citizens of Massachusetts, respecting property situated in Massachusetts. The shipment of the machines at Worcester—Parsons paying the freight from that point—made Worcester the place of delivery, and vested in Parsons all the right and interest he ever acquired in the property. The agreement to send a man to set up the machines at Northfield was not a condition precedent to the vesting of the conditional title in Parsons, any more than an agreement to furnish instruction as to the mode of operating the machines would have been. The written agreement shows that the parties understood that the conditional title passed upon the shipment of the machines, by fixing the times of payment from that date. The contract was a conditional sale of chattels in Massachusetts, negotiated and completed there by Massachusetts parties, and valid by the law of Massachusetts, and, being valid where it was made, its validity was not affected by the subsequent removal of the property to New Hampshire: *Sessions v. Little*, 9 N. H. 271; *Smith v. Godfrey*, 28 N. H. 379; 61 Am. Dec. 617; *Stevens v. Norris*, 30 N. H. 466.

As a general rule, contracts respecting the sale or transfer of personal property, valid where made and where the property is situated, will be upheld and enforced in another state or country, although not executed according to the law of the latter state, unless such enforcement would be in contravention of positive law and public interests. A personal mortgage of property in another state, executed and recorded according to the laws of that state, is valid against the creditors of the mortgagor attaching the property in this state, although the mortgage is not recorded here: *Offutt v. Flagg*, 10 N. H. 46; *Ferguson v. Clifford*, 37 N. H. 86. A mortgagor of horses in Massachusetts, bringing them into this state, cannot subject them to a lien for their keeping against the Massachusetts mortgagee: *Sargent v. Usher*, 55 N. H. 287; 20 Am. Rep. 208. A boarding-house keeper's lien under the laws of Massachusetts is not lost by bringing the property into this state: *Jaquith v. American Express Co.*, 60 N. H. 61.

Formerly by the law of Vermont a chattel mortgage was invalid against creditors of the mortgagor if the property

remained in his possession. But it was held both in Vermont and in New Hampshire that a mortgage of personal property in New Hampshire, duly executed and recorded according to the law of New Hampshire, was valid against creditors of the mortgagor attaching the property in his possession in Vermont: *Cobb v. Buswell*, 37 Vt. 337; *Lathe v. Schoff*, 60 N. H. 34. In *Cobb v. Buswell*, 37 Vt. 337, the property was taken to Vermont with the consent of the mortgagee, and in *Lathe v. Schoff*, 60 N. H. 34, it was understood, when the mortgage was executed, that the horses mortgaged ³⁶⁴ were to be removed to Vermont by the mortgagor and kept there after the season of summer travel closed. So a chattel mortgage made by a citizen of Massachusetts temporarily in New York with the mortgaged property, if valid by the law of New York, is valid against the creditors of the mortgagor attaching the property in his possession in Massachusetts: *Langworthy v. Little*, 12 Cush. 109.

The law of New Hampshire respecting conditional sales has no extraterritorial force, and does not apply to sales made out of the state. Neither the parties nor the subject matter of the contract respecting the machines were within its operation. If the conditional sale had been made in this state before the statute was enacted requiring an affidavit of the good faith of the transaction and a record in the town clerk's office, it would not have been affected by the statute. When the machines were brought to this state, there was no provision of the statute for recording the plaintiffs' lien. There was no change or transfer of title in this state, and the title of the plaintiffs, valid against creditors under a contract completed in Massachusetts, was not destroyed by the removal of the property to New Hampshire.

Smith v. Moore, 11 N. H. 55, cited by the defendant as sustaining the position that the plaintiffs' lien was destroyed because there was no law in this state providing for a record in such a case, is an authority against the defendant. In that case the property was in this state when the mortgage was made, the mortgagor residing out of the state. The court says: "If the property had been situated out of the state when the mortgage was made, and the mortgage had been valid according to the law of the place, a subsequent removal of the property to this state would not have affected its validity": Citing *Offutt v. Flagg*, 10 N. H. 46.

Conditional sales were valid in this state without record until January 1, 1886: *McFarland v. Farmer*, 42 N. H. 386; *Holt v. Holt*, 58 N. H. 276; *Weeks v. Pike*, 60 N. H. 447. The statute

of 1885, chapter 30, had no application to contracts between parties residing out of the state, and made no provision for recording such contracts. The fact that the contract is not within the statute is an answer to the position that the plaintiffs' title is to be tested by the law of New Hampshire.

The attachment of the real estate gave the defendant no possession of or right of property in the machines: *Scott v. Manchester Print Works*, 44 N. H. 507. By attaching them as personal property, the defendant claims to hold the possession and property in them, as the property of Parsons, for the benefit of the attaching creditors. If Parsons had an attachable interest subject to the plaintiffs' lien, the defendant's claim to hold the entire property under the attachment entitles the plaintiffs to maintain replevin, if they have any title to the machines and there is no ³⁶⁵ estoppel. As between the plaintiffs and Parsons, the machines were the property of the plaintiffs. They were never the property of Parsons. He was simply a bailee, and never claimed to own them.

"Judgment and execution liens attach to the defendant's real, instead of his apparent, interest in the property. It follows from this that the sale made under such a lien can ordinarily transfer no interest beyond that in fact held by the defendant when the lien attached, or acquired by him subsequently thereto and before the sale": *Freeman on Executions*, sec. 335. A purchaser at a sheriff's sale, there being no estoppel, acquires no title to property not belonging to the debtor: *Bryant v. Whitcher*, 52 N. H. 158.

An attaching creditor is not in the position of a purchaser for a valuable consideration without notice of any defect of title. The defendant, and the creditors of Parsons whom he represents, do not occupy the relation of bona fide vendees or mortgagees for value without notice. They stand no better than Parsons, who never owned or claimed to own the machines. Their claim to hold the property against the plaintiffs' title is based upon Parsons' ownership, and not upon any attempted transfer of title by him to them; and as he had no title they took nothing by the attachment.

The case has no analogy to an attachment of property to which the debtor has a voidable title valid until rescinded (*Bradley v. Obear*, 10 N. H. 477), or to the numerous class of cases where the debtor once had a valid title which he has conveyed or transferred in fraud of creditors.

As Parsons had no title to the machines, and as no legal or

equitable ground of estoppel to the assertion of the plaintiffs' title is shown, the plaintiffs are entitled to judgment.

Judgment for the plaintiffs.

Blodgett, J., did not sit; the others concurred.

SALES—CONFLICT OF LAWS—VALIDITY.—The law of the place where a contract is made governs so far as the validity or obligation of the contract is concerned: Note to *Schultz v. Howard*, 56 Am. St. Rep. 475. If the last act necessary to consummate a sale of goods takes place in one state, such state is regarded as the place of the contract, which is valid though it offends the laws of the state of the purchaser's residence, wherein the goods are to be sold or used: See monographic note to *McGarry v. Nicklin*, 55 Am. St. Rep. 49; and it will be enforced in the latter state, unless clearly contrary to good morals, or repugnant to the policy or positive statutes: *Sondheim v. Gilbert*, 117 Ind. 71; 10 Am. St. Rep. 23.

THOMPSON MANUFACTURING COMPANY v. SMITH.

[67 NEW HAMPSHIRE, 409.]

MECHANICS' LIENS—ENGINE AS PART OF BUILDING. A portable engine is not a building, or even a part thereof, when placed therein, within the meaning of a statute giving a lien for "erecting, altering, or repairing a house or other building or appurtenances" thereto.

SALES—CHANGE OF POSSESSION.—A sale cannot be declared as a matter of law not to have been accompanied by a sufficient change of possession when the vendee after the sale examined the property bought, and took away small parts that were likely to be lost or stolen.

Suit to enforce a mechanic's lien for repairs done to a portable engine, which at the time was situated in a sawmill belonging to the defendant, and standing upon leased land. The suit was contested by one Fellows, who examined and bought the engine from the defendant, Smith, after the repairs were made, and the vendee at the time of the sale took away several small parts of the engine, such as gaugecocks, et cetera, which were likely to be lost or stolen, and which were taken for the sole purpose of preserving them.

O. Ray and Ladd & Fletcher, for the plaintiffs.

F. B. Osgood, for the defendant.

⁴¹⁰ **CARPENTER, J.** "Any person who by himself or others shall perform labor or furnish materials, to the amount of fifteen

dollars or more, for erecting, altering, or repairing a house or other building or appurtenances, by virtue of a contract with the owner thereof, shall have a lien thereon, and on any right of the owner to the lot of land on which said house, building, or appurtenances stand": Gen. Laws, c. 139, sec. 11. The burden rests upon the plaintiffs to prove the lien which they assert. The engine was not a building within the meaning of the statute, and it does not appear to have been a part or an appurtenance of a building when the repairs were made. It was portable. It might be placed in a building, and yet be neither a part nor an appurtenance of the building. It does not appear even that the "saw-mill" in which the engine was at one time situated was a building. It might have been nothing but a saw operated by the engine in the open air, or under a temporary cover: *State v. Livermore*, 44 N. H. 386.

Upon the facts stated, it cannot be declared as matter of law that the sale to Fellows was not accompanied by a sufficient change of possession: *Lewis v. Whittemore*, 5 N. H. 364; 22 Am. Dec. 466; *Morse v. Powers*, 17 N. H. 286; *Stowe v. Taft*, 58 N. H. 445.

Judgment for Fellows.

All concurred.

MECHANIC'S LIEN—BUILDING—WHAT IS.—If a structure is of a substantial and permanent character, and may, in any reasonable sense, be known as a building, it may be encumbered by a mechanic's lien: *Wheeler v. Pierce*, 167 Pa. St. 416; 46 Am. St. Rep. 679. As to what structures are subject to mechanics' liens, see monographic note to *La Crosse etc. R. R. Co. v. Vanderpool*, 78 Am. Dec. 694; also monographic note to *Pacific etc. Co. v. Bear Valley Irr. Co.*, 65 Am. St. Rep. 168.

SALES—DELIVERY A QUESTION OF FACT.—Delivery is a fact dependent upon intention and must be determined by the jury from a consideration of the whole evidence: *Byer v. Etnyre*, 2 Gill, 150; 41 Am. Dec. 410. Whether or not a thing sold has been sufficiently delivered depends upon the character of the property, the use to be made of it, the nature and object of the transaction, the position of the parties and the usages of trade or business: *Stephens v. Gifford*, 187 Pa. St. 219; 21 Am. St. Rep. 868, and note.

BLY v. NASHUA STREET RAILWAY.

[57 NEW HAMPSHIRE, 474.]

STREET RAILWAYS—REGULATION OF SPEED OF.—A statute providing that "no person shall ride through any street, in the compact part of any town, on a gallop, or at a swifter pace than at the rate of five miles an hour," applies to a street railway company whose charter provides that the mayor and aldermen of the city in which its railway is operated may make such regulation as to rate of speed and mode of the use of the railway as the public safety and convenience may require, if the mayor and aldermen have not made any such regulation.

Action to recover damages for the death of plaintiff's intestate, caused by the defendant by running a street-car over him when such car was being propelled at a rate of speed greater than five miles an hour. Verdict for the plaintiff.

E. S. & H. A. Cutter, R. M. Wallace, and C. H. Burns, for the plaintiff.

G. B. French, and Burnham, Brown & Warren, for the defendants.

474 CHASE, J. Does the statute providing that, "No person shall ride through any street or lane, in the compact part of any town, on a gallop, or at a swifter pace than at the rate of five miles an hour" (Gen. Laws, c. 269, sec. 14), apply to the defendants, whose charter provides that their "railway may be operated by such horse or other motive power as may be authorized by the mayor and aldermen" of Nashua, and that the mayor and aldermen "shall have 475 power to make all such regulations as to rate of speed and the mode of use of said railway as the public safety and convenience may require"? Laws 1885, c. 192, sec. 5. The statute was enacted in 1792, and has been re-enacted in every general revision of the laws substantially in the same form: Laws, ed. 1792, p. 181; ed. 1830, p. 160, sec. 5; Rev. Stats., c. 113, sec. 13; Comp. Stats., c. 119, sec. 15; Gen. Stats., c. 252, sec. 14; Gen. Laws, c. 269, sec. 14. Street railways were unknown in 1792. The mode of conveyance for persons then in general use was by horseback. A gallop is a favorite gait for such riding. But the mode of conveyance was a mere incident of the mischief to be remedied. This consisted of the danger to which the lives and limbs of persons using a street or lane were exposed by the fast riding of others, whatever be the mode of conveyance. The object of the statute was to remedy the mischief; and it was to be accomplished by preventing fast riding generally, not fast

riding on horseback in particular. The words used are general: "No person shall ride . . . at a swifter pace," et cetera. The means of riding may be any that is in use while the statute is in force: See *Taylor v. Goodwin*, L. R. 4 Q. B. Div. 228; *Williams v. Ellis*, L. R. 5 Q. B. Div. 175. The defendants are restrained by this limitation the same as persons using other modes of conveyance, unless their charter gives them a special privilege.

The charter does not give the defendants the exclusive use of the portions of streets occupied by their tracks. If it did, there would be ground for inferring that the legislature intended to exempt them from the limitation, for in such case no one could lawfully occupy a position in which he would be exposed to the danger of collision with their cars. The public generally have a right to use those portions of the streets, but in a manner and to an extent modified by the use which the defendants make of them. People may pass across or along the tracks when cars are not passing. The rights of the public and of the defendants are in a great measure common: *Middlesex R. R. Co. v. Wakefield*, 103 Mass. 261, 263; *Concord v. Concord etc. R. R. Co.*, 65 N. H. 30, 36. By the charter, the legislature authorized a new use of streets, which is the source of a new and greater danger to other travelers. The driving of cars over steel or iron rails is attended with greater danger to others using the streets than the driving of ordinary vehicles over their uneven surfaces. As cars are heavier than ordinary vehicles, and as there is less resistance to their motion, their momentum is not so easily controlled, and causes more serious consequences when they come in collision with objects. Being confined to a fixed track, they cannot be turned aside to avoid collision. They have a tendency to frighten horses, especially when propelled by steam or electricity. The legislature were aware of these facts, and they are competent evidence upon the question of the legislative intent expressed by the charter. They show that there is greater necessity for limiting the speed of cars than for limiting ⁴⁷⁶ that of ordinary vehicles. In view of this necessity, it is highly improbable that the legislature intended to release the defendants from all restraint as to speed, even temporarily. If the general law does not apply to the defendants, they may drive their cars at any rate of speed, however great, until the mayor and aldermen establish regulations for their government, while a person riding upon horseback or in a carriage cannot drive across, along, or in the vicinity of their tracks at a swifter pace than five miles an hour without subjecting himself to liability to be fined or im-

prisoned. Such inequality would be arbitrary and unreasonable.

The speed at which the defendants may drive cars without endangering the safety of other travelers depends somewhat upon the width and character of the streets and the extent and nature of travel over them. Recognizing this fact, and the further fact that the mayor and aldermen, from their knowledge of the streets and travel, are well qualified to judge of the speed allowable within the limits of safety, the legislature delegated to them authority "to make all such regulations as to rate of speed and the mode of use of the railway as the public safety and convenience may require": *Commonwealth v. Temple*, 14 Gray, 69, 74. This is in accordance with a policy adopted in this state when the first street railway charter was granted, and which has been generally adhered to in the enactment of later charters: *Laws 1864*, c. 3030, sec. 5; *Laws 1878*, c. 118, sec. 4; *Laws 1881*, c. 251, sec. 4; *Laws 1889*, c. 178, sec. 3, c. 218, sec. 4, c. 241, sec. 3; *Laws 1891*, c. 258, sec. 5, c. 293, sec. 5; *Laws 1893*, c. 250, sec. 4. "This control is given to these municipal officers, not as representing a conflicting interest, but as independent bodies charged with the duty of protecting the rights and promoting the convenience of the whole public": *Union Ry. Co. v. Cambridge*, 11 Allen, 287, 292; *Cambridge v. Cambridge R. R. Co.*, 10 Allen, 50, 57. The legislature intended that the mayor and aldermen should take the subject up where they left it, that is, with the general law in force and applicable to the defendants. If the mayor and aldermen find that no additional or different regulations are required, they need not act; but if they find that the public safety and convenience require that the defendants shall run their cars at a less rate of speed than five miles an hour, or that they shall take precautions of any kind to avoid injury to travelers, they are authorized to make regulations accordingly. After the adoption of regulations, the defendants would be governed by the statute as modified by the regulations: *Cooley's Constitutional Limitations*, 198; 1 *Dillon on Municipal Corporations*, sec. 368; *Rogers v. Jones*, 1 Wend. 237; 19 Am. Dec. 493; *State v. Welch*, 36 Conn. 215; *State v. Clarke*, 54 Mo. 17; 14 Am. Rep. 471; *State v. Hayes*, 61 N. H. 264; *School District v. Prentiss*, 66 N. H. 145, 146.

The suggestion that this law has no more application to the defendants than the law requiring travelers meeting in a highway to turn to the right (*Gen. Laws*, c. 75, sec. 11) has not been overlooked. It is apparent that the latter law does not apply to street railways, ⁴⁷⁷ for it would disable them from exercising the

rights which the legislature has granted them: *Commonwealth v. Temple*, 14 Gray, 69, 78. But the application of the speed law to them does not have that effect. On the other hand, it produces the result in respect to street railways that it was designed to produce in respect to other travelers. It protects, to some extent at least, the lives and limbs of those who have occasion to use the highways in common with the railway corporations. While it cannot be supposed that the legislature intended to disable the defendants from exercising the rights granted to them by requiring them to do an impracticable thing, it is reasonable to suppose that they did intend to require the defendants to regulate the speed of their cars so as to avoid, as much as possible, the great danger caused by them to other travelers.

It is also suggested that there is the same reason for applying the speed law to steam railroads when crossing highways at grade. The law may have had such application before the enactment of section 1 of chapter 965 of the Laws of 1850, which provided that "no railroad corporation shall run their engine, cars, or train across any public highway, in or near the compact part of any town or city in this state, at a greater speed than six miles per hour." If the law of 1792 previously applied to steam railroads, this section excepted them from its operation. It imposed the same restraint upon them while crossing highways as the act of 1792 did upon travelers who use highways in the ordinary manner, except that the maximum rate of speed was six instead of five miles an hour. It was re-enacted from time to time until 1889, when it was repealed, and the matter was committed to the railroad commissioners for regulation: Laws 1889, c. 90. In the mean time an act was passed requiring railroad corporations to maintain a warning sign at every grade crossing over a highway at which there was no gate or flagman, and to cause the locomotive whistle to be sounded and the bell to be rung when approaching crossings: Laws 1885, c. 98, secs. 1-4. In the absence of regulations by the railroad commissioners, travelers upon highways have some protection from these warnings. The legislation on this subject shows a disposition to impose restraints upon other occupants of highways as well as upon ordinary travelers, for the safety and convenience of all. It is far from being inconsistent with the view taken of the law under consideration.

It does not appear that the mayor and aldermen have made any regulations concerning the speed of the defendants' cars. They may have decided that the public safety and convenience

do not require any regulation in addition to the general law. If so, there was no occasion for them to act. It was incumbent on the party alleging that they have made regulations to prove the allegation. Upon the facts disclosed in the case, the general law is applicable to the defendants the same as to other travelers.

⁴⁷⁸ This law was competent evidence on the question of the defendants' negligence: *State v. Boston etc. R. R. Co.*, 58 N. H. 408; *Nutter v. Boston etc. R. R. Co.*, 60 N. H. 483; *Clark v. Boston etc. R. R. Co.*, 64 N. H. 323; *Wright v. Malden etc. R. R. Co.*, 4 Allen, 283; *Hanlon v. South Boston etc. R. R. Co.*, 129 Mass. 310.

Exception overruled.

Carpenter and Wallace, JJ., did not sit; the others concurred.

STREET RAILROADS—REGULATION OF SPEED.—A cable railway company running its trains through the streets of a city at a rate of speed prohibited by city ordinance is guilty of negligence per se: *Weber v. Kansas City Cable Ry. Co.*, 100 Mo. 194; 18 Am. St. Rep. 541. See extended note to *Bott v. Pratt*, 53 Am. Rep. 52, discussing statutes and ordinances regulating the speed of street cars.

QUIMBY v. WILLIAMS.

[67 NEW HAMPSHIRE, 489.]

MORTGAGES—ASSIGNMENT—ESTOPPEL.—If a mortgagee, who assigns his mortgage afterward, takes a conveyance of the mortgaged premises from the mortgagor, and agrees to discharge him from liability on the mortgage note, the subsequent assent of the assignee to such discharge does not estop the latter from insisting upon his mortgage security as against the mortgagee or his grantees.

MORTGAGES — ASSIGNMENT — PRIORITIES.—An assignment of a mortgage by a mortgagee after the mortgage debt has been paid to him, though the mortgage has not been canceled of record, is not valid as against his subsequent assignment of a second mortgage executed and recorded prior to the first assignment.

MORTGAGES—ASSIGNMENT—PRIORITIES.—If a mortgagee takes a conveyance of the mortgaged premises in payment of the mortgage debt, and the mortgage remains uncanceled of record, the title of an assignee of such mortgage for value must prevail over that of a subsequent grantee of such mortgagee.

MORTGAGES — FRAUD—PRIORITIES.—A conveyance of land merely to enable the grantee to mortgage it back to the grantor, and thereby perpetrate a fraud, does not make the mortgage so executed void in the hands of a bona fide assignee, and the rights of the latter are junior only as to encumbrances on the premises, which he could have discovered by an examination of the record at the time he took the mortgage.

MORTGAGES—ASSIGNMENT—PRIORITIES.—The fact that a mortgage is in the hands of the mortgagee after the property has been transferred to him in payment of the mortgage debt does not necessarily show that the mortgage is invalid; nor does the fact that while in his hands it was invalid against previous encumbrances, because equitably it had been paid, prove that it could have no force, when assigned by him, as against his subsequent assignees or grantees.

MORTGAGES—MERGER.—The title of a mortgagee, to whom the property is transferred in satisfaction of the mortgage, which is not delivered to the mortgagor or canceled of record, is not thereby merged in his title as owner.

MORTGAGES.—ASSIGNMENT AND DELIVERY of a mortgage note transfers the mortgagee's title under the mortgage.

FRAUDULENT CONVEYANCES—MECHANICS' LIENS.—A conveyance of land to be held by the grantee under a secret trust for the grantor is void as against mechanics' liens for labor subsequently performed under a contract with the grantor.

FRAUDULENT CONVEYANCES.—A CONVEYANCE OF PROPERTY ABSOLUTE IN TERMS, but without consideration, or as a mere security, is fraudulent as against the creditors of the insolvent grantor.

FRAUDULENT CONVEYANCES—NOTICE.—A conveyance made to defraud creditors of the grantor is valid as against a subsequent purchaser from the grantor for a valuable consideration, but with notice of the first conveyance.

Bills in equity by Quimby, Gould, and Tibbetts, separately against Williams, to determine the rights of the parties as mortgagees. The first bill showed that Abigail Brown executed three mortgages on her farm to Williams, one dated December 1, 1883, for eight hundred dollars, one dated March 18, 1884, for five hundred dollars, and one dated December 18, 1884, for seventeen hundred dollars. The last mortgage was intended by the parties thereto to be in satisfaction of the prior mortgages, but they were left with Williams, and not canceled of record. On January 29, 1886, Mrs. Brown conveyed her whole farm to Williams, it being understood between them that all her notes were thereby paid. On March 28, 1886, Williams executed a deed of the farm to one Hammond, and took a mortgage from him for two thousand five hundred dollars. This transaction was to enable Williams to raise money on the mortgage as collateral security. In December, 1883, Williams transferred the eight hundred dollar mortgage to one Parkhurst, who knew of the conveyance of Mrs. Brown to Williams and relied upon his promise to pay the note, but supposed that the farm would still stand as security if he failed to pay the debt. On September 1, 1885, Williams pledged the seventeen hundred dollar note to the Newbury National Bank as security for loans made to him. In 1886, Williams assigned to Quimby the Hammond mortgage of two

thousand five hundred dollars. On March 4, 1887, Williams assigned the five hundred dollar mortgage of Mrs. Brown to one Lamb. On July 28, 1888, he mortgaged the Brown farm to the Bradford Savings Bank as part security for twelve thousand dollars loaned to him. These mortgages were held by the several parties named for valuable consideration, without knowledge at the time they took the mortgages of the state of the title. The mortgages were all duly recorded and the notes indorsed and delivered by Williams. In the case of Gould v. Williams, it appeared that one Norris gave Williams a mortgage on certain land, dated November 24, 1884, to secure the payment of three notes of five hundred dollars each. Williams pledged these notes to Gould as collateral security, giving him a certified copy of the mortgage and retaining the original. He afterward pledged three apparently genuine notes of five hundred dollars each of like nature to those delivered to Gould, and the original mortgage, to the Bradford Savings Bank. In the case of Tibbetts v. Williams, it appeared that on May 2, 1885, Williams conveyed to one Hammond a certain farm, and took a mortgage back for one thousand dollars. Subsequently, Williams pledged such mortgage to one Blodgett to indemnify him as surety on a note afterward paid by Blodgett. On March 25, 1886, Hammond reconveyed the farm to Williams, but the deed was not recorded. These conveyances between Williams and Hammond were to enable the former to raise money on the latter's note and mortgage without divesting the former of title. Hammond never had possession of the land, and left the deeds thereto with Williams, who had the first deed and mortgage recorded without Hammond's knowledge. Hammond had knowledge of the conveyance to him, and executed the mortgage and note, but his conveyance of the farm to Williams was under an agreement that Williams would cancel the note and mortgage, which he did not do. On February 4, 1888, Williams executed a deed of the farm to one Sarah A. Tibbetts. At that time she gave him one thousand dollars, but did not take possession of the land, and Williams has paid interest on this money as well as taxes on the land. On July 28, 1888, Williams executed a mortgage of this same farm to the Bradford Savings Bank as part security for a loan of twelve thousand dollars. There are mechanics' liens on the property for lumber and material furnished and labor performed on a building erected on the land by Williams while he was in possession and soon after his deed to Mrs. Tibbetts.

Bingham & Bingham, for the plaintiffs

T. E. Johnson, Chapman & Lang, Drew & Jordan, J. I. Parsons, and J. H. Dudley, for the defendants.

491 PER CURIAM. 1. Mrs. Brown's mortgage to Williams for eight hundred dollars, which was duly recorded, was the first of the several encumbrances placed upon the Brown farm. Its validity at the time of its execution is admitted, and it is not claimed that its assignment a few days later by Williams to Parkhurst was defective or void. The title to the note and mortgage passed to Parkhurst before the seventeen hundred dollar mortgage was given, and his rights were not affected by the fact that Mrs. Brown and Williams understood that the last mortgage operated as a payment of her former notes to Williams. She might have protected herself by insisting upon a surrender of the old notes and mortgages. Her failure to do so did not release the mortgage in the hands of a bona fide holder like Parkhurst. But it is claimed that Parkhurst is estopped to insist upon his mortgage, because, after he learned that Mrs. Brown had conveyed her equity in the farm to Williams, in liquidation, as she supposed, of her notes, he assented to the transaction, and relied upon Williams to pay the eight hundred dollar note. Whether he released Mrs. Brown from her personal liability on the note it is unnecessary to inquire, for the note was not paid or canceled; it still represented the debt which the mortgage was given to secure; and the case shows that Parkhurst did not intend to relinquish that security. There are no special equities as against Parkhurst's mortgage in favor of the Bank of Newbury. When they received the seventeen hundred dollar mortgage, they were chargeable with knowledge from the record that the eight hundred dollar mortgage was a first lien on the farm; and as it has not been 492 discharged, it remains a first lien. Nor have the parties who acquired mortgages on this land subsequently to the time Mrs. Brown conveyed it to Williams any ground upon which to claim an estoppel against Parkhurst. An examination of the record would have given them the information that the eight hundred dollar mortgage was apparently a first lien on the land; and if, having this knowledge, they chose to rely upon statements of Williams and Mrs. Brown that it had in fact been discharged, if they were willing to take subsequent mortgages without having the first one discharged on the record, they, and not the innocent holder of the first mortgage, should suffer the consequences of their misplaced confidence: *Wilson v. Kimball*, 27 N. H. 300; *Blake v. Williams*, 36 N. H. 39; 1 *Jones on Mortgages*, sec. 474.

As the seventeen hundred dollar mortgage was given in payment of Mrs. Brown's previous notes and mortgages, it must take precedence of the five hundred dollar mortgage which had not been assigned and which Williams might have discharged. To hold that to be a valid encumbrance in the hands of Williams against his subsequent assignees and grantees would be to assist him in carrying out his fraudulent and dishonest scheme. He held it as a discharged mortgage, and his subsequent assignees and grantees are entitled to the benefit resulting therefrom. As the National Bank of Newbury received the seventeen hundred dollar mortgage September 1, 1885, and as Williams did not assign the five hundred dollar mortgage until March 4, 1887, the bank holds its security as the second mortgagee.

The next valid encumbrance is the two thousand five hundred dollar mortgage held by Mrs. Quimby, which was pledged to her March 28, 1886. The fact that Williams conveyed the farm to Hammond merely to enable Hammond to mortgage it back to him, and to perpetrate another fraud, did not make the mortgage invalid in the hands of Mrs. Quimby, a bona fide holder for value. An examination of the title when she received the mortgage would have disclosed two valid mortgages on the land, the one held by Parkhurst and the seventeen hundred dollar mortgage.

At the time Williams mortgaged the farm to the Bradford Savings Bank the five hundred dollar mortgage had been assigned to Lamb. By investigation, the bank would have learned not only that it had not been formally discharged, and that it apparently constituted a lien on the farm, but that it was an outstanding encumbrance in the hands of an assignee for value; and they are chargeable with that knowledge. Lamb had the right, as against a subsequent mortgagee, to rely upon the state of the record title as it appeared when he received his mortgage; and although Williams, his assignor, then held the mortgagor's title, the record disclosed that it was subject to several encumbrances, among which was the five hundred dollar mortgage. The fact that it was in Williams' possession did not necessarily show that it was invalid; nor did the fact that while in his hands it was invalid against previous ⁴⁹³ encumbrances, because equitably it had been paid, prove that it could have no force, when assigned by him, as against his subsequent assignees or grantees. Lamb took the mortgage as a valid and subsisting encumbrance, so far as Williams was concerned; and if, for some purposes, it is regarded in equity as discharged, it would be plain-

ly inequitable and unjust to allow Williams to defend against it upon that ground; and no reason is perceived why the bank, his subsequent grantee, should have the advantage of that defense. There was no merger of titles in Williams: 1 Jones on Mortgages, sec. 870.

2. Williams' pledge or transfer of the Norris notes to Gould was an equitable assignment of the mortgage given to secure their payment (*Whitemore v. Gibbs*, 24 N. H. 484, 487), and the fact that the original mortgage was not delivered to the assignee is immaterial. For the fraud practiced upon the bank by Williams, Gould is not responsible, nor is the validity of his security affected thereby.

3. Blodgett has the first lien on the stock farm. His claim is not affected by the fact that Williams' conveyance to Hammond was made for the purpose of taking back a note and mortgage to be used by Williams as collateral security. In that transaction there was nothing that imparts any element of fraud or invalidity to Blodgett's title. In taking the note and mortgage he was justified in relying upon the record title as against Williams, Hammond, and subsequent purchasers.

The defendants, who furnished materials for and performed labor upon the building built by Williams on the premises while the title was apparently held by Mrs. Tibbetts, have a lien thereon if they took the necessary steps to perfect it: Pub. Stats., c. 141, sec. 10. Their contract was with Williams; they were his creditors, and his conveyance to Mrs. Tibbetts was a fraudulent one as to them. He remained in the possession of the farm after the conveyance as before, managing it as his own, and paid her the interest on the money advanced by her at the time of the conveyance. He also paid the taxes on the place, and built the building on account of which the liens are claimed. The secret trust for his benefit is manifest. The deed was either without consideration, or it was intended as security for the one thousand dollars paid by Mrs. Tibbetts. In either event it was void as against the creditors of Williams: *Stratton v. Putney*, 63 N. H. 577; *Watkins v. Arms*, 64 N. H. 99.

But the Bradford Savings Bank, being a subsequent grantee or purchaser from Williams, is not entitled to the protection afforded creditors by the statute of Elizabeth against fraudulent conveyances. A conveyance made to defraud the creditors of the grantor is valid against a subsequent purchaser for a valuable consideration, with notice of the first conveyance: *Stevens v. Morse*, 47 N. H. 532. As was said in that case: "The grantor

can recover neither the land itself nor its value. This rule has been adopted ⁴⁹⁴ with a view to deter from and discourage such fraudulent acts. But the adoption of the doctrine that a purchaser for value, with notice from the fraudulent grantor, can take the land away from the fraudulent grantee, amounts to a nullification of the preceding rule. For this would give back to the grantor, not, indeed, his land, but what is the same thing, its value. . . . Such a doctrine would encourage, rather than repress, conveyances to defraud creditors, for it diminishes the chance of loss to the debtor." The result is, that Mrs. Tibbetts, under her deed, has a claim to the land superior to that of the bank.

Case discharged.

Carpenter, J., did not sit; the others concurred.

MORTGAGES—ASSIGNMENT—PRIORITIES.—The assignment of a mortgage puts the assignee in the place of the mortgagee to all intents and purposes, unless a different intention is apparent from the contract: *Hills v. Elliot*, 12 Mass. 26; 7 Am. Dec. 26. It is regarded as a conveyance: *Swasey v. Emerson*, 168 Mass. 118; 60 Am. St. Rep. 368; and as a proper instrument for record: *Merrill v. Luce*, 6 S. Dak. 354; 55 Am. St. Rep. 844, and note. A mortgagee, having sold the note secured by the mortgage, cannot cause satisfaction of it to be entered on the record to its destruction as a security to the noteholders: *Roberts v. Halsted*, 9 Pa. St. 32; 49 Am. Dec. 541. A mortgage remains an equitable lien upon lands in favor of an assignee of the bond and mortgage, to whom it is assigned as collateral security for a loan made by him to the mortgagee, notwithstanding the mortgagee afterward receives a conveyance of the lands from the mortgagor, and gives him, in consideration thereof, an acquittance of the bond and mortgage: *Brown v. Blydenburgh*, 7 N. Y. 141; 57 Am. Dec. 506, and note. Compare *Jenks v. Shaw*, 99 Iowa, 604; 61 Am. St. Rep. 256.

FRAUDULENT CONVEYANCES.—A DEED ABSOLUTE ON ITS FACE, but intended as a mere security for a debt, is fraudulent and void as against the creditors of the grantor: *Bernhardt v. Brown*, 122 N. C. 587; 65 Am. St. Rep. 725, and note.

FRAUDULENT CONVEYANCES—RIGHTS OF SUBSEQUENT CREDITORS.—In cases of voluntary conveyances, it matters not whether or not the donee had notice of the fraudulent intent of the grantor: *Gilliland v. Jones*, 144 Ind. 662; 55 Am. St. Rep. 210, and note. Such a conveyance in any case is void, both as to existing and subsequent creditors: Note to *Brundage v. Cheneworth*, 63 Am. St. Rep. 888. As to the rights of subsequent purchasers from the grantor, see monographic note to *Jenkins v. Clement*, 14 Am. Dec. 708.

BEACH v. MORGAN.

[67 NEW HAMPSHIRE, 529.]

FISHERIES—UNNAVIGABLE STREAMS.—The right of fishing in unnavigable stream is limited exclusively to the riparian owner or his tenant, unless another shows a right acquired in some way recognized by law.

FISHERIES.—A CUSTOM TO TAKE FISH from an unnavigable stream in the land of another is not a lawful custom. If such a right is available at all, it must be set up by prescription as belonging to some estate, and should be pleaded with a *que estate*.

EASEMENTS.—ADVERSE RIGHTS to an easement cannot grow out of a mere permissive enjoyment for any length of time.

RIGHTS IN GROSS are not assignable or inheritable.

LANDLORD AND TENANT—LEASE AS EVIDENCE.—A tenant's lease is valid against his lessor, although unrecorded, and upon being recorded is admissible in proof of his title against any one.

FISHERIES.—STOCKING OF STREAMS with young fish, raised at the expense of the state by the fish commissioner, does not operate as a license to the public for fishing in waters not public, nor in unnavigable streams on private lands. The public thus benefited are the landowners along the stream.

TRESPASS—MEASURE OF DAMAGES.—In trespass *quare clausum fregit* for taking animals *ferae naturae*, the landowner can recover for the trespass only.

Trespass on land while taking fish. The plaintiff is lessee of a strip of land through which there flows a natural brook or unnavigable stream. The lease gives him the exclusive right to use the premises for fishing, fish culture, and fish preservation. For fifty years or more, the defendant, his father, and others, have fished such brook above, through, and below the leased lands at pleasure, without asking permission, and without objection or interference from any landowner, except the plaintiff since the date of his lease.

Albin & Martin, for the plaintiff.

Leach & Stevens, for the defendant.

530 **SMITH, J.** The stream flowing through the land leased to the plaintiff not being navigable, and not being public water, the right of fishing in it is limited at common law to the riparian owner of the soil, and belongs exclusively to him, unless the defendant shows a right acquired in some way recognized by law: *State v. Roberts*, 59 N. H. 256; 47 Am. Rep. 199.

So far as the facts agreed and the facts which the defendant offers to prove are evidence of a custom of fishing in the brook on the land leased to the plaintiff, they are immaterial. "A custom to take anything from another's land, or for a profit a prendre, is not a lawful custom. If such a right is available at all, it must be set up by prescription as belonging to some estate,

and should ⁵³¹ be pleaded with a *que estate*": *Waters v. Lilley*, 4 Pick. 145, 148; 16 Am. Dec. 333; *Gateward's case*, 6 Coke, 60; *Grimstead v. Marlowe*, 4 Term Rep. 717, 718; *Washburn on Easements*, 10.

Whether a party can prescribe for a several fishery in the estate of another without alleging some estate of freehold to which it is appendant, was left undecided in *McFarlin v. Essex Co.*, 10 Cush. 304, and is immaterial in this case, for the facts agreed and the facts which the defendant offers to prove do not show a prescriptive right of fishery in the stream on the land leased to the plaintiff. An adverse right to an easement cannot grow out of a mere permissive enjoyment for any length of time. There was no assertion by the defendant that his entry upon the leased land was under a claim of right, and his occasional acts in entering and fishing were such as have been so generally regarded as permissive that it must have been understood by the parties that the defendant entered under a license. They were not of such exclusive and notorious character as to afford notice of a claim of right. Any right which his father or others acquired, if they could acquire or have acquired any, being a mere personal right not appendant to an estate, a right in gross, is not assignable nor inheritable, and cannot avail the defendant: *Washburn on Easements*, 8.

The plaintiff's lease is valid against his lessor, although unrecorded (*Pub. Stats.*, c. 137, sec. 4), and, upon being recorded, is admissible in proof of his title. But, irrespective of the lease, his possessory title is sufficient to enable him to maintain this suit in the absence of any better title in the defendant.

The stocking of streams with young trout, raised at the expense of the state, by the fish commissioner, does not operate as a license to the public for fishing in waters not public, nor in unnavigable streams on private lands. The "public" benefited by the placing of young trout in the stream in question are the landowners on their respective lands on the stream, from its source to its mouth, its tributaries, and the stream into which it flows.

The fish taken by the defendant being *ferae naturae*, the plaintiff can recover for the trespass only.

Judgment for the plaintiff for one dollar.

All concurred.

IN WISCONSIN THE TITLE TO LAND beneath the waters of a navigable stream belongs to the adjacent landed proprietors, but it is a title in trust for the public, to the extent of being subject to the public rights of navigation and fishing. If the same person owns the

lands on both sides of the stream, he has no property in the fish therein. Others have no right to enter upon his land not covered by the waters of the stream for the purpose of fishing, but they may enter on the stream, or that part of it situate upon his lands, by means of a boat, without committing any trespass or other wrong, and, if they do so, may, from such boat, catch fish without violating any right of the owner of the land. In considering this subject in the case of Willow River Club v. Wade, 100 Wis. 86, Chief Justice Cassody first inquired respecting the character of the stream in question for the purpose of ascertaining whether, in contemplation of law, it was navigable, and, having resolved that question in the affirmative, said: "The question recurs whether the public right of fishery is included in, or an incident of, such public right of navigation. In other words, has the plaintiff, as riparian owner, the exclusive right to take fish from the river? The plaintiff certainly has no right in the particles of water flowing in the stream, any more than it has in the air that floats over its land. Its rights in that respect are confined to their use and to preserving their purity while passing: *Lawson v. Mowry*, 52 Wis. 234, 235. So the fish in the stream were not the property of the plaintiff at common law, any more than the birds that flew over its land: *State v. Roberts*, 59 N. H. 256; 47 Am. Rep. 199; Angell on Watercourses, 7th ed., sec. 65 a, and cases there cited; *State v. Welch*, 66 N. H. 178. As indicated, the public right of fishery in tidal waters was maintained, at common law, in England, before the use of the stream—when vessels could only be carried up the river by the flow of the sea, and down the river by the ebb of the sea—and consequently when the ebb and flow of the tide practically measured the navigability of the stream. For the same reason, the public should have the right to fish in all the public navigable waters of the state. The supreme court of the United States, in a recent case, partially adopting the language of the New Hampshire case cited, has declared that, 'at common law, the right of fishing in navigable waters was common to all. The taking and selling of certain kinds of fish and game at certain seasons of the year tended to the destruction of the privilege or right by the destruction consequent upon the unrestrained exercise of the right. This is regarded as injurious to the community, and therefore it is within the authority of the legislature to impose restriction and limitation upon the time and manner of taking fish and game considered valuable as articles of food or merchandise. For this purpose fish and game laws are enacted. The power to enact such laws has long been exercised, and so beneficially for the public that it ought not now to be called into question': *Lawton v. Steele*, 152 U. S. 138, 139. In this state, the legislature has expressly declared that 'all fish in the public waters of the state of Wisconsin are hereby declared to be the property of the state, and may be taken for the use of the individual and become his property at any time and in any manner not prohibited by the laws of this state': Laws 1893, c. 307, sec. 20. Public navigable streams are certainly 'public waters,' within the meaning of that act. Since the defendant kept within the banks of the river—with-

in the limits of the public highway—his fishing was nothing more than the exercise of a right common to the public. We must hold that the Willow river was a public navigable stream, and the defendant was not guilty of trespass by going upon it, as he did, catching the fish in question." Mr. Justice Marshall, however, was of the opinion that the right of public navigation and the public right of fishing both existed in such a stream, and, further, that in the pursuance of either right, the public might make such use of the margin of the stream as was necessary for the full enjoyment of the right in question.

EASEMENT—RIGHT TO, HOW GAINED BY ADVERSE USER. The adverse use of an easement will give title by prescription, if accompanied by the same facts as to length of time, exclusiveness, and acquiescence which are necessary to give title to real estate, by adverse possession under the statute of limitations. It is otherwise if such facts do not exist: *North Point etc. Ins. Co. v. Utah etc. Canal Co.*, 16 Utah, 246; 67 Am. St. Rep. 607; *Swan v. Munch*, 65 Minn. 500; 60 Am. St. Rep. 491, and note; *Whiting v. Gaylord*, 66 Conn. 337; 50 Am. St. Rep. 87, and note.

PICKERING v. MOORE.

(57 NEW HAMPSHIRE, 532.)

MANURE AS PART OF REALTY.—Manure made upon a farm by the consumption of its products in the ordinary course of husbandry is a part of the realty, and cannot be sold or carried away by the tenant without the consent of the landlord.

MANURE AS PART OF REALTY.—Manure made upon a farm from products not produced thereon is not part of the realty and may be held by the tenant.

MANURE—PROPERTY IN—INTERMIXTURE OF.—A tenant does not lose his property in manure by intermixing it with the landlord's manure of the same quality and value, without his consent, but without any fraudulent or wrongful intent.

PROPERTY—INTERMIXTURE.—The intentional but innocent intermixture of property of substantially the same quality and value does not change the ownership.

COTENANCY—PARTITION OF CHATTELS.—A cotenant of personal as well as real property has a right to partition if that is possible, and, if not, to a regulation of its use equivalent to partition and sale.

COTENANCY—PARTITION OF PERSONALTY—CONVERSION.—A cotenant of goods divisible by tale, measure, or weight, may, without the consent and against the will of his cotenant, rightfully take and appropriate to his sole use, sell, or destroy so much of them as he pleases, not exceeding his share, and by so doing effect, pro tanto, a valid partition; and his cotenant who prevents him from so doing is guilty of conversion.

Trover to recover manure owned by a tenant and produced from fodder not raised upon the leased premises, and which the landlord prevented him from taking away.

· Leach & Stevens, for the plaintiff.

Albin & Martin, for the defendant.

533 CARPENTER, J. The plaintiff held the farm after the expiration of three years, as tenant from year to year, upon the terms **534** expressed in the lease: *Russell v. Fabyan*, 34 N. H. 218, 223; *Conway v. Starkweather*, 1 Denio, 113. Manure made upon a farm by the consumption of its products in the ordinary course of husbandry is a part of the realty. It cannot be sold or carried away by a tenant without the landlord's consent: *Sawyer v. Twiss*, 26 N. H. 345, 349; *Perry v. Carr*, 44 N. H. 118, 120; *Hill v. De Rochemont*, 48 N. H. 87, 88. The doctrine "was established for the benefit of agriculture. It found its origin in the fact that it is essential to the successful cultivation of a farm that the manure produced from the droppings of cattle and swine fed upon the products of the farm, and composted with earth and vegetable matter taken from the land, should be used to supply the drain made upon the soil in the production of crops, which otherwise would become impoverished and barren; and in the fact that the manure so produced is generally regarded by farmers in this country as a part of the realty, and has been so treated by landlords and tenants from time immemorial": *Haslem v. Lockwood*, 37 Conn. 500, 505; 9 Am. Rep. 350.

Whether a tenant, "where there is no positive agreement dispensing with the engagement to cultivate his farm in a husband-like manner, is bound to spend the hay and other like produce upon it as the means of preserving and continuing its capacity" (*Perry v. Carr*, 44 N. H. 118, and *Hill v. De Rochemont*, 48 N. H. 87), in other words, whether the express or implied obligation to cultivate the farm in "a husbandlike manner" binds him as matter of law to convert into manure all the fodder grown on the premises, is a different and possibly an open question: *Wing v. Gray*, 36 Vt. 261, 266, 267; *Lewis v. Lyman*, 22 Pick. 437, 444, 445; *Middlebrook v. Corwin*, 15 Wend. 169, and cases cited; *Brown v. Crump*, 1 Marsh. C. P. 567; *Leph v. Hewitt*, 4 East, 154, 159; *Moulton v. Robinson*, 27 N. H. 550, 561; *Cooley on Torts*, 334, 343, 344. However that may be, no rule of good husbandry requires a tenant to buy hay or other fodder for consumption on the farm. If, in addition to the stock maintainable from its products, he keeps cattle for hire and feeds them upon fodder procured by purchase or raised by him on other lands, the landlord has no more legal or equitable interest in the

manure so produced than he has in the fodder before it is consumed. It is not made in the ordinary course of husbandry. It is produced "in a manner substantially like making it in a livery stable": *Hill v. De Rochemont*, 48 N. H. 87, 90; *Corey v. Bishop*, 48 N. H. 146, 148. It is immaterial whether the additional stock is kept for hire, or is the tenant's property! *Needham v. Allison*, 24 N. H. 355.

The plaintiff did not lose his property in the manure by intermixing it with the defendant's manure of the same quality and value without his consent. It is not claimed that the plaintiff mixed the manure with any fraudulent or wrongful intent. "The intentional and innocent intermixture of property of substantially ⁵³⁵ the same quality and value does not change the ownership. And no one has a right to take the whole, but in so doing commits a trespass on the other owner. He should notify him to make a division, or take his own proportion at his peril, taking care to leave to the other owner as much as belonged to him": *Ryder v. Hathaway*, 21 Pick. 298, 306; *Gilman v. Hill*, 36 N. H. 311, 323; *Robinson v. Holt*, 39 N. H. 557, 563; 75 Am. Dec. 233; *Moore v. Bowman*, 47 N. H. 494, 501, 502; *Cheshire R. R. Co. v. Foster*, 51 N. H. 490, 493. "Even if the commingling were malicious or fraudulent, a rule of law which would take from the wrongdoer the whole, when to restore to the other his proportion would do him full justice, would be a rule not in harmony with the general rules of civil remedy, not only because it would award to one party a redress beyond his loss, but because it would compel the other party to pay not damages, but a penalty": *Cooley on Torts*, 53, 54.

Whether the parties were tenants in common of the manure is a question that need not be determined: *Gardner v. Dutch*, 9 Mass. 427, 430, 431; *Ryder v. Hathaway*, 21 Pick. 298, 305; *Chapman v. Shepard*, 39 Conn. 413, 425; *Kimberly v. Patchin*, 19 N. Y. 330, 341; 75 Am. Dec. 334. Assuming that they were, the action may be maintained. A tenant in common has the same right to the use and enjoyment of the common property that he has to his sole property, except in so far as it is limited by the equal right of his cotenants. Where two have each an equal title to an indivisible chattel, "as of a horse, an ox or a cowe," neither, without actual and exclusive possession of the chattel, can enjoy his moiety. Simultaneous enjoyment by each of his equal right is impossible. Hence, neither can lawfully take it from the possession of the other. The one excluded from possession has no legal remedy except to take it "when he can

see his time": Littleton, sec. 323; Southworth v. Smith, 27 Conn. 355, 359; 71 Am. Dec. 72.

A tenant in common of personal as well as real property has a right to partition if partition is possible, and if not, to a regulation of its use equivalent to partition or to a sale: Coke on Littleton, 164 b, 165 a; Stoughton v. Leigh, 1 Taunt. 402, 411, 412; Morrill v. Morrill, 5 N. H. 134, 135; Crowell v. Woodbury, 52 N. H. 613. On partition he is entitled to no particular part of the property, but only to his due proportion in value and quality of the whole. When it consists of chattels differing in quality and value, an appraisal of the value and a consideration of the qualities of the several chattels are essential to an assignment to each of his just share. In this case, as in that of a single indivisible chattel, if the parties cannot agree upon the use, sale, or division, judicial intervention is necessary. Until an adjudication of their rights, neither can assert a title in severalty to any portion of the property. When the common property is divisible by weight, measure, or number into portions identical in quality and value, as corn and various other articles, a different case is presented. ⁵³⁶ There is no question of legal or equitable right. There is and can be no dispute that a court of law or equity can settle. Counting, weighing, and measuring are not judicial, but ministerial, functions. Equity could do no more than decree that each might take so many pounds, bushels, or yards, or so many of the articles in number, and enforce its decree by process—in other words, enforce the conceded right. One may in general do without a decree what equity would decree that he might do. Neither law nor equity allows one in the exercise of his own rights to do an unnecessary and avoidable injury to another. One is entitled to the possession of the whole in those cases only where it is necessary to his enjoyment of his moiety. Here it is not necessary. There is no more difficulty in separating one portion from another, than there is in selecting A's marked sheep from B's flock. Either may make the division. The law is not so unreasonable as to compel a resort to the courts in order to obtain a partition which either may make without expense and without danger of injustice to his cotenant. Except in Daniels v. Brown, 34 N. H. 454, 69 Am. Dec. 505; it has never been held, so far as observed, that a tenant in common is liable to his cotenant in any form of proceeding for taking from the latter's possession and consuming or destroying his just proportion only of the common property. The conveyance by a tenant in common of a part of the common

land by metes and bounds may effect a partition, and will if it does no injustice to his cotenants—if their just share can be assigned to them out of the remaining land: *Holbrook v. Bowman*, 63 N. H. 313, 321. No reason is perceived why a similar doctrine should not be applied in the case of a common tenancy of chattels. If A and B own in common one hundred horses, and B sells ten of them to C, why should A be permitted to take them “when he can see his time,” if he has possession of and can have his full share assigned to him from the remaining ninety? However that may be, a tenant in common of goods divisible by tale or measure may, without the consent and against the will of his cotenant, rightfully take and appropriate to his sole use, sell, or destroy so much of them as he pleases, not exceeding his share, and by so doing effect pro tanto a valid partition. To this extent *Daniels v. Brown*, 34 N. H. 454, 69 Am. Dec. 505, is overruled: *Haley v. Colcord*, 59 N. H. 7, 8; 47 Am. Rep. 176; *Gage v. Gage*, 66 N. H. 282, 288; *Seldon v. Hickock*, 2 Caines, 166; *Lobdell v. Stowell*, 51 N. Y. 70, and cases cited; *Stall v. Wilbur*, 77 N. Y. 158, 164; *Cooley on Torts*, 455; 6 *American Law Review*, 455-459, and cases cited. The defendant, by preventing the plaintiff from taking his part of the manure, exercised a dominion over it inconsistent with the plaintiff's rights: *Evans v. Mason*, 64 N. H. 98.

Judgment for the plaintiff.

Wallace, J., did not sit; the others concurred.

LANDLORD AND TENANT—RIGHT TO MANURE.—The rule of law may be safely declared that manure made upon a farm, or gathered in therefrom and produced mainly by the feeding and depasturing of stock upon its products, in absence of any stipulation or custom to the contrary, belongs to the farm and cannot be legally removed by the tenant. But if the manure is not produced directly or indirectly from the land, and is in no sense the product of agricultural demised premises, such as accumulates in livery stables and the like, it is no part of the realty, and may be removed by the tenant at the close of his term: Extended note to *Kittredge v. Wood*, 14 Am. Dec. 397; *Lewis v. Jones*, 17 Pa. St. 262; 55 Am. Dec. 550, and note; note to *Chase v. Wingate*, 28 Am. Rep. 39. See *Galagher v. Shipley*, 24 Md. 418; 87 Am. Dec. 611. The doctrine of confusion of goods will give to the owner of a farm all manure produced thereon during the occupancy of a tenant under an agricultural lease, when: *Lewis v. Jones*, 17 Pa. St. 262; 55 Am. Dec. 550.

COTENANCY—RIGHT TO PARTITION.—As a general rule, an adult tenant in common may demand partition as a matter of right: *Martin v. Martin*, 170 Ill. 639; 62 Am. St. Rep. 411, and note; *Crocker v. Cutting*, 170 Mass. 68; 64 Am. St. Rep. 278.

CONFUSION OF GOODS—DOCTRINE OF—INNOCENT INTERMIXTURE.—Where the intermixture of goods belonging to different

parties is innocent, or by mistake, or even merely negligent, without the element of willfulness or fraud, the party causing the confusion will not lose his property: See monographic note to *Pulcifer v. Page*, 54 Am. Dec. 598; note to *Wells v. Batts*, 34 Am. St. Rep. 512.

BROWN v. MERRIMAC RIVER SAVINGS BANK.

[67 NEW HAMPSHIRE, 549.]

BANKS AND BANKING—LOSS OF BANK-BOOK—BY-LAWS.—A by-law of a bank providing that it is "not responsible for loss sustained when the depositor has not given notice of his book being lost or stolen, if such book be paid in whole or in part on presentation," does not relieve the bank from the duty of acting in good faith and with reasonable care.

BANKS AND BANKING—PAYMENT OF BANK-BOOK TO STRANGER—NEGLIGENCE.—Payment by a bank of the money due on a bank-book presented by a stranger, without any inquiry as to his identity and without comparing his signature with that of the real owner, is negligence, which is not excused by the owner's negligent loss of such book.

BANKS AND BANKING—PAYMENT ON LOST BANK-BOOK—EVIDENCE OF FRAUD.—In an action against a bank to recover money paid by it on a lost bank-book, upon the issue whether the owner of the book or someone with whom he was in collusion had drawn the money to defraud the bank, evidence is admissible to show the amount of money possessed by the owner of such book at the time of his death, shortly after the money was thus paid out.

Assumpsit to recover money deposited by plaintiff's intestate in the defendant's bank. The intestate's bank-book was lost or stolen from him, and presented to the bank for payment by a stranger some two months before the death of the intestate. The bank paid out the deposit to such stranger. Hence this suit.

Burnham, Brown & Warren, for the plaintiff.

D. Cross and Sulloway & Topliff, for the defendants.

551 WALLACE, J. The by-law of the bank, that "the institution will not be responsible for loss sustained when the depositor has not given notice of his book being lost or stolen, if such book be paid in whole or in part on presentation," was a material part of the contract of deposit entered into by the bank and Page when he made his first deposit and signed the agreement to be bound by the by-laws, which were printed in the deposit-book then given him, and governs the rights of the parties: *Heath v. Portsmouth Sav. Bank*, 46 N. H. 78; 88 Am. Dec. 194; *Wall v. Provident Inst. for Savings*, 6 Allen,

320. It, however, did not relieve the bank from the duty of acting in good faith and with reasonable care: *Kimball v. Norton*, 59 N. H. 1; 47 Am. Rep. 171; *Wall v. Emigrant Industrial Sav. Bank*, 64 Hun, 249; *Wegner v. Second Ward Sav. Bank*, 76 Wis. 242; *Allen v. Williamsburgh Sav. Bank*, 69 N. Y. 314. .

The motion for a nonsuit was properly denied, because there was some evidence tending to show negligence on the part of the defendants in not requiring the person who presented the book to identify himself, and in not comparing his signature with that of Page on the bank's books.

The question of contributory negligence is not involved. The plaintiff's loss of his bank-book, whether with or without negligence on his part, was not the legal cause of the injury complained of, but only the occasion of it, or merely an antecedent condition of it. The only question is, whether the defendants exercised ordinary care in paying this money in the way they did. ⁵⁵³ If they did, they are without fault, and are not liable. If they did not, their negligence is, in law, the sole cause of the plaintiff's loss: *Nashua Iron etc. Co. v. Worcester etc. R. R.*, 62 N. H. 163. The question was rightfully submitted to the determination of the jury: *Paine v. Grand Trunk Ry. Co.*, 58 N. H. 611, 613. The offer of the defendants to show that Merryfield, who was suspected of the theft of Page's book, kept a disreputable place near where Page roomed was properly denied, as that evidence does not bear on the question at issue.

As bearing on the claim of the defense that Page himself, or some one with whom he was in collusion to defraud the defendants, drew the money from the bank, the plaintiff was properly allowed to show that Page, at the time of his death, about two months and a half after the money was drawn, possessed but a small amount of money—the testimony having some tendency to negative this position of the defendants. In regard to the instructions requested by the defendants, the first was properly denied because it limited the duty of the bank to the exercise of ordinary care measured by the "facts and circumstances within their knowledge," instead of the facts and circumstances which by the use of due care they might have known, thus relieving them from the consequences of "culpable ignorance."

The second request was also properly denied, because it asked that the degree of care ordinarily exercised by the defendants in their business should be the standard which should determine

the defendants' liability, instead of the degree of care which persons of average prudence exercise. The instructions given in regard to these matters were unobjectionable.

The third and fourth requests were properly refused, since the question of contributory negligence was not involved.

Exceptions overruled.

Smith and Chase, JJ., did not sit; the others concurred.

BANKS AND BANKING—SAVINGS BANKS—PAYMENT TO UNAUTHORIZED HOLDER OF BANK-BOOK.—A bank by-law providing that the bank will not be liable for loss sustained when a depositor has not given notice that his deposit-book has been lost or stolen, and the deposit is paid in part or in full on presentation of such book, is a reasonable and proper regulation for the protection of the bank, and will protect it, except where it fails to exercise reasonable care under facts sufficient to excite the suspicion of a prudent man and put him on inquiry: *Gifford v. Rutland Sav. Bank*, 63 Vt. 108; 25 Am. St. Rep. 744, and note; *Kimball v. Norton*, 59 N. H. 1; 47 Am. Rep. 171, and extended note; *Sullivan v. Lewiston Inst. of Savings*, 56 Me. 507; 93 Am. Dec. 500.

CASES
IN THE
SUPREME COURT
OF
NEW JERSEY.

NORTH HUDSON COUNTY RAILWAY CO. v. ANDERSON.

[61 NEW JERSEY LAW, 242.]

LEGAL TENDER—MUTILATED MONEY.—The rules of the United States treasury department, with regard to the redemption of mutilated money, do not make such money legal tender.

LEGAL TENDER—MUTILATED MONEY AS CARFARE.—If paper money is tendered a railway conductor as carfare, he has a right to demand an entire bill, and is not bound to accept one from which a portion has been torn, especially if any part is absent which might aid in determining whether the bill is genuine.

LEGAL TENDER—MUTILATED MONEY.—The absence of a piece one inch and a quarter by one inch and a half in dimensions from the corner of a dollar bill makes it mutilated money, and renders it insufficient and invalid as legal tender.

LEGAL TENDER—MUTILATED MONEY AS CARFARE—EXPULSION OF PASSENGER.—A railway conductor is not bound to accept mutilated money when tendered as carfare, and is justified in ejecting a passenger who tenders it, and refuses to make other payment.

G. Holmes, for the plaintiff in error.

W. Dixon, for the defendant in error.

VAN SYCKEL, J. Anderson, the plaintiff below, tendered the conductor on a car of the company defendant below a mutilated one dollar note for his carfare. The conductor refused to accept the note because it was imperfect, and put Anderson off the car for not paying his fare. Thereupon Anderson brought suit to recover damages for the alleged wrongful act of the conductor.

The evidence of Anderson was that a piece one inch and a quarter by one inch and a half had been torn from the upper

249 left-hand corner of the bill, while the evidence on the part of the company was that the piece torn off was two and a half inches by one inch and three quarters.

The trial court was requested by the counsel of the company to charge the jury that the note was not a legal tender for the carfare, which request the court refused to grant.

On the contrary, the court did charge that the note was a legal tender.

To the refusal to charge as requested and to the charge as made the defendant company excepted, and error is thereupon assigned.

The case of *Jersey City etc. R. R. Co. v. Morgan*, 52 N. J. L. 60, is relied upon to support the ruling of the trial court, but it is not parallel. There is a genuine silver coin, worn smooth by use, not appreciably diminished in weight, and distinguishable as a coin duly issued from the mint, was held to be a legal tender.

The United States statutes make certain paper money legal tender, but there is no provision that part of such notes shall be impressed with that quality.

The rules of the treasury department with regard to the redemption of mutilated notes relate simply to redemption, and do not make such notes legal tender.

The company was not under any obligation to take upon itself the burden of applying to the treasury department at Washington for a perfect note, nor to assume the risk of failing to obtain it. The conductor had the right to demand an entire bill, and was not bound to accept one from which a portion had been torn. If any part was absent which might aid in determining whether it was a genuine bill, he was under no duty to receive it. The portion torn off the bill presented in this case constituted a substantial mutilation of it. It was not a legal tender, and the trial court erred in refusing so to charge.

The judgment below should therefore be reversed.

TENDER—IN WHAT MONEY MUST BE MADE.—The acts of Congress called "legal tender acts" do not merely confer a privilege on debtors for their benefit, but are measures of public policy, and the right under them to pay in any lawful money cannot be waived: *Galliano v. Pierre*, 18 La. Ann. 10; 89 Am. Dec. 643. As to the general requisites of tender, see monographic note to *Moynahan v. Moore*, 77 Am. Dec. 475.

WATER COMMISSIONERS v. CRAMER.

(61 NEW JERSEY LAW, 270.)

ESTOPPEL OF RECORD, TO BE EFFECTUAL, must be pleaded if there is an opportunity to plead it.

JUDGMENTS AS ESTOPPEL.—To work an estoppel, a former judgment must be pleaded, if there is an opportunity to plead it; and it must be shown to be directly in point, and to involve the same parties and the identical matter presented in the new action.

OFFICERS.—A PUBLIC OFFICE CANNOT BE THE SUBJECT OF A CONTRACT.

OFFICERS—CONTRACTS RESPECTING PUBLIC OFFICE. A board of commissioners of waterworks, empowered by statute to elect a treasurer, and required to elect annually one of their number president of the board, who may, under their direction, have general superintendence of the waterworks and the business of the board, cannot, by written contract, appoint and employ a third person, not a member of the board, as general superintendent of the waterworks and treasurer of the board for a stated period of years at a specified compensation per year. Such contract is ultra vires, and void; and the person appointed thereunder cannot enforce it, because the duties of such appointee are such as are incidental to a public office created by law for a certain term, and cannot be made the subject of a contract extending beyond such term.

R. Adrain, for the plaintiffs in error.

A. V. Schenck, for the defendant in error.

²⁷¹ **COLLINS, J.** This writ of error reviews the judgment of the supreme court on a case reserved, turned by leave into a special verdict for the purpose of permitting a writ of error.

The state of the case discloses the following facts: On February 8, 1892, the board of water commissioners of the city of New Brunswick, by resolution, appointed the plaintiff general superintendent of the waterworks of the city, and the parties entered into a written contract, whereby it was agreed that the plaintiff should perform the duties of such position for five years and the board should pay him the yearly sum of two thousand five hundred dollars in monthly payments. It was also agreed that the plaintiff should, if desired, perform the duties of treasurer of the board without further compensation. On June 12, 1893, the board, by resolution, declared vacant the position of superintendent of the waterworks and appointed another person thereto. The plaintiff tendered himself ready and willing to perform his duties, but was refused permission to do so. He has renewed his tender each month with like result, and has presented monthly bills. His suit is for the equivalent of compensation under the contract, from July 1, 1893, to December 31,

1895, with interest on the monthly installments. He has diligently sought other employment without success, except that he has been employed, without compensation, as an officer of a corporation in which he is interested.

It is claimed that the case also shows that before the suit was brought the plaintiff had recovered under said contract a judgment for the value of his services for June, 1893, and that therefore his right to recover in this suit, under the same contract, is *res adjudicata*. This claim cannot be sustained.

An estoppel of record, to be effectual, must be pleaded if there be opportunity to plead it: *Ward v. Ward*, 22 N. J. L. 699; *Black on Judgments*, sec. 784.

²⁷² Not only did the plaintiff fail to plead such former judgment in his declaration, but he did, in fact, therein aver that he had performed and been paid for the services agreed on in the contract up to July 1, 1893. He met the defense, set up by notice in lieu of plea, by an answering notice, on the merits, without reference to any former adjudication.

Nor was any estoppel of record established by proof. It was indeed admitted by the defendants that the plaintiff had "brought a suit in the supreme court for two hundred and eight dollars and thirty-three cents, for services for the month of June, 1893, under the contract, and interest on the same; that there was a verdict in his favor at the April term, 1894, of the Middlesex circuit; that a rule to show cause was thereupon granted, which was discharged at the February term, 1895, of the supreme court; that the defendants paid the judgment and that the case is reported in *Cramer v. Water Commrs.*, 57 N. J. L. 478"; but the record was not produced, and there is no competent evidence of the issue tried and determined.

The decision cited does deal with the legal question now being litigated, but it is entirely possible that a judgment for compensation for a month, during a part of which the defendants had accepted the plaintiff's services, might, under the pleadings in the case, have been warranted without involving an adjudication that the contract was enforceable as to subsequent compensation. The admission was made in order to explain why counsel did not intend to argue the point involved in the former decision, and it was coupled with the statement that it was the purpose of the defendants to review that decision by means of a writ of error to be brought upon any judgment against them in the pending cause. *Stare decisis*, not *res adjudicata*, was the obstacle confronting the defendants at the trial.

Had any purpose to claim an estoppel been disclosed, they could have objected to the evidence as not within the pleadings, and had the record of the judgment been produced they might have shown that it did not estop their defense. To work an estoppel, a former judgment must be directly in point and must involve the ²⁷³ identical matter presented in the new action. This rule is strict: *Hopper v. Chamberlain*, 34 N. J. L. 220; *Mutual Fire Ins. Co. v. Newton*, 50 N. J. L. 571; *Cromwell v. County of Sac*, 94 U. S. 351.

It must not be understood, however, that had the former judgment been pleaded and proved, it would have been an estoppel of defense to the plaintiff's suit. The decision turned on a pure question of public law, and there is very respectable authority that such a question may be reconsidered in a subsequent controversy between the parties, involving identical facts.

In *Boyd v. Alabama*, 94 U. S. 645, the supreme court of the United States held that *res judicata* would not preclude inquiry into the constitutionality of a statute interpreted as if valid in a former cause between the same parties, and held to make a contract between the state and the defendant on facts proved in both causes. The case is not decisive, for it was on an indictment, but the principle is plainly declared. In *Brownsville v. Loague*, 129 U. S. 493, the same court looked through a judgment, founded on coupons, to the statute under which the bonds were issued, and, finding it invalid, refused a mandamus to raise a tax to pay the coupons, although merged in the judgment. The judgment stood as such, but was held not to bar an inquiry into the law. The doctrine that the estoppel of a judgment is complete on the facts, but not on the law, is approved by Mr. Bigelow in his work on Estoppel, fifth edition, page 100. In this state a close precedent to the case in hand has stood unquestioned since 1859. It is the decision of the supreme court in *Bernard v. Mayor etc. of Hoboken*, 27 N. J. L. 412. The situation was this: The city, under its charter, had, by an ordinance that was claimed to make a contract, established a police force for two years, with the plaintiff as a member. After his discharge, on the disbanding of the force at the end of a half year, he brought suit and recovered the equivalent of his compensation up to the time of the bringing of his suit. In a later suit for compensation for the residue of the term, it was held that the ²⁷⁴ former judgment did not estop the defense; that as the plaintiff was a public officer, he was subject

to discharge, notwithstanding an employment by contract for a fixed term. The decision was put on the ground that this question of law was not concluded by the former judgment.

I proceed, therefore, to the merits of the defense urged to the plaintiff's suit.

The waterworks of the city of New Brunswick were, by authority of the city charter (Pamph. Laws 1873, p. 450), purchased from a private company, and, under the same enactment, are controlled as follows:

"Sec. 2. That the said waterworks shall be conducted and managed by a board of commissioners to be appointed by the common counsel, who shall hold their office for three years, one-third of them to be appointed yearly; that all the authority, powers, and duties relative thereto now exercised or performed, or that hereafter may be exercised or performed by the said company, shall be exercised and performed by the said commissioners (except as thereafter provided); and, in pursuance of this authority, the said commissioners may appoint and employ all proper assistants, officers, agents, and clerks necessary or convenient for the purpose aforesaid, at such compensation as they may deem reasonable, and shall take from their treasurer and such other officers and agents as they may appoint, such bonds and sureties for the faithful performance of their duties as they may deem proper.

"Sec. 3. That the said commissioners shall elect annually one of their number to be president of the board, who may, under their direction, have the general superintendence of the waterworks and the business of the board; the said president, or, in his absence, one of the said commissioners appointed by the said board for the purpose, shall sign all contracts and all orders on their treasurer for the payment of moneys which may be authorized by said commissioners.

"Sec. 10. That the contracts and engagements, acts and doings of the said commissioners, within the scope of their duty or authority, shall be obligatory upon and be in law ²⁷⁵ considered as done by the mayor and common council of the city of New Brunswick, and any judgment recovered against the said commissioners in their official capacity shall have the same force and effect and be enforced in the same manner as if the same had been rendered in an action against the city in its corporate name."

The defendants insist that under this statute the contract with the plaintiff was beyond the power of their predecessors who made it.

The supreme court, in its judgment now under review, followed the decision in the former suit on the same contract, to which allusion has already been made. That decision declared the grant of power conferred by section 2 above quoted to be broad enough to warrant any contract with an employé not a public officer. The discretion of the board, both as to salary and time, was held to be unlimited. I do not dissent from that view. It was correctly assumed, and is now conceded by the plaintiff, that a public office cannot be the subject of a contract. It was further held that such a position as superintendent of waterworks, created, not by statute, but by appointment under a general power to "appoint and employ all proper assistants, officers, agents, and clerks," is not a public office, but is a mere employment. The industry of the learned counsel for the plaintiff has supported that decision with many others of like purport from the courts of sister states and of the federal jurisdiction. I do not question their correctness. The real defense to the plaintiff's action was not made in the supreme court, or at least was not there discussed. It is this, that the duties embraced in the contract for the plaintiff's services are attached by the statute to public offices thereby created. Of course, the president and treasurer of the board of water commissioners are public officers. Attached to the office of president is the right to have, "under direction" of the board, "the general superintendence of the waterworks."

The plaintiff's contract was to perform the duties of "general superintendent of the waterworks of the city of New ²⁷⁶ Brunswick, under the direction of the board of commissioners thereof," for five years, at the salary fixed. It is frankly stated in the brief of plaintiff's counsel that "Mr. Cramer under the contract in question was in fact, and was designed and intended to be, simply a substitute for and a subordinate of the president of the board of commissioners, and who, in his place and under their direction, should, in the language of the act of 1873, 'have the general superintendence of the waterworks.'" Granting the power of the board with the assent of the president to afford him a salaried substitute or subordinate, it seems to me clear that such power is limited by the official tenure of the president himself. He is elected annually. The commissioners cannot make a contract that will take from future presidents their statutory right. If they can put upon a stranger a part of the duties of the president, they can so confer all the powers of that office. The board may, indeed, direct; but the direction must be to the

officer created by the law. Change the designation in the contract to its admitted equivalent and the infirmity of such a contract will more plainly appear. No one will contend that the commissioners have power to appoint a "substitute president" to perform under their direction a part of the statutory duties of the president, and make with their appointee an ir-repealable contract to pay him a salary for five years; yet this is what was in effect attempted.

The contract further provided that, if so desired, the plaintiff should perform the duties of "treasurer of the said board (giving such bond as may from time to time be required of him by the said board) without any further or additional compensation therefor." The right to plaintiff's service in the capacity of treasurer must have entered into the consideration of the contract, and, while the board did not assume to bind itself or its successors to a fixed term for the treasurership, a new board could not, if this contract were valid, make a change to another salaried treasurer without entailing on the public pecuniary loss. In effect, the attempt was to appoint a treasurer for five years, which, of course, is not warranted ²⁷⁷ by the statute. The contract of the water commissioners was plainly *ultra vires*.

I shall vote to reverse the judgment and to remit the record to the supreme court for the entry there upon the special verdict of a judgment for the defendants.

ESTOPPEL OF RECORD MUST BE PLEADED.—One who has an opportunity to plead an estoppel, but does not, thereby waives it: *Nickum v. Burckhardt*, 30 Or. 464; 60 Am. St. Rep. 822. The general rule requiring an estoppel to be pleaded does not apply in cases where there has been no opportunity to plead it. In such cases, it is admissible in evidence with the same conclusive effect as if it had been pleaded: See monographic note to *Tyler v. Hall*, 27 Am. St. Rep. 345.

JUDGMENT AS ESTOPPEL—ESSENTIALS.—A judgment, to be conclusive as an estoppel, must have been rendered upon the merits of the case and the same subject matter: *Emlden v. Lisherness*, 89 Me. 578; 56 Am. St. Rep. 442, and note. Also, the case adjudicated must have been between the same parties in the same right or capacity: *Nickum v. Burckhardt*, 30 Or. 464; 60 Am. St. Rep. 822, and note.

CONTRACTS RELATING TO OFFICES.—The incumbent of an office has not any property in it. His right to exercise it is not based upon any contract or grant, nor are public offices the subject of contract: See monographic note to *State v. Hocker*, 63 Am. St. Rep. 185, as to what are public offices.

RUNYAN v. CENTRAL RAILROAD COMPANY.

[61 NEW JERSEY LAW, 587.]

CARRIERS—BAGGAGE—WHAT MAY BE CARRIED AS—LIMITATION BY TICKET.—A railroad ticket, stating that "free transportation is allowed for one hundred and fifty pounds of baggage (wearing apparel) only, and company's liability expressly limited to one dollar per pound," does not restrict, nor in any way affect, the right of the passenger to carry personal baggage with him, but simply limits the extent of accommodation he may have with respect to baggage committed to the custody of the carrier.

CARRIERS—BAGGAGE—WHAT MAY BE CARRIED AS. In addition to the baggage committed to the custody of the carrier, a passenger, who has paid fare, has a right to take with him for use his personal baggage appropriate to the journey and its object—that is, not only wearing apparel for use and ornament, but also other articles, within reasonable limit, the use of which is personal to him during his journey and in accomplishing its purposes.

CARRIERS—BAGGAGE—MERCHANDISE AS CUSTOM—EVIDENCE.—If a common carrier has for a long time acquiesced in, and made accommodation for, the carriage of small packages of merchandise of its passengers as personal baggage, so as to lead them to accept and rely upon its attitude in that respect as one of its regulations, it can deprive them of such privilege only after reasonable notice of its rescission of such regulation; and a passenger refused admission to the carrier's cars, because he desires to take with him such merchandise, may prove the existence of such regulation in an action to recover for such refusal of admission.

Action to recover for breach of contract of carriage. Runyan, who resided in the city of Elizabeth, New Jersey, bought of the defendant an excursion ticket to New York and return, which provided that: "Free transportation is allowed for one hundred and fifty pounds of baggage (wearing apparel) only, and company's liability expressly limited to one dollar per pound." Plaintiff traveled to New York on the ticket, and there purchased a small package of nails, and he had with him, in addition thereto, when he attempted to start on his return journey, a satchel containing a pair of gloves and some catalogues and papers pertaining to his business, and another small package containing a letter-file and a pair of rubber shoes. On presenting his ticket for his return fare, he was refused admission to the defendant's cars because of his satchel and packages. He then walked about one mile to another station on defendant's road and there purchased a ticket from that station to his home, such ticket containing a similar regulation as to baggage. He was again refused admission to the defendant's cars on this latter ticket because of his satchel and packages. He then purchased a ticket from the same station to Newark, New Jersey, and was again refused admission to defendant's cars, for the

same reason before stated, and the last ticket contained the same stipulation as to baggage as the others. Plaintiff suffered a nonsuit and now assigns error.

R. H. McCarter, for the plaintiff in error.

W. H. Corbin, for the defendant in error.

540 THE CHANCELLOR. It does not appear that either of the three tickets held by the plaintiff purported to be an agreement between him and the company. Each was simply a receipt or token that the holder was entitled to transportation between given stations according to the contract the law made between him and the carrier upon his paying the lawful fare, which contained notices of regulations of the carrier to the ⁵⁴¹ effect that the passage should be continuous, and that the holder might have transported, without additional charge, one hundred and fifty pounds of wearing apparel under limited responsibility upon the part of the defendant. We do not understand that this last stated regulation is designed to restrict or in any way affect the common-law right of the passenger to carry personal baggage with him. We deem it to simply state the extent of accommodation the passenger might have with respect to baggage committed to the custody of the defendant. The notice is not couched in the language of an agreement that it shall be a substitute for the passenger's common-law right, and nothing in the case discloses that the plaintiff saw it and accepted it as such substitute. We then deem the plaintiff to have been a traveler with the rights which the law accords.

He was entitled to take with him for use his personal baggage appropriate to the journey and its object—that is, not only wearing apparel for use and ornament, but also other articles, all within reasonable limit, the use of which was personal to him during his journey, and in accomplishing its purposes. To illustrate the character of such articles, other than wearing apparel, it is settled that a sportsman journeying for sport may take his gun case or fishing apparatus: *Hawkins v. Hoffman*, 6 Hill, 586; 41 Am. Dec. 767; an artist may take his easel when he is on a sketching tour: *Merrill v. Grinnell*, 30 N. Y. 594; a surgeon traveling with troops may take his surgical instruments: *Hannibal R. R. v. Swift*, 12 Wall. 262; and a student in pursuit of study may take his needed books and manuscripts: *Hopkins v. Westcott*, 6 Blatchf. 64. But the plaintiff could not take with him as personal baggage mere merchandise, the use of

which was not personal to him in accomplishing the purpose of the journey: *Collins v. Boston etc. R. R. Co.*, 10 Cush. 506; *Hawkins v. Hoffman*, 6 Hill, 586; 41 Am. Dec. 767; *Stimson v. Connecticut River R. R. Co.*, 98 Mass. 83; 93 Am. Dec. 140; *Humphreys v. Perry*, 148 U. S. 627; *Railroad Co. v. Fraloff*, 100 U. S. 24; *Belfast etc. Ry. Co. v. Keys*, 9 H. L. Cas. 556; nor ~~was~~ articles intended for use at his permanent abode, disconnected with his personal use during the journey, or in accomplishing its purposes: *Macrow v. Great Western Ry. Co.*, L. R. 6 Q. B. 612.

In the case considered it is deemed that the plaintiff's rubbers and gloves, and, as well, the catalogues and memoranda carried for the business purposes of the journey (*Staub v. Kendrick*, 121 Ind. 226) were personal baggage, but that inasmuch as neither the nails nor the letter file appear to have had any connection with the personal use of the plaintiff upon the journey or in the accomplishment of its purpose, or to be appropriate therefor, we deem that they cannot be regarded as personal baggage. The nails were purchased immediately prior to the plaintiff's return to Elizabeth, under circumstances which make it quite plain that they could have been carried only for uses not personal to the plaintiff either during his journey or in furtherance of its purposes.

But it is insisted for the plaintiff that at the trial he offered to show that the defendant had, by long-continued acquiescence in and provision in its passenger-cars for the carriage of small packages of merchandise by its passengers, established as one of its regulations that such parcels might be carried as personal baggage, to the end that he might urge that such regulation gave him a right to carry the parcels in question until, at least, he should have timely notice of the discontinuance of the regulation, and that such offer was overruled erroneously. This offer, it is claimed, is embodied in the two questions overruled.

It is deemed that the questions, though introductory, do with sufficient clearness embody the offer. The trial judge does not appear to have had doubt as to their purpose, otherwise he would have called upon counsel to state it. And we think, also, if the defendant company had, previous to the denial of admission of the plaintiff to their cars complained of, for a long time acquiesced in and made accommodation for the carriage of small packages of merchandise of its passengers ~~as~~ as personal baggage, so as to lead them to accept and rely upon its attitude in that respect as one of its regulations, that it could resume its

right under the law only after reasonable notice of its rescission of the regulation so made. It could not suddenly enforce the right resumed against passengers who were in good faith traveling in reliance upon the previous regulation without reasonable notice, and ignorant of, and unprepared for any change in it.

We think that the questions asked were admissible as a step in the plaintiff's proofs, and were wrongly overruled, and for that reason that the judgment should be reversed.

CARRIERS—BAGGAGE—WHAT MAY BE CARRIED AS.—Baggage is defined to be whatever a passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities, or to the ultimate purpose of the journey: *Kansas City etc. Ry. Co. v. McGahey*, 68 Ark. 344; 58 Am. St. Rep. 111. Thus, merchandise is not baggage: See monographic note to *Hutchings v. Western etc. R. R. Co.*, 71 Am. Dec. 160; nor a large amount of jewelry carried by a man traveling alone: *Metz v. California etc. R. R. Co.*, 85 Cal. 329; 20 Am. St. Rep. 228; nor articles carried for the purposes of business, as stage properties or costumes: *Oakes v. Northern Pac. R. R. Co.*, 20 Or. 392; 23 Am. St. Rep. 128. Baggage does not include an unreasonable amount of money: Note to *Railway Co. v. Berry*, 46 Am. St. Rep. 215; nor samples of merchandise carried for the purpose of making sales: *Kansas City etc. R. R. Co. v. State*, 65 Ark. 363; 67 Am. St. Rep. 933.

WILSON v. TRENTON.

[61 NEW JERSEY LAW, 509.]

MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS.—Property owners are not chargeable with the price of municipal improvements, but only with an equivalent for the special benefits they derive therefrom; and such equivalent cannot exceed the reasonable value of the improvement, and hence the municipality, and not the assessable property owners, must bear the excess of price beyond fair cost.

MUNICIPAL CORPORATIONS—STREET IMPROVEMENT—CONTRACTS TO KEEP IN REPAIR.—Municipal authorities, when contracting for the paving of a street, may embody in the contract provisions by which the contractor guarantees the durability of the pavement for a stated period and to repave at a stated price all openings made in the street during such period, but such contract must not raise the price of paving to property owners assessed therefor beyond the fair cost of a good pavement, and they may show that the nominal price for paving under the contract includes extra compensation for the guaranty, and for repaving, and thus reduce the assessment to the cost of a proper pavement without the added stipulations.

APPELLATE PRACTICE—QUESTION NOT REVIEWABLE.—The determination by municipal authorities as to who among several bidders is the lowest, if supported by evidence, cannot be reviewed on appeal or error.

APPELLATE PRACTICE.—LAWFUL CONCLUSIONS on disputed questions of fact cannot be interfered with on appeal.

J. H. Backes, for the plaintiff in error.

J. Ballstab and G. W. Macpherson, for the defendants in error.

*** DIXON, J. The plaintiff in error, owning land on Hamilton avenue, in the city of Trenton, sued out a writ of certiorari to set aside a contract which the city had made for paving that avenue with Trinidad Lake asphaltum. The supreme court having adjudged the contract legal, he has brought the matter to this court by writ of error.

The first reason urged by counsel of the plaintiff for holding the contract unlawful is that, besides requiring the contractor to lay a good pavement, it binds him to guarantee the ^{good} durability of the pavement for five years, and during that period to maintain the pavement in good condition, and also binds him to repave, at a price stated, all openings made in the street during the same time. The effect of these provisions, it is argued, has been to enhance the price nominally charged for laying a good pavement by making it cover the cost of maintenance and the cost of repaving beyond the stated price, which is said to be inadequate, and thus will be to increase the assessment to be levied upon the property owners, who are legally assessable for laying the pavement, but not for maintaining or re-laying it.

This contention, we think, ignores the principle on which assessments for municipal improvements are levied in this state. Property owners are not chargeable with the price of such improvements, but only with an equivalent for the special benefits they derive therefrom. Such an equivalent cannot exceed the reasonable value of the improvement, and hence the municipality itself, not the assessable property owners, must bear the excess of price beyond fair cost. If, therefore, the commissioners who levy an assessment for this improvement charge upon the property owners anything beyond the fair cost of laying a good pavement, their assessment will, to that extent, be illegal. The same evidence which would now show that the nominal price for paving includes compensation for the guaranty and for repaving will be then available for the same purpose, and, if produced, will result in reducing the assessment to such sum as would have secured a proper pavement without the added stipulations. The plaintiff's complaint, if well founded in fact, must be reserved until the assessment is levied.

This point being thus decided, we see no reason for denying the power of the municipal authorities to include in the same contract the three stipulations above mentioned. The preparation and laying of asphaltum as a pavement require special skill, and the quality of the pavement cannot well be ascertained by municipal authorities without the test of time. It is therefore reasonable that those who lay such pavement ⁶⁰¹ should submit it to this test in order to insure its goodness. And since the contractors who engage in this kind of work obtain their crude asphaltum from different sources and subject it to various processes of preparation, there is a manifest fitness in providing that those who lay the original pavement should relay it whenever openings are made, so that uniformity of work and materials may be secured. It thus appears that the guaranty of durability and the stipulation for repaving are but incidents of the principal object of the bargain dictated by prudence, and, therefore, rightly included with it in a single contract.

Another contention of the plaintiff is, that the contract was not awarded to the lowest bidder, as section 107 of the city charter, with some reservations, requires.

It appears from the evidence in the case that the contract was awarded to the person whom the city authorities, taking into consideration all the provisions of the agreement, found to be the lowest bidder. This determination of fact the supreme court did not overturn, and, on examining the testimony, we cannot say that it is without legal support. The question who was the lowest bidder was primarily submitted by the law to the city authorities, and their decision must stand until legally reversed. On writ of error this court does not interfere with lawful conclusions on disputed questions of fact, and therefore we must accept it as settled that this contract was awarded to the lowest bidder. Hence, we need not consider under what circumstances a contract may be given to one who is not the lowest bidder.

With regard to the other objection, that the specifications on which bids were invited were uncertain, we think the specifications are reasonably definite, in view of the desirability of competition among the various pavements in use.

The judgment of the supreme court is affirmed.

THE PRINCIPAL CASE incidentally affirms a principle of very great importance, which has recently been emphasized and applied by the supreme court of the United States. It is this: that it is not within the power of a municipality or of a state to impose upon real

property any burden or liability for the construction of public improvements adjacent thereto in excess of the benefit thereby added to, or conferred upon, such property. This question may be presented in two phases—a public street may be improved at very great cost, which is sought to be assessed against the property abutting thereon, irrespective of the benefits conferred, or, though it is not claimed that the benefits resulting from the public work are less than the costs thereof, it may be insisted that, as to some parcel of land affected by the work, it has in some mode been charged with more than its just share of the benefits accruing to it. In view of what is said in the principal case and in other decisions in the same and in other states, it must be accepted as settled that there is no right or power to impose upon property the whole cost of any public improvement, unless it further appears that such property has been to that extent benefited: *Thomas v. Gain*, 35 Mich. 155; 24 Am. Rep. 535; *Bogert v. Elizabeth*, 27 N. J. Eq. 568; *Hammett v. Philadelphia*, 65 Pa. St. 146; 3 Am. Rep. 615; *Barnes v. Dyer*, 56 Vt. 469.

In many of the states statutes have been enacted authorizing the opening or improving of public streets and the assessment of the cost thereof against the real property abutting thereon without taking into consideration whether the property was benefited to the extent of the cost, and also without considering the special benefit to each parcel, and on the assumption that all the land was equally benefited, directing an assessment upon each tract in proportion to its frontage upon the street opened or improved. It appears to us that these statutes cannot be sustained, and that, whenever an assessment is made thereunder the property owner may avoid it by showing that his property has not been benefited to the amount assessed against it.

In *Norwood v. Baker*, 172 U. S. 298, decided December 12, 1898, it appeared that the statutes of Ohio, in the case of the opening of a new road, authorized a special assessment upon bounding and abutting property by the front foot for the entire cost and expense of the improvement. An assessment, made in pursuance of the laws of this state, was assailed in the national court upon the ground that it was in violation of the Fourteenth Amendment, providing that no state should deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. It was not denied that abutting property owners might be subject to special assessments to meet the expenses of opening public highways in front of their property, so far as such assessments rested upon the ground that special or peculiar benefits had accrued to such property from the public improvements for the payment of which the assessments had been made, but it was determined that "the principle underlying special assessments to meet the cost of public improvements is, that the property upon which they are imposed is peculiarly benefited, and therefore the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement. But the guaranties for the protection of private property would be seriously impaired if it were estab-

lished as a rule of constitutional law that the imposition by the legislature upon particular private property of the entire cost of a public improvement, irrespective of any particular benefits accruing to the owner from such improvement, could not be questioned by him in the courts of the country. It is one thing for the legislature to prescribe it as a general rule that property abutting on a street opened by the public shall be deemed to have been specially benefited by such improvement, and therefor should specially contribute to the cost incurred by the public. It is quite a different thing to lay it down as an absolute rule that such property, whether it is in fact benefited or not by the opening of the street, may be assessed by the front foot for a fixed sum representing the whole cost of the improvement, and without any right in the property owner to show, when an assessment of that kind is about to be made, that the sum so fixed is in excess of the benefits received. In our judgment, the exaction from the owner of private property of the costs of public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation. We say substantial excess, because exact equality of taxation is not attainable, and for that reason the excess of costs over special benefits, unless it be of a material character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment." It was hence decided that if the sum attempted to be assessed against a parcel of property for the expenses of opening a public street in front thereof was in substantial excess of the benefits conferred upon such property by such improvement, that the assessment could not be maintained, and, furthermore, that the property owner was entitled to the aid of a court of equity in preventing the enforcement of the assessment by the sale of his property. This decision seems to leave a property owner in every instance in which an assessment is imposed upon his property for work done upon a public street or for any other public improvement to resist such assessment by showing that his property has not been benefited to an amount equal to the assessment. The principle had already been applied in California to assessments made upon swamp lands to pay the expense of the reclamation thereof. Although in that state commissioners were by statute required to be appointed for the purpose of assessing upon each parcel of land its proportion of the charge for reclamation, they were not permitted to make such assessment in any arbitrary manner, but were required to apportion it among the several parcels of land benefited according to the benefit conferred upon each parcel. It was, nevertheless, held that the action of the commissioners was not conclusive, and that when suit was brought to collect the assessment the landowner might present the issue whether his property had been benefited to the extent determined by the commissioners, and, if it had not, that the assessment made by them could not be sustained: *Reclamation District v. Phillips*, 108 Cal. 306.

In *English v. Wilmington*, 2 Marvel, 63, decided by the court of appeals of Delaware before the supreme court of the United States

had determined *Norwood v. Baker*, 172 U. S. 298, a statute providing for the construction of sewers and assessing the cost thereof on all property adjoining a sewer, or with access thereto at a fixed and uniform rate per foot of frontage, and per square foot of area, to a certain depth, was sustained.

PUBLIC CONTRACTS—LETTING TO LOWEST BIDDER—REVIEW OF ACTION OF OFFICERS.—Statutory requirements that public contracts be let to the lowest bidder are not intended for his protection, but for that of the public, and hence he has no remedy to recover damages sustained by their violation: *Talbot Paving Co. v. Detroit*, 109 Mich. 657; 63 Am. St. Rep. 604. Ordinarily, courts will not decide disputed facts or weigh evidence in order to review the action of public boards in awarding public contracts: See monographic note to *State v. Rickards*, 50 Am. St. Rep. 489-497.

MELEY v. WHITAKER.

[61 NEW JERSEY LAW, 602.]

INSURANCE—INSOLVENCY OF INSURER—POWERS OF RECEIVER.—If a premium note given by an insured to the insurer provides that the former is to pay to the latter a certain sum of money "in such proportions and at such time or times as the directors of said company may agreeably to their charter require," the power given to such directors by the note, upon the insolvency of the insurance company, passes to the receiver appointed for it, and the insured is bound to pay an assessment on the note levied by the receiver under the charter of the insurer.

D. J. Pancoast, for the plaintiff in error.

S. H. Richards and T. E. French, for the defendant in error.

602 DIXON, J. On September 19, 1870, the Millville Mutual Marine and Fire Insurance Company issued to the plaintiff in error a policy of insurance, No. 1171, for which the latter gave the company a note in the following form:

"\$600.00.

"For value received in Fire Policy No. 1,171, dated the _____ day of _____, 18—, issued by the Millville Mutual Marine and Fire Insurance Company, I promise to pay to the said company the sum of six hundred dollars, in such proportions and at such time or times as the directors of said company may, agreeably to their charter, require.

"Given as an assessment of said policy.

"GEORGE MELEY."

603 On August 10, 1872, the company issued to him another policy, for which he gave a similar note in the sum of eight hundred and twenty-five dollars, and on December 10, 1883, the

company issued to him a third policy, for which he gave a like note in the sum of six hundred dollars.

On September 21, 1885, the company having become insolvent, a bill was filed in the court of chancery, pursuant to the statute, to have it so adjudged and its assets administered. On this bill the company was declared to be insolvent, and the defendant in error was appointed its receiver.

On January 26, 1886, the receiver presented to the chancellor a petition asking the aid and direction of the court in the making of an assessment upon the notes above mentioned and all similar obligations held by the company, in order to pay the company's debts, and thereupon the chancellor referred the matter to a master, to ascertain and report the facts required for such an assessment. Accordingly, the master, after summoning all the makers of such notes to appear before him, ascertained and reported the necessary facts, and on July 16, 1892, the chancellor directed the receiver to levy a corresponding assessment. This the receiver did, and fixed March 1, 1894, as the day for payment, of which he gave due notice.

The plaintiff in error having failed to pay the assessment levied on his notes, the receiver brought suit in the supreme court to recover the same, and upon a special verdict found in the Camden circuit, the supreme court rendered judgment for the receiver, which judgment is now before us for review.

In assailing this judgment, counsel for the plaintiff in error has directed his argument wholly against the proposition laid down in the opinion of the supreme court, that the plaintiff in error was a party to the proceedings in the court of chancery to the extent that its adjudication as to the fact and the amount of his indebtedness to the insolvent company bound him and could be reviewed only by appeal therefrom.

If the maintenance of this proposition were necessary to support the judgment, we would hesitate to affirm it.

⁶⁰⁴ The notes in suit were mere legal obligations, the character of which was not changed by the fact that the promisee became insolvent and was summoned into the court of chancery for the settlement of its affairs: *Barkalow v. Totten*, 53 N. J. Eq. 573. We have not been able to discover any principle or any established practice by which, without any bill or petition filed against him, and without any subpoena to answer served upon him, the maker of such an obligation could be compelled to litigate its validity and effect in a court of equity.

No doubt if the plaintiff in error had appealed to the chancellor from the proceedings of the receiver or of the master,

who might be deemed an assistant to the receiver, as was done in *Doane v. Millville Mut. etc. Ins. Co.*, 43 N. J. Eq. 522; 45 N. J. Eq. 274, and as all persons thinking themselves aggrieved by the proceedings of such receivers may, under the statute, appeal, the jurisdiction of the court would have attached to his complaint, and the chancellor's decision thereon would have possessed the finality of a judicial decree *inter partes*. But in the absence of such an appeal and on the facts of this case, we find difficulty in attempting to regard the assessment made against the plaintiff in error as a conclusive judgment, notwithstanding the indications of a contrary view in *Hawkins v. Glenn*, 131 U. S. 319, and cases cited.

But the question does not at this time demand critical examination, for assuming that the proceedings in chancery have not such force, still we think the judgment of the supreme court should be affirmed, on the ground now to be stated.

According to the terms of the contracts the stipulated sums were payable "in such proportions and at such times as the directors of the company might, agreeably to their charter, require." The law in force when these contracts were made provided in effect that a receiver appointed on the insolvency of a corporation should possess all the powers of the corporation and of the directors which would be conducive to the settlement of its affairs. This appears from section 7 of the ⁶⁰⁵ insolvent corporation act, approved April 15, 1846 (*Nixon's Digest*, 404), under which the receiver is clothed with full power and authority to demand, sue for, collect, and receive all rights and credits, moneys and effects, choses in action, bills, notes and property of every description belonging to the corporation at the time of its insolvency. As was said by Mr. Justice Magie, speaking for this court in *Vanderbilt v. Central R. R. Co.*, 43 N. J. Eq. 669. 681: "In general, these powers are such as suffice to enable the assets and property of the corporation to be turned into money and distributed among the creditors. These powers are to be exercised by the receiver under the control of the court."

This statutory power of the receiver to sue upon these contracts included, therefore, by reasonable implication, the power of doing whatever the corporation or its directors were required to do as a preliminary to suit. One of the steps necessary to be taken by the directors, in order to render these notes enforceable by suit, was a determination, made agreeably to the charter, of the proportions in which and the times when payment should be required: *Grosse Isle Hotel Co. v. P'Anson*, 43

N. J. L. 10; 43 N. J. L. 442; *Scovill v. Thayer*, 105 U. S. 143. Consequently, the right to make such a determination passed to the receiver in insolvency. The express contracts of the plaintiff in error to pay in such proportions, et cetera, as the directors might, agreeably to the charter, require, contained promises, implied by operation of law, to pay in such proportions, et cetera, as the receiver, on the insolvency of the company, might, agreeably to the charter, require. An assessment made by the receiver binds the promisor as he would have been bound if the directors had made it: *Hawkins v. Glenn*, 131 U. S. 319, 329. See, also, *Falk v. Whitman Cigar Co.*, 55 N. J. Eq. 396.

In order to render the plaintiff in error thus responsible to the receiver instead of the company, it was no more requisite that he should be made a party to the insolvency proceedings than it is that any promisor should be a party to a legal transfer of his obligation from the original promisee to a ⁶⁰⁶third person; and in order to legalize the receiver's assessment, notice to the promisors that it would be made was no more essential than it would have been if the directors had acted, so that the facts on which the receiver's suit rests are the validity of these notes, the levying of an assessment thereon by him agreeably to the charter, and due notice of the payment required.

Although the special verdict in this cause lacks that directness and precision of statement which ought to characterize such a record, yet we are able to gather therefrom the facts deemed essential to support the judgment. Indeed, counsel for the plaintiff in error has not intimated that any such fact is wanting, save in this, that the last policy, he contends, was issued, not upon the mutual plan, but as an "especial insurance," under section 14 of the charter (*Pamph. Laws*, 1859, p. 144), and therefore no premium note, he insists, should have been given therefor. But certainly, nothing in the charter or in general law forbade the giving of such a note for the insurance actually obtained, and the policy in terms provides for it. We perceive no legal reason for relieving the promisor from the obligation which he voluntarily assumed.

The judgment must be affirmed.

RECEIVERS—POWERS OF.—The receiver of a corporation may, with the permission of the court, do anything which the corporation might lawfully have done to make the most out of its assets: *Pacific Ry. Co. v. Wade*, 91 Cal. 449; 25 Am. St. Rep. 201, and note. A receiver for an insolvent corporation, appointed at the instance of its creditors, is clothed with all their rights: *Cole v. Satsop R. R. Co.*, 9 Wash. 487; 43 Am. St. Rep. 858, and note.

WHALEN v. CONSOLIDATED TRACTION COMPANY.

[61 NEW JERSEY LAW, 606.]

CARRIERS—DUTY TO PASSENGERS—ASSUMPTION OF RISKS.—A passenger, by taking his stand upon the outside running-board of a street-car, assumes the risk of such damages as are obviously incident to that position, but the carrier, by accepting him there as a passenger, owes to him a high degree of care.

CARRIERS—NEGLIGENCE—PRESUMPTION.—If a passenger shows that he was injured while in charge of a common carrier through some defect in the appliances of the carrier or through some act or omission of the carrier's servant, which might have been prevented by due care on the part of the carrier, negligence is properly inferred, in the absence of any proof of the exercise of such care.

CARRIERS—DEGREE OF CARE REQUIRED.—The care due from a common carrier and his servants toward passengers in their charge, is a high degree of care under all circumstances.

T. McEwan, Jr., and F. M. Hardenbrook, for the plaintiff in error.

Vredenburg & Garretson, for the defendant in error.

THE COURT. DIXON, J. The circumstances presented by the plaintiff's evidence on the trial of this cause are as follows: On June 21, 1896, about forty minutes past 9 o'clock at night, the plaintiff, with his wife and four young children, boarded a trolley-car of the defendant, in Bayonne, for the purpose of riding to Jersey City. The car was an open one, with a board running along the outside, upon which the conductor walked to collect fares. When the car stopped to receive the plaintiff, it was crowded with passengers, not only within the car but also on the running-board outside. The plaintiff's wife and children secured places inside, but the plaintiff himself stood upon the board near the middle of the car, crowded in among other passengers and holding on to an upright post of the car. When he had been in that position about fifteen minutes, the conductor, who had passed by him several times collecting fares, approached him again in going from front to rear on the board, and then occurred the accident for which the plaintiff sues, and which, on the trial, he thus described:

THE WITNESS. "He [the conductor] was passing right around me, and somehow he stumbled, I could not say how, but he caught hold of me to save himself; . . . he caught me by the shoulder and threw me off the car; . . . he tried to catch the upright, and lost his foot and caught hold of me."

Upon this evidence a judgment of nonsuit was entered, which the plaintiff seeks to have reversed.

It is clear that, although, by taking his stand upon the outside running-board of the car, the plaintiff assumed the risk of such damages as were obviously incident to that position, still the company, by accepting him there as a passenger, owed to him the duty arising out of that relation: *City Ry. Co. v. Lee*, 50 N. J. L. 435; 7 Am. St. Rep. 798; *New York etc. R. R. Co. v. Ball*, 53 N. J. L. 283; *Watson v. Camden etc. R. R. Co.*, 55 N. J. L. 125; 39 Am. St. Rep. 624; *Graham v. Manhattan Ry. Co.*, 149 N. Y. 336. Consequently, while one of the obvious dangers of his position was that resulting from the use of the board by the conductor, it would, nevertheless, be competent for the plaintiff to insist that, in the manner of using it, the conductor had been guilty of a breach of the defendant's duty toward him.

It is contended for the plaintiff that the company might be held responsible for not providing a car within which he might ride safely, or for not furnishing other means for the passage of the conductor in the discharge of his functions; but, even if it could be maintained that the company was under such obligations to the public, it was evident to the plaintiff, before he boarded the car, that, with respect to that ride, those duties could not be performed toward him, and for that ride he took the risk of their nonperformance and absolved the company therefrom.

Under the circumstances of this case, the only breach of duty chargeable against the defendant could exist in a lack of due care on the part of the conductor as he passed along the board, and therefore we must consider whether the evidence was such as should have been submitted to the jury on the question of his negligence.

*** The ordinary rule in actions for negligence is, that plaintiff must produce some affirmative proof of the want of care on the part of the defendant, and if his evidence is as consistent with care as with negligence in the defendant, he must fail: *Cotton v. Wood*, 8 Com. B., N. S., 568; *Hammack v. White*, 11 Com. B., N. S. 588; *Weller v. McCormick*, 17 N. J. L. 397; 54 Am. Rep. 175; *Searles v. Manhattan Ry. Co.*, 101 N. Y. 661.

But in actions for injuries suffered by passengers while in charge of common carriers the rule is somewhat different. The rule there applicable is modified by the doctrine which seems to have given rise as to the almost absolute responsibility of the common carrier of goods—the doctrine that the carrier's greater means of ascertaining and disclosing the cause of damage place upon him a greater duty of explanation.

The rule supported by authority is, that when a passenger shows that he was injured through some defect in the appliances of the carrier, or through some act or omission of the carrier's servant, which might have been prevented by due care, then the jury have the right to infer negligence, unless the carrier proves that due care was exercised.

Thus, in *Christie v. Griggs*, 2 Camp. 79, the plaintiff, a passenger in a stagecoach, proved that the axletree broke, and Chief Justice Mansfield, deeming such proof *prima facie* evidence of negligence, called upon the defendant to show that the damage arose from mere accident.

In *Carpue v. London Ry. Co.*, 5 Q. B. 747, where the train had left the track, Chief Justice Denman instructed the jury that the exclusive management of the machinery and railway being in the hands of the defendants, it was presumable that the accident arose from their want of care, unless they gave some explanation of the cause by which it was produced, which explanation the plaintiff, not having the same means of knowledge, could not reasonably be expected to give.

In *Stokes v. Saltonstall*, 13 Pet. 181, where the plaintiff's wife had been injured by the upsetting of a stagecoach in ⁶¹⁰ which she was a passenger, a charge to the jury that the fact that the coach was upset was *prima facie* evidence of carelessness was approved.

In *Feital v. Middlesex R. R. Co.*, 109 Mass. 398, 12 Am. Rep. 720, it was held that, on trial of an action against a street railway corporation for injuring a passenger, proof that the injury was caused by a car running off the track, at a place where the track and the car were under the exclusive control of the defendants, was sufficient to charge them with negligence, in the absence of any evidence that the accident happened without their fault. The same application of the rule was made in *Seybolt v. New York etc. R. R. Co.*, 95 N. Y. 563; 47 Am. Rep. 75.

In *Pennsylvania R. R. Co. v. MacKinney*, 124 Pa. St. 462, 10 Am. St. Rep. 601, the plaintiff, while a passenger in one of the defendant's trains, was struck in the eye by some hard substance hurled from without, and the trial judge charged the rule of law applicable to the case to be that the mere happening of an injurious accident to a passenger while in the hands of a carrier will raise, *prima facie*, a presumption of negligence and throw the onus of proving that it did not exist on the carrier. Of this charge the supreme court said, "it is an old and well-settled principle of law, of very general application in cases of injury to passengers while in the course of transportation,"

but that it could be invoked only when there was some evidence tending to connect the carrier or his servants, or some of the appliances of transportation, with the happening of the injury: See, also, 2 Sherman and Redfield on Negligence, 5th ed., *516.

Under this rule we think the plaintiff's evidence presented a question for the jury. His injury was the direct result of the conductor's act in seizing him to save himself as he stumbled. The cause of his stumbling the plaintiff did not know and could not reasonably be required to ascertain and disclose, while it probably was known to the conductor, the agent of the defendant. Bearing in mind that the care due ⁶¹¹ from a common carrier and his servants toward passengers in their charge is a high degree of care (*Readhead v. Midland Ry. Co.*, L. R. 4 Q. B. 379,393; *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282; *Feital v. Middlesex Ry. Co.*, 109 Mass. 398; 12 Am. Rep. 720; *City Ry. Co. v. Lee*, 50 N. J. L. 435; 7 Am. St. Rep. 798; *Consolidated Traction Co. v. Thalheimer*, 59 N. J. L. 474), it is certainly not irrational to infer that the conductor, who had passed so often over the same place, under apparently the same conditions, without stumbling, on this occasion stumbled through a failure to exercise that high degree of care required of him. To preclude the jury from drawing such an inference, the defendant should have been called on to explain the true cause of the occurrence.

The judgment of nonsuit must be reversed and a venire de novo awarded.

CARRIERS OF PASSENGERS—CARE REQUIRED—ASSUMPTION OF RISK—STREET RAILROADS.—In carrying passengers, railroads are held to the highest degree of care, diligence, and skill consistent with such mode or means of transportation under the circumstances; *McKeon v. Chicago etc. Ry. Co.*, 94 Wis. 477; 59 Am. St. Rep. 910, and note. This rule applies to street-car companies: *Appleby v. St. Paul etc. Ry. Co.*, 54 Minn. 169; 40 Am. St. Rep. 308. There is a corresponding obligation on the part of the passenger to act with care and prudence: *Weber v. Kansas City etc. Ry. Co.*, 100 Mo. 194; 18 Am. St. Rep. 541. If there is standing room inside a street-car with pendant straps for holding on, it is negligent to ride on the platform: *Andrews v. Capitol etc. R. R. Co.*, 2 Mack. 137; 47 Am. Rep. 266. But it is not negligence per se for a passenger to stand or ride on the platform or steps of a crowded street-car: *Pray v. Omaha Street Ry. Co.*, 44 Neb. 167; 48 Am. St. Rep. 717, and note.

CARRIERS—INJURY TO PASSENGER—PRESUMPTION OF NEGLIGENCE.—Injury to a passenger in consequence of something done or not done by the carrier or his employés, or connected with the appliances of transportation, raises a presumption of negligence, which the carrier is required to rebut: *Fleming v. Pittsburg etc. Ry. Co.*, 158 Pa. St. 130; 38 Am. St. Rep. 835; *Chicago Street Ry. Co. v. Rood*, 163 Ill. 477; 54 Am. St. Rep. 478; *Hite v. Metropolitan Street Ry. Co.*, 130 Mo. 132; 51 Am. St. Rep. 555, and notes thereto.

DELAWARE, LAOKAWANNA AND WESTERN RAILROAD COMPANY v. REICH.

[81 NEW JERSEY LAW, 636.]

NEGLIGENCE—DUTY TO TRESPASSING CHILDREN.—

An owner who constructs or places upon land anything which, though necessary for its proper enjoyment, happens to be of a character attractive to children, and at the same time dangerous to them if they yield to the attraction, does not thereby invite them to enter the premises, nor become charged with the duty of using reasonable care to keep them off his premises, or to protect them when they enter as trespassers.

NEGLIGENCE—DUTY TO TRESPASSING CHILDREN.—A

landowner is under no obligation to a mere licensee or trespasser, even though a child of tender years, to keep his premises in a safe condition; and such child, upon entering, assumes all risk of danger incident to the condition of the premises.

NEGLIGENCE—TURNABLES—INJURIES TO CHILDREN.—

A railroad company which maintains an unguarded turntable upon its own land near a public street is not liable to a child of tender years, who comes upon the land without invitation, and is injured while playing upon or about such turntable.

Action to recover for an injury to the plaintiff, a young child, received upon a turntable of the defendant company, while attempting to rescue her younger brother from what she considered a situation of danger. Such turntable was located upon the private land of the defendant company near a public street, and was entirely unguarded. Children of all ages frequently congregated about, and played upon, the turntable without invitation or permission from the defendant company. The plaintiff recovered a verdict in the court below, and the defendant sued out this writ of error.

Depue & Parker, for the plaintiff in error.

S. Kalisch, for the defendant in error.

⁶³⁷ GUMMERE, J. This case was tried below, and has been argued here by counsel on both sides, on the theory that the legal position of the parties, so far as their respective rights and duties are concerned, is the same as if the plaintiff had been injured while herself playing upon the defendant company's turntable, in ignorance of the danger to which she was subjecting herself, and that such ignorance was due to the fact that she was not of an age to understand or appreciate the peril. For the purpose of disposing of the case, therefore, it will be assumed that this is the true situation of the parties, although it may well be considered that the plaintiff, in doing

what she did, took upon herself all the risk of danger which was incident to her undertaking.

The underlying question, upon the solution of which our decision must rest, is whether the owner of land, who constructs or places upon it anything which, though necessary for its proper enjoyment, happens to be of a character which is attractive to children and at the same time dangerous to them if they yield to the attraction, thereby becomes chargeable with the duty of using reasonable care to keep them off his premises or to protect them if they enter, for it must be admitted that, unless such user creates a duty on the part of the landowner to protect the child who comes upon his premises, the neglect of which produces injury to the child, no liability rests upon him for such injury. If there is no duty in the case there can be no negligence; there cannot be such a thing as the negligent performance of a nonexistent duty.

It is universally acknowledged that no such duty rests upon the owner of lands with regard to adults, but in many of the decided cases a distinction is made between trespassers of mature years and children, and it is held that as to the latter the duty of protection exists. Most of the cases in ⁶³⁸ which this doctrine has been enunciated have arisen on facts similar to those presented by the case now before us—that is, in cases where children have been injured while playing upon turntables located upon the private property of railroad companies. *Railroad Co. v. Stout*, 17 Wall. 657, is the first of this line of cases. *Keffe v. Milwaukee etc. Ry. Co.*, 21 Minn. 207, 18 Am. Rep. 393; *Koons v. St. Louis etc. Ry. Co.*, 65 Mo. 592; *Kansas Cent. Ry. Co. v. Fitzsimmons*, 22 Kan. 686, 31 Am. Rep. 203, *Ferguson v. Columbus etc. Ry. Co.*, 75 Ga. 637, and *Barrett v. Southern Pac. Co.*, 91 Cal. 296, 25 Am. St. Rep. 186, also support this doctrine and are all of them so-called “turntable cases.”

It is apparent, however, that if the duty exists in the case of a railroad company having a dangerous attraction upon its land, it exists equally in the case of a private landowner, who, for the purpose of carrying on his business properly, maintains upon his premises an attraction of a character dangerous to children, and, in fact, numerous cases may be found in the books where “dangerous attractions” other than turntables, placed upon the premises of the individual owner for their more complete beneficial user, have been held to charge him with the duty of protecting children who are allured thereby. *Siddall v. Janssen*, 168 Ill. 43, *Birge v. Gardner*, 19 Conn. 507, 50 Am. Dec. 261,

Whirley v. Whiteman, 1 Head, 610, Powers v. Harlow, 53 Mich. 507, 51 Am. Rep. 154, and Bransom v. Labrot, 81 Ky. 638, 50 Am. Rep. 193, are cases of this character.

But, although this doctrine has received the support of many courts of high distinction, it has been absolutely repudiated by other courts whose decisions rank equally high. The cases of Frost v. Eastern R. R. Co., 64 N. H. 220, 10 Am. St. Rep. 396, Daniels v. New York etc. R. R. Co., 154 Mass. 349, 26 Am. St. Rep. 253, and Walsh v. Fitchburg R. R. Co., 145 N. Y. 301, 45 Am. St. Rep. 615, all declare that no distinction exists between adults and infants when entering uninvited upon lands of another, with relation to the duty which the owner or occupier of such lands owes to them.

The same view is expressed by the supreme court of this state, in the case of Turess v. New York etc. ⁴³⁰ R. R. Co.; 61 N. J. L. 314, in an opinion by Chief Justice Magie, in which the whole subject is carefully and exhaustively considered. This court, however, has, up to the present time, never been called upon to decide the question, and we are free to adopt either the view taken by the United States supreme court, in Railroad Co. v. Stout, 17 Wall. 657, and the cases which have followed it, or that taken by the courts of Massachusetts, New Hampshire, and New York, as well as by our supreme court, according as the one or the other shall the more commend itself to us.

It must be conceded, I think, that the rule which imposes liability upon the landowner is a hard one, so far as he is concerned, in this respect, that no matter how carefully he may endeavor to protect himself by discharging the duty which the law places upon him, the probability of his failure is great. When contemplating the alteration of his land from the condition in which nature left it, for the purpose of obtaining a more beneficial user therefrom, he must first consider whether the alteration will render it attractive to children of tender years, and, if so, whether they will be subjected to danger if they succumb to the attraction. If he honestly concludes that the change will not operate to attract children, and that, therefore, although it may make his property dangerous, he is under no obligation to provide for their safety, or if he concludes that, although the alteration may render his property attractive to children, they will not incur danger by coming upon it, and, for either of these reasons, fails to take precautions for their safety, it will be for the jury to say whether he must answer for the result if injury to a child follows upon his omission; and their

verdict will depend upon whether, in their opinion, he had reasonable ground for his conclusion. So, too, if he appreciates that the change which he proposes to make will render his premises dangerously attractive to children, and takes precautions to exclude them therefrom, it is still possible that they may elude his vigilance and receive hurt while trespassing, and when that occurs it at once becomes a question for the jury to say whether ⁶⁴⁰ or not the injury was the result of the want of due care on the part of the landowner in affording that protection which his duty required. What the conclusion of the jury would be in any given case, of course no one can tell. The fact, however, is suggestive that, in every reported case, so far as I have examined them (and I have examined many), where this doctrine has been under consideration, it has always been the landowner, and never the injured child, who was trying to avoid the result of the verdict of the jury. It is only in those cases where the action of the jury has been controlled by the trial court that the injured child has sought a review.

The probability that the landowner will not be able to avoid liability for injuries to children who come upon his lands without invitation, no matter how careful he may have been, while it affords no reason for denying the existence of the rule which holds him to responsibility, certainly requires that we should not accept it as sound, unless it rests upon a solid foundation.

Some of the cases above cited, in which the liability of the landowner has been sustained, assume that the duty of protection rests upon him merely by reason of the inability of the child to care for its own safety, and discuss only the question whether the alleged duty has been negligently performed. Other of the cases consider the question of the existence of the duty, and sustain it on the ground that the landowner who places upon his land anything which is attractive to children, and, at the same time, dangerous to them if they yield to the attraction, is presumed to know that they are likely to be overcome by the temptation presented to them, and that, therefore, he is to be considered as having "allured" or impliedly invited them to come upon his premises and submit themselves to the dangers there encountered.

The suggestion contained in the line of cases first adverted to, viz., that the duty of protection is cast upon the landowner solely by reason of the inability of the child to care for its own safety, seems to me to be unsound in principle. Primarily, the duty of affording protection to the child rests ⁶⁴¹ upon the

parent, who is responsible for its being. If the parent neglects the duty which the law casts upon him and permits his child to stray upon the land of another and there incur peril, why should the duty of protection be shifted from the negligent parent to the owner of the land? It is usually the fact, in cases of this kind, that the landowner has no knowledge that the children have come upon his premises and are exposed to the danger there until after injury has actually occurred, while other persons who are passing by frequently observe the risk that is being run by childish intruders, but take no steps to bring it to an end. If the duty of protection, under such circumstances, is to be shifted from the parent to a third person, it would seem more consonant with reason to place it upon those who have knowledge of the existence of the danger and opportunity to terminate it, rather than upon the landowner, who is entirely ignorant of the entry of the children upon his premises. The mere fact that a child is unable to guard itself against peril, and that its parent fails to provide for its safety, does not, ipso facto, cast upon any third person the duty of affording it protection.

Nor am I able to appreciate the force of the reasoning upon which the conclusion is based that a landowner who puts upon his premises a structure which is attractive and also dangerous to children is to be regarded as having, by implication, invited them to enter or as having "allured" them into danger, and is, therefore, to be held to the same measure of responsibility as if he had expressly invited them to come upon his lands.

No one, I presume, will contend that a landowner who, in the beneficial user of his premises, places thereon something which attracts children into danger really puts it there with the intention of extending an invitation to them or of luring them into jeopardy. On the contrary, it will be admitted that the entry is ordinarily against the desire of the landowner, and that if his permission was asked it would be refused. But the argument is that the intent, although it does not exist in fact, nevertheless exists in law, because ⁶⁴² every man is presumed to intend the natural consequences of his acts. The fallacy of this argument is clearly shown in an interesting and instructive article on the liability of landowners to children entering without permission, by Hon. Jeremiah Smith, a former justice of the supreme court of New Hampshire, published in the Harvard Law Review in February and March, 1898. The author says: "The so-called presumption that every man intends the probable consequences of his acts is not a rule of law further or otherwise

than as it is a rule of common sense. In other words, the 'presumption' is, at most, only a *prima facie* presumption, and may be strong, weak, or utterly inefficacious, according to the varying situations where the attempt is made to apply it. If the result in question is one which men are frequently prone to desire, and there is no assignable reason for the act except the single one of accomplishing that particular result, the inference that the result was intended is strong. If, on the other hand, the result is one which not one man in ten thousand desires, and there is another assignable reason for the act, and one, moreover, by which men are generally influenced and which is amply sufficient to account for the act, the inference is, practically speaking, reduced to zero."

If the landowner is to be held responsible for injuries resulting from an entry by a child upon his premises, merely because he has placed there something which presents a temptation to the child that it cannot (or, rather, does not) resist, although the entry is not only without his consent but against his desire, why, in principle, is he not equally responsible for the injuries received by an adult trespasser who yields to the temptation presented by a dangerous attraction which is placed upon the land, particularly if such trespasser be so constituted mentally as not to appreciate the impropriety of his entry or to understand the danger which he is incurring?

The viciousness of the reasoning which fixes liability upon the landowner because the child is attracted lies in the assumption that what operates as a temptation to a person of immature mind is, in effect, an invitation. Such an assumption ⁶⁴³ is not warranted. As was said by Mr. Justice Holmes, in *Holbrook v. Aldrich*, 168 Mass. 16, 60 Am. St. Rep. 364: "Temptation is not always invitation; as the common law is understood by the most competent authorities, it does not excuse a trespass because there is a temptation to commit it, or hold property owners bound to contemplate the infraction of property rights because the temptation to untrained minds to infringe them might have been foreseen."

No good purpose will be effected by discussing here the various cases which have been supposed to sustain the doctrine first put forward in *Railroad Co. v. Stout*, 17 Wall. 657. I refer to cases like *Bird v. Holbrook*, 4 Bing. 628, where the plaintiff was injured, while trespassing upon the lands of the defendant, by the discharge of a spring-gun which had been set by the defendant for the protection of his property against thieves; Town-

send v. Wathen, 9 East, 277, where the plaintiff's dogs were caught and killed in traps set by the defendant upon his premises and baited with decaying meat, for the purpose of entrapping his neighbor's dogs; and Lynch v. Nurdin, 1 Ad. & E., N. S., 29, where the plaintiff, a child, was injured while playing with a horse and cart which the defendant's servant had carelessly left standing unguarded in the public highway. That they are not, in fact, authority for any such doctrine is clearly shown by Mr. Justice Peckham, in Walsh v. Fitchburg R. R. Co., 145 N. Y. 301, 45 Am. St. Rep. 615, and by Mr. Justice Lathrop, in Daniels v. New York etc. R. R. Co., 154 Mass. 349; 26 Am. St. Rep. 253.

The general rule with regard to the duty which a landowner owes to persons coming upon his premises is that where the entry is made by his invitation, either express or implied, he is required to use reasonable care to have his premises in a safe condition; but that where the entry is made merely by his permission (and, a fortiori, where it is an actual trespass) the landowner is under no obligation to keep his premises in a nonhazardous state; his only duty to a licensee or a trespasser is to abstain from acts willfully injurious. And this rule has been frequently enforced by the courts of this state: Phillips v. Library Co., 55 N. J. L. 307; Mathews v. Bense, 51 N. J. L. 30; Vanderbeck v. Hendry, 34 N. J. L. 467; Fitzpatrick ⁶⁴⁴ v. Cumberland Glass Mfg. Co., 61 N. J. L. 378; Turess v. New York etc. R. R. Co., 61 N. J. L. 314.

In the cases of Frost v. Eastern R. R. Co., 64 N. H. 220; 10 Am. St. Rep. 396, Daniels v. New York etc. R. R. Co., 154 Mass. 349, 26 Am. St. Rep. 253, Walsh v. Fitchburg R. R. Co., 145 N. Y. 301, 45 Am. St. Rep. 615, and Turess v. New York etc. R. R. Co., 61 N. J. L. 314 (in which, as has already been stated, the courts of New Hampshire, Massachusetts, New York, and our own supreme court have refused to adopt the rule of liability as declared in Railroad Co. v. Stout, 17 Wall. 657, and the cases which followed it), the basis of decision was the rule just adverted to.

In the New York case, the infant plaintiff was conceded to have been upon the defendant company's premises by its permission; in the Massachusetts and New Hampshire cases he was a mere trespasser. In each case the conclusion was that a licensee or a trespasser who entered upon the lands of another assumed all risk of danger which was incident to the condition of the premises; and that the landowner was not responsible for injuries received by him unless they were intentionally inflicted,

and that the fact of the licensee or trespasser being an infant of tender years afforded no reason for modifying the rule and charging the landowner with a duty which did not otherwise exist. In *Vanderbeck v. Hendry*, 34 N. J. L. 467, *Fitzpatrick v. Cumberland Glass Co.*, 61 N. J. L. 378, and *Turess v. New York etc. R. R. Co.*, 61 N. J. L. 314, our supreme court took a similar view, holding in each case that the infancy of the plaintiff afforded no ground for a recovery against the landowner.

In my judgment the reasons upon which the doctrine of a landowner's liability for injuries received by children entering upon his premises is rested do not justify such a material restriction upon the full and untrammelled enjoyment of real property. On the contrary, it seems to me that the doctrine of nonliability promulgated by the line of cases last referred to is more in accord with settled principles, and should, therefore, be adopted by this court. I conclude, therefore, that there was error in submitting to the jury the question whether, under the circumstances of this case, the defendant company ⁶⁴⁵ was chargeable with the duty of providing for the safety of the plaintiff. The trial judge should have directed a verdict for the defendant.

The judgment below should be reversed.

THE CASE of *Turess v. New York etc. R. R. Co.*, 61 N. J. L. 314, was based upon facts similar to those existing in the principal case, and in the former case the court held that a railroad company, maintaining a turntable upon its own land near a public street, is not liable in damages to a child who comes upon the premises without invitation, express or implied, and receives an injury by playing with the turntable. In delivering the opinion, Mr. Chief Justice Magie said that: "It is obvious that the relation between a railroad company and a child who enters its land to play with a turntable is not one created by implied invitation. A turntable, however attractive, could not be deemed to be have been erected for the use which the child makes of it. This objection is not obviated by an appeal to the doctrine that children of tender years are not held to the same degree of prudence and care as adults, but only to such prudence and care as their years indicate them to possess, for it is not a question of the child's negligence, but a question of the duty of the railroad company toward the child. If that duty is conceived to arise from the relation created by implied invitation, it must appear that the child is justified in believing that the turntable was designed for the use he makes of it, which is, of course, absurd. In my judgment it follows that the liability of a railroad company to a child injured by playing on its turntable cannot arise out of a duty imposed on the company by reason of a supposed implied invitation. If a child is not to be deemed invited to enter a railroad company's land to play upon a turntable it also follows that a child, in doing so, is either a trespasser or is there by mere permission. In neither case is any duty cast upon the landowner, except to abstain from willful injury, and from maintaining hidden or concealed dangers."

REAL PROPERTY—DANGEROUS MACHINERY—INJURY TO TRESPASSING CHILD—TURNTABLE CASES.—The principal case passes upon a question as to which the authorities are not in accord: Note to *Holbrook v. Aldrich*, 60 Am. St. Rep. 365. It is held that it is not the duty of a landowner to keep his property in such condition that persons, whether children or adults, going thereon without his invitation may not be injured: *Dobbins v. Missouri etc. Ry. Co.*, 91 Tex. 60; 66 Am. St. Rep. 856; that temptation is not invitation in such a case: *Holbrook v. Aldrich*, 168 Mass. 15; 60 Am. St. Rep. 364. But the contrary is also held: *Price v. Atchison Water Co.*, 58 Kan. 551; 62 Am. St. Rep. 625. The holdings in the class of cases to which the principal case belongs, known as the "turntable cases," are equally inharmonious. The conflict of authority is discussed in the monographic note to *Barnes v. Shreveport City R. R. Co.*, 49 Am. St. Rep. 417.

CASES
IN THE
SUPREME COURT
OF
NEW YORK.

PEOPLE v. HAWKINS.

[157 NEW YORK, 1.]

CONSTITUTIONAL LAW—TAKING PROPERTY WITHOUT DUE PROCESS OF LAW, WHAT IS.—A law which annihilates the value of property, or restricts its use or takes away any of its essential attributes, is forbidden and rendered void by the provision of the constitution declaring that a citizen shall not be deprived of his property without due process of law. A law which interferes with property by depriving the owner of the profitable and free use of it, or hampers him in the application of it to the purposes of trade, or imposes conditions upon the right to hold or use it, may seriously impair its value, against which the constitution is a protection. [Per O'Brien, Judge.]

CONSTITUTIONAL LAW—STATUTE REQUIRING PERSONS SELLING GOODS MANUFACTURED IN A PRISON TO DISCLOSE THEIR HISTORY.—A statute requiring all articles made by prison labor or in any establishment in which convict labor is employed, before being sold or exposed for sale, to be branded, labeled or marked, so as to show that they are convict made, is unconstitutional. It is an inexcusable and intolerable invasion of the rights and liberty of the citizen. [Per O'Brien, Judge.]

CONSTITUTIONAL LAW — PROVISION RESPECTING PRISON LABOR.—The provision of the constitution of the state of New York declaring that the legislature shall, by law, provide for the occupation and employment of prisoners sentenced to the several state prisons, and that no persons in such prisons shall be required or allowed to work at any trade, industry, or occupation wherein or whereby his work, or the product or profit thereof, shall be farmed out, contracted, given, or sold to any person, firm, or corporation, but that the provision shall not be construed to prevent the legislature from providing that convicts may work for, and the product of their labor be disposed of to, the state or any political division thereof, or for or to any public institution owned, managed, or controlled by the state or any political division thereof, does not authorize the enactment of a statute forbidding the sale of any wares produced by prison labor unless so stamped as to disclose that fact. [Per O'Brien, Judge.]

INTERSTATE COMMERCE—PRISON MADE GOODS.—A statute requiring prison made goods to be stamped before being offered for sale or sold, so as to show when and where they were made, and that they are the product of prison labor, if sought to be applied to goods manufactured in another state, is void as an attempted regulation of interstate commerce. [Per O'Brien, Gray, Martin, and Vann, Judges.]

Harry C. Perkins, for the appellant.

Frederick Collin, for the respondent.

* O'BRIEN, J. The defendant was indicted for a misdemeanor, the charge being that he violated chapter 931 of the Laws of 1896 relating to the labeling and marking of convict made goods or articles. The indictment alleges that the defendant, on the fifth day of November, 1896, had in his possession and offering for sale, unlawfully and with criminal intent, a certain scrub-brush of the form, style, and material commonly used in scrub-brushes, but made and manufactured, as the defendant well knew, by the labor of convicts lawfully sentenced to and confined in a prison at Cleveland, Ohio. It then charges that this article was brought from that institution into this state and was in the defendant's possession for the purpose of sale, without having upon it in any manner the words "Convict made" or any words indicting in any manner that it was manufactured by convict labor..

The defendant demurred to the indictment, upon the ground that the facts stated did not constitute a crime, and the courts below have sustained the demurrer for the reason that the statute was in conflict with the constitution, and therefore void. The statute went into effect by its terms on November 1, 1896, and the several sections material to the question in this case are as follows:

"Section 1. All goods, wares, and merchandise made by convict labor in any penitentiary, prison, reformatory, or other establishment in which convict labor is employed shall, before being sold, or exposed for sale, be branded, labeled, or marked as hereinafter provided, and shall not be exposed for sale in any place within this state without such brand, label or mark.

"Sec. 2. The brand, label, or mark hereby required shall contain at the head or top thereof the words 'convict made,' followed by the year and name of the penitentiary, prison, reformatory, or other establishment in which it was made, in plain English lettering, of the style and size known as great primer Roman condensed capitals. The brand or mark shall in all cases, where

the nature of an article will permit, be placed upon the same, and only where such branding or marking is impossible shall a label be used, and where a label is used it shall be in the form of a paper tag, which shall be attached by wire to each article, where the nature of the article will permit, and placed securely upon the box, crate, or other covering, in which such goods, wares, or merchandise may be packed, shipped, or exposed for sale. Said brand, mark, or label shall be placed upon the outside of and upon the most conspicuous part of the finished article and its box, crate, or covering.

"Sec. 5. Section 384 b of the Penal Code is hereby amended so as to read as follows: Sec. 384 b. Penalty for dealing in convict made goods without labeling.—A person having in his possession for the purpose of sale, or offering for sale, any convict made goods, wares, or merchandise hereafter manufactured and sold, or exposed for sale, in this state without the brand, mark, or label required by law, or removes or defaces such brand, mark, or label, is guilty of a misdemeanor, punishable by a fine not exceeding ten hundred dollars nor less than one hundred dollars, or imprisonment for a term not exceeding one year nor less than ten days, or both."

The act charged against the defendant, and which is admitted by the demurrer, is declared to be a crime by this statute, and the only question that we need consider is, whether the legislature had any power, under the constitution, to enact "such a law. The law is similar, in all respects, to the law of 1894 (Laws 1894, c. 698), except that the latter statute was aimed at prison made goods of other states, while the present statute applies to all prison made goods, whether of this or other states. The act of 1894 was held to be unconstitutional and void: *People v. Hawkins*, 85 Hun, 43. The present act makes it a criminal offense to expose for sale prison made goods of this state as well as of other states. It seems to have been assumed that the feature of the former act, which discriminated against the prison made goods of other states, was the only objection to this class of legislation. But the broader scope of the present law removes no objection that existed to the former. On the contrary, it multiplies and intensifies them.

It is important at the outset to ascertain, if we can, the legislative purpose and intent that led to the enactment of this law. The learned district attorney in his brief in the court below has, I think, stated it quite fairly and accurately in these words:

"The statute in question is an attempt to solve a great public

and economic problem. It has a bearing, directly or indirectly, upon wages paid to workmen in certain lines of industry. . . . It involves the welfare and prosperity of the laboring classes who comprise a great portion of our population. . . . It is against sound public policy to compel workmen, who have to support their families by their daily earnings, to compete with the unpaid labor of convicts in penal institutions. The framers of the state and federal constitutions never intended to create and foster such competition. The people have a right to demand protection from the legislature in this respect, and it is within the police power of the state to require the mark, brand, or label of goods made in penal institutions."

We may assume, therefore, that the purpose of the law was to promote the welfare of the laboring classes by suppressing, in some measure, the sale of prison made goods. Waiving for the present the question whether the means employed can ever ⁷ in the nature of things accomplish the end in view, it is quite clear that unless this statute in some degree affects the value of certain articles of merchandise by restricting the demand or imposing conditions upon the right to deal in them as property, in order to exclude them from the market, it is a mere brutum fulmen. The scrubbing-brush in question was beyond all doubt an article of property in which the defendant could lawfully deal. He is forbidden, however, by this statute, under all the penalties of the criminal law, from buying or selling or having it in his possession, except upon the condition that he shall attach to it a badge of inferiority which diminishes the value and impairs its selling qualities. It is not claimed that there is any difference in the quality of this scrubbing-brush when compared with one of the same grade or character made outside the prisons. There is no pretense that the act was passed to suppress any fraudulent practice, or that any such practice existed with respect to such goods. The validity of the law must depend entirely upon the exercise of the police power to enhance the price of labor by suppressing, through the instrumentality of the criminal law, the sale of the products of prison labor.

The citizen cannot be deprived of his property without due process of law. The principle embodied in this constitutional guaranty is not limited to the physical taking of property. Any law which annihilates its value, restricts its use, or takes away any of its essential attributes, comes within the purview of this limitation upon legislative power. The validity of all such laws is to be tested by the purpose of their enactment and the prac-

tical effect and operation that they may have upon property. A law which interferes with property by depriving the owner of the profitable and free use of it, or hampers him in the application of it for the purposes of trade or commerce, or imposes conditions upon the right to hold or sell it, may seriously impair its value, against which the constitution is a protection. The fact that legislation hostile to the rights of property assumes the guise of a health law or a labor law will not save it from judicial scrutiny, since the ^s courts cannot permit that to be done by indirection which cannot be done directly.

The guaranty against depriving the citizen of his liability comprehends much more than the exemption of his person from all unlawful restraint. It includes the right to engage in any lawful business, and to exercise his faculties in all lawful ways in any lawful trade, profession, or vocation. All laws, therefore, which impair or trammel these rights, or impose arbitrary conditions upon his right to earn a living in the pursuit of a lawful business are infringements upon his fundamental rights of liberty, which are under constitutional protection. These rights may doubtless be affected to some extent by the exercise of the police power, which is inherent in every sovereign state. But that power, however broad and extensive, is not above the constitution. The conduct of the individual and the use of property may be affected by its lawful and proper exercise in cases of overruling necessity and for the public good. The preservation of public order, the protection of the public health and the prevention of disease, the sale of articles of unwholesome or adulterated food, the calamities caused by fire, and perhaps other subjects relating to the safety and welfare of society, are within its scope. But no law which is otherwise objectionable as in conflict with the fundamental guaranties of the constitution can be upheld under the police power, unless the courts can see that it has some plain or reasonable relation to those subjects, or some of them.

These principles have been so fully discussed and sanctioned by judicial authority and so often asserted that they may now be regarded as elementary. It is, therefore, unnecessary to enter the vast field of litigation involving discussions of the police power, and the validity of statutes enacted really or ostensibly in its exercise: *Wynehamer v. People*, 13 N. Y. 378; *In re Jacobs*, 98 N. Y. 98; 50 Am. Rep. 636; *Lawton v. Steele*, 119 N. Y. 226; 16 Am. St. Rep. 813; *Forster v. Scott*, 136 N. Y. 577; *Colon v. Lisk*, 153 N. Y. 188; 60 Am. St. Rep. 609.

It is entirely safe to assert that no court has yet invoked the

• police power to justify a statute, the purpose of which was to enhance the wages of labor in certain factories by suppressing, through the agencies of the criminal law, the sale of competing products made in prisons. If the wages of labor in a few factories producing goods such as are also made in prisons may be regulated by the police power, there is no reason why that power may not be used to regulate the rewards of labor in any other field of human exertion. That all legislation of this character, with this end in view, which subjects the individual to criminal prosecution unless he will comply with regulations in the sale of such goods that are intended to depress their value or demand in the market, is in violation of the constitution, cannot be doubted.

It would be trifling with the constitution to attempt to uphold this law on the ground that all producers or vendors of goods may be required to tell the truth concerning them, both as to their quality and the means by which or the place where they were manufactured. A knowledge of the truth concerning the origin of every article of property which is the subject of sale, trade, or commerce cannot be essential to the public welfare, and, even if it was, the law could be effective only when applied to all property alike and not limited to articles made in certain places and by a certain class of workmen. Any attempt to carry the police power to such an extent as to require the owner of an article of property kept for sale, such as a scrubbing-brush, to label it with the history of its origin and to indicate the place where it was made and the class of workmen that produced it, and to enforce such regulations by the aid of the criminal law, must be regarded as an inexcusable and intolerable invasion of the rights and liberty of the citizen.

There is nothing in the character or effect of prison labor to justify such legislation. The health and welfare of convicts is a subject peculiarly within the functions of government. The state, in order to carry out the purposes of punishment, must employ them at some useful labor. Whatever it may be, their work must, in some degree, come into competition with ¹⁰ the labor of others. It is not at all likely that this result ever had or can have any material or perceptible influence on wages. But even if it had, the welfare of the convicts and the interests of the taxpayers are proper subjects for consideration.

The question is reduced to the simple inquiry whether the legislature, under the guise of the police power can regulate the price of labor by depressing, through the penalties of the crim-

inal law, the price of goods in the market made by one class of workmen and correspondingly enhancing the price of goods made by another class. If the statute does not tend to produce that result, there is no reason or excuse for its existence, and it would be a useless and arbitrary interference with the liberty of the individual without any possible reason or motive behind it. The law is now defended upon the ground that it was intended to accomplish, and in fact does tend to promote, that very result. If the police power extends to the protection of certain workmen in their wages against the competition of other workmen in penal institutions, why not extend it to other forms of competition? Why not give the workman who has a large family to support some advantage over the one who has no family at all? Why not give to the old and feeble a helping hand by legislation against the competition of the young and the strong? Why not give to the women, the weaker sex, who are often the victims of improvidence and want, a preference by statute over the men? Why confine such legislation to scrubbing-brushes and like articles made in prisons, when multitudes of men engaged in farming, mercantile pursuits, and almost every vocation in life are struggling against competition? If the statute now under consideration is a valid exercise of the police power, I am unable to give any reason why the legislature may not interfere in all the cases I have mentioned to help those who need help at the expense of those who do not.

It would be difficult to give any satisfactory reason, legal, moral, or economic, why a person who happens to be confined in a prison should not be permitted or compelled to earn his living and pay his way instead of becoming a burden upon ¹¹ the public, to the detriment of his health and morals. The mere fact that he is in prison may be due to misfortune or to his natural surroundings, and in some cases he may be at least morally innocent. The state may certainly, for his own benefit and for the relief of the taxpaying community, employ him at some useful labor, and whether that labor be in building roads or making shoes, he takes the place of another. If it be lawful and right to so employ him, it is difficult to see why the state may, by legislation, depress the value of the products of his labor when such property is purchased in the ordinary course of commerce by a dealer therein. The state, while permitting such property to come within its jurisdiction in the regular course of trade, cannot then impair its value by hostile legislation without a violation of the constitutional guaranties for the protection of prop-

erty. Aside from the peculiar restrictions of revenue laws, the merchant or dealer may buy his goods where he can obtain them to the best advantage, and any restriction upon his freedom of action in this respect by state laws is, in a broad sense, an invasion of his right of liberty, since that term comprehends the right of the individual to pursue any lawful calling.

I think that the statute in question is in conflict with the constitution of this state, since it interferes with the right to acquire, possess, and dispose of property and with the liberty of the individual to earn a living by dealing in the articles embraced within the scope of the law. It is an unauthorized limitation upon the freedom of the individual to buy and sell all such articles, subject only to the law of supply and demand, and the legislation is not within the scope of the police power.

It has been suggested by some members of the court that the statute in question can be upheld under the recent amendment to the state constitution with respect to prison labor. It should be observed that no such point was argued or submitted, either in this court or the court below, but since some of my brethren are of that opinion, the question may be properly discussed. The language of the amendment is as follows:

12 "The legislature shall, by law, provide for the occupation and employment of prisoners sentenced to the several state prisons, penitentiaries, jails, and reformatories in the state; and on and after the first day of January, in the year 1897, no person in any such prison, penitentiary, jail, or reformatory shall be required or allowed to work, while under sentence thereto, at any trade, industry, or occupation, wherein or whereby his work, or the product or profit of his work, shall be farmed out, contracted, given, or sold to any person, firm, association, or corporation. This section shall not be construed to prevent the legislature from providing that convicts may work for, and that the products of their labor may be disposed of to, the state or any political division thereof, or for or to any public institution owned or managed and controlled by the state, or any political division thereof": Const. 1894, art. 3, sec. 29.

It is said that this provision of the constitution indicates and expresses a public policy on the part of the state to suppress the competition of prison labor with free labor by forbidding the sale to the general public of prison made goods. The term "public policy" is frequently used in a very vague, loose, or inaccurate sense. The courts have often found it necessary to define its juridical meaning, and have held that a state can have no public pol-

icy except what is to be found in its constitution and laws: *Vidal v. Girard*, 2 How. 127; *Hollis v. Drew Theological Seminary*, 95 N. Y. 166; *Cross v. United States Trust Co.*, 131 N. Y. 343; 27 Am. St. Rep. 597; *Dammert v. Osborn*, 140 N. Y. 40. Therefore, when we speak of the public policy of the state, we mean the law of the state, whether found in the constitution, the statutes, or judicial records, so that the inquiry is whether the provision of the constitution above cited forbids the sale of prison made goods to the general public. Either it does or does not. If it does not, there is an end of the argument on that point. If it does, we will see hereafter how it affects the validity of this statute. If the framers of the constitution intended to forbid the sale of prison made goods to the general public, or to prohibit dealing ¹³ in them, it was an easy matter to say so in terms that could not be misunderstood. Surely, the poverty of our language is not such as to preclude the framers of the fundamental law from giving plain and direct expression to such a simple thought. But the section above quoted does not forbid the sale of any article of property. It deals only with modes of employing convicts and with practices that had formerly existed, under which the labor of convicts had become a subject of bargain and sale. It simply abolished what was known as the contract system of labor in prisons, whereby the profits of the labor of convicts were secured by contractors or private parties. This is apparent from the language of the section which begins by providing for the employment of convicts. It then forbids the employment of the inmates of penal institutions at any trade or industry whereby "his work or the product and profits of his work shall be farmed out, contracted, given or sold to any person." What is it that this language forbids? Not dealing in tangible things or articles of property wherever made, but the farming out, contracting, giving away, or selling of convict labor. The words "product and profit of his work" do not refer to articles of property, but to the net value of labor. If the framers of the constitution intended to prohibit dealing in any article of merchandise, surely they would not have described the article by such vague terms as the products of work. A manufactured article is not known in common parlance, in law, or political economy as the "product of labor." Of course, labor enters into its production, but in many cases it is an insignificant element. The article is the product of raw material and labor combined, or, as it is commonly expressed, labor and capital. The prohibition against dealing in any article of property cannot be found

in this section without giving to the words a strained and unnatural meaning. If any of the penal institutions of the state happen to have a farm attached to it, worked by the convicts, as some of them probably have, it would be a very narrow construction of this section to hold that the products or profits of the farm, whether consisting of ¹⁴ cattle or other farm produce, could not be sold to the general public because it would be the products and profits of prison labor.

But if it be assumed for the purpose of the argument that the constitution does forbid the sale of prison made goods to the public, it would not help the statute in question, but, on the contrary, would furnish an additional reason for its condemnation. If the constitution forbids the sale of such goods, or prohibits dealing in them as merchandise, then clearly the legislature has no power to enact laws regulating and permitting such sales. That this was the purpose and was the obvious effect of the statute in question in its entire scope and meaning must, of course, be admitted. Therefore, if the section means what is claimed for it, the legislature has attempted to regulate and permit what the constitution forbids. It has attempted to regulate and permit the sale of prison made goods by fixing upon them a badge of their origin, when the constitution provides that they shall not be sold at all. It is difficult, therefore, to understand how anyone, who believes that the constitution interdicts the sale of convict made goods, can at the same time reach the conclusion that the statute is in harmony with the constitution.

It would be manifestly unjust and inconsistent for the state, while it encourages and commands the employment of convicts and becomes itself the patron and customer of prison made goods, to prohibit its citizens from dealing in the same property.

What policy could the framers of the constitution have had in view when providing for the employment of convicts and for drawing all supplies needed by the state from goods produced in the prisons, if at the same time they forbid the general public from dealing in the same class of goods? When it is asserted that the lawmakers intended to employ convict labor in the production of property, and at the same time enacted that the property so produced should not become a part of the general mass of merchandise in the state, or the subject of bargain and sale like other property, we look for language in the constitution so clear and explicit that no ¹⁵ other construction is possible to be put upon it, but such language is not there. This construction

would really impeach the honor and justice of the state, make it the sole beneficiary of convict labor and the sole competitor with free labor. I think the constitution is open to quite another construction, and one much more honorable to the state.

But such a construction of the constitution must, if adopted, encounter another and still more serious obstacle. Assuming that it forbids the sale in this state of the convict made goods of Ohio, it is in conflict with the commerce clause of the federal constitution. The article described in the indictment in this case came into this state from a penal institution in Ohio through the operation of interstate commerce. The argument in favor of the validity of the statute assumes and asserts that it was not only the purpose of the statute, but of the constitution of the state, to discriminate against such articles and in favor of the same articles, produced by free labor, in the markets of this state. It was a regulation of commerce by means of which the value of merchandise produced in another state was to be depressed or its sale entirely prohibited. No state can in its sovereign capacity or in its fundamental law enact anything in violation of the federal constitution any more than can the legislature, acting in a representative capacity. That constitution is the supreme law of the land; anything contained in the constitution or statutes of any state to the contrary notwithstanding. A state constitution which is in violation of the supreme law is of no more force than a state statute open to the same objection, so that, even if this statute was not in conflict with our own constitution, it would come under the condemnation of the constitution of the United States. A state law which interferes with the freedom of commerce is not saved by the fact that it applies to all states alike, including the state enacting it. Interstate commerce cannot be taxed, burdened, or restricted at all by state laws, even though operating wholly within its own jurisdiction. If it is a regulation of commerce, the law relates to a subject within the exclusive jurisdiction of Congress, upon which the state has no power ¹⁶ to legislate. It matters not whether the regulation be under the guise of a law requiring a municipal license to sell certain goods, or a health law requiring inspection of the article, or a label law, as in this case, requiring the article to be branded or labeled. When they operate as burdens or restrictions upon the freedom of trade or commercial intercourse they are invalid: *Brennan v. Titusville*, 153 U. S. 289; *Brimmer v. Rebman*, 138 U. S. 78; *Minnesota v. Barber*, 136 U. S. 313; *Welton v. Missouri*, 91 U. S. 275; *Webber v. Vir-*

ginia, 103 U. S. 344; Ward v. Maryland, 12 Wall. 418; Voight v. Wright, 141 U. S. 62; Bowman v. Chicago etc. Ry. Co., 125 U. S. 465; Guy v. Baltimore, 100 U. S. 434; Gloucester etc. Co. v. Pennsylvania, 114 U. S. 196; Brown v. Houston, 114 U. S. 622; Robbins v. Shelby County Taxing Dist., 120 U. S. 489; Gulf etc. Ry. Co. v. Ellis, 165 U. S. 150; Allgeyer v. Louisiana, 165 U. S. 578; People v. Hawkins, 85 Hun, 43.

This statute manifestly discriminates against the sale of goods made in a prison in the state of Ohio by a certain class of workmen, and in favor of the same articles when made outside a penal institution and by free labor. In some of the states labor is much cheaper than in others. But the state where labor commands the highest price cannot make discriminating regulations for the sale of the goods made in the state where it is cheapest in order to favor the interests of its own workmen. One state may have natural advantages for the production of certain goods by reason of location, climate, or the rate of wages over another state where it costs more to produce them, but the latter cannot, by hostile legislation, drive the cheaper made goods of the former out of its markets, even though such legislation would increase the wages of its own workmen. Trade and commerce between the states must be left free. The constitution intended that it should be affected only by natural laws and the ordinary burdens of government imposed through the exercise of the taxing power equally on all property. The police power of a state cannot be used to depress the price or restrict the sale of articles of commerce merely because they happen to be made in a prison ¹⁷ or by a certain class of workmen, while the same articles made in some other place and by free labor are left untouched by the regulation. At citizen of this state who happens to buy goods made in a prison in Ohio has the right to put them upon the market here on their own merits, and if this right is restricted by a penal law, while the same goods made in factories are untouched, such a law is a restriction upon the freedom of commerce, and the objection to it is not removed by the fact that it may have been enacted in the guise of a police regulation. The validity of such a law is to be tested by its purpose and practical operation without regard to the name or classification that may have been given to it.

This state has declared its policy to utilize convict labor in the production of such articles as the government itself, or that of any political division, or the management of any public institution may need. The convict labor necessary to supply such

a large consumption must necessarily, in some degree at least, affect the wages of free labor, if the argument in support of this law be correct, but the general public good overbalances any evil, real or imaginary, that may proceed from that policy. Some other state may not see fit to take all the profits of convict labor itself, but to sell the products in the market, and, when the articles thus produced have been absorbed into the general mass of merchandise, they cannot be made the object of hostile legislation to depress their value any more than if they had been made in private manufacturing establishments. The statute in question is aimed at property produced by a certain kind of labor, and the plain purpose is to depress its value or restrict its sale in order to enhance the price or enlarge the demand for the same kind of property produced by some other kind of labor. It belongs to a class of laws which have become quite common in recent years, all resting largely upon the notion that the important problems involved in the social or industrial life of the people may be solved by legislation. This theory has, no doubt, a certain fascination over some minds, but so long as legislative power is circumscribed by the restriction of a written constitution, ¹⁸ a statute like this cannot be sustained by the courts. Whether tested by the federal or state constitution it is, I think, an invalid law.

The judgment of the courts below sustaining the demurrer to the indictment should be affirmed.

CHIEF JUSTICE PARKER AND JUDGES BARTLETT AND HAIGHT dissented. Judge Bartlett in his dissenting opinion maintained: 1. That the statute assailed was a proper exercise of the police power, and was especially authorized by the constitution of the state of New York by a provision therein respecting prison labor; 2. That the statute did not discriminate against citizens of other states and in favor of those of New York, because it threw open to the markets of the state all prison made goods of all states, subject only to the restriction that they should be so marked as to show when and by whom they were made; 3. That the protection of free labor from competition with prison made goods will promote the general welfare, and that it is competent for the state to protect its citizens from fraud and deception when any such goods were offered for sale by advising them that they were convict made; 4. That the statute does not, as a matter of law, interfere with the power of Congress to regulate commerce among the states; 5. That the provision of the constitution of New York referred to in the opinion of the court indicates a policy on the part of the state to suppress the competition of prison labor with free labor.

Chief Justice Parker, in his dissenting opinion, referred to the provision in the constitution of New York respecting prison labor, and declared that it was equivalent to an expression of opinion by the people that the public welfare demanded that free labor should not be placed in competition with prison labor, and that the constitu-

tion of the United States permitted the exercise of the police power of the state to the extent of preventing fraud and deception on purchasers.

CONSTITUTIONAL LAW—TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW.—Any restriction or interruption of the common or necessary use of property that destroys its value or strips it of its attributes, or to say that the owner shall not use his property as he pleases, takes it in violation of the constitution: *Janesville v. Carpenter*, 77 Wis. 288; 20 Am. St. Rep. 123. The objects and interpretation of the fourteenth amendment to the federal constitution are exhaustively discussed in the monographic note to *State v. Goodwill*, 25 Am. St. Rep. 870.

INTERSTATE COMMERCE—SALE OF CONVICT MADE GOODS.—A statute regulating the sale of convict made goods manufactured in other states, by imposing a license tax on those who sell such goods within the state, is unconstitutional as a regulation of interstate commerce: *Arnold v. Yanders*, 56 Ohio St. 417; 60 Am. St. Rep. 753, and note.

STANDARD FASHION Co. v. SIEGEL-COOPER Co.

[187 New York, 60.]

SPECIFIC PERFORMANCE—DIFFICULTY OF SUPERVISING.—Though a contract is of such a character that the difficulty of supervising its performance may induce the court not to undertake to compel a specific performance, yet the court may interpose by injunction to restrain one of the parties to the contract from violating the negative and severable covenants thereof.

INJUNCTION AGAINST VIOLATION OF CONTRACT NOT TO SELL OR PERMIT OTHERS TO SELL A SPECIFIC ARTICLE.—If, by the terms of a contract, one of the parties agrees that he will not sell nor allow others to sell on his premises any but a specific make of patterns during the continuance of the contract, an injunction should issue to prevent his disregarding his agreement.

SPECIFIC PERFORMANCE—DIFFICULTY OF SUPERVISING CANNOT BE URGED BY DEMURRER.—If a complaint states a good and sufficient contract for specific performance, a demurrer thereto cannot be sustained on the ground that the contract is one the supervising of the performance of which the court cannot undertake because of difficulty. The court will not, on demurrer, undertake to decide the extent to which it will undertake to supervise the performance of the contract.

Suit for an injunction and specific performance. The complaint alleged that the parties plaintiff and defendant were corporations, and that the plaintiff was the rival of another corporation, called the Butterick Publishing Company, in the business of preparing and selling paper dress patterns and designs; that the defendant carried on, in the city of New York, the greatest department store in the world, and engaged therein in selling articles at retail; that a contract was entered into between the plaintiff and the defendant, whereby the latter was appointed

the agent of the plaintiff for the sale of Standard patterns and Standard fashion publications for the period of two years. By such contract the plaintiff agreed to conduct at its own expense and risk a pattern department on the ground floor of the defendant's store, the plaintiff to furnish its own employes, who were to be subject, however, to the rules of the defendant company. The plaintiff was to furnish free of charge not less than two hundred and fifty thousand eight-page fashion sheets of the kind sold at ten dollars per thousand, and print advertisements of the defendant company on the front and back thereof, to be changed monthly, if desired. The defendant was to distribute such fashion sheets from its store and pattern counters without expense to the plaintiff. The defendant corporation also agreed not to sell or allow to be sold on its premises, during the continuance of the contract, any other make of fashion patterns, and to pay over to the plaintiff two-thirds of the moneys received from the sale of patterns and fashion publications. The complaint also alleged that the agreement, as the defendant well knew, was entered into for the purpose of securing plaintiff the great prestige to be obtained from the sale of its patterns exclusively in the defendant's store, and to prevent it from selling, or allowing to be sold therein, any other make of patterns than the plaintiff's; that the plaintiff was willing to perform the contract on its part, but that the defendant company had refused to do so, and had entered into an agreement with the Butterick Publishing Company, and had notified plaintiff that defendant would not sell or allow to be sold the patterns of the plaintiff in the defendant's store. The complaint prayed that the defendant company be required to specifically perform its contract with the plaintiff, and that it and the Butterick Publishing Company (also made a party defendant) be restrained from selling in the store any patterns except those made by the plaintiff. The trial court sustained demurrers to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. On appeal, the appellate court reversed the judgment of the trial court, holding that, though plaintiff could not have specific performance of the contract, because the supervision of such performance would impose too great a burden upon the court, still the plaintiff was entitled to an injunction to enforce the negative covenant of the Siegel-Cooper Company not to sell or allow to be sold on its premises any other make of paper patterns than the plaintiff's. The defendants thereupon appealed.

Edward C. Perkins and Thomas M. Debevoise, for the appellants.

James W. Gerard and John M. Bowers, for the respondent.

¶ VANN, J. Contracts which require the performance of varied and continuous acts, or the exercise of special skill, taste, and judgment, will not, as a general rule, be enforced by courts of equity, because the execution of the decree would require such constant superintendence as to make judicial control a matter of extreme difficulty: *Marble Co. v. Ripley*, 10 Wall. 339, 358; *Beck v. Allison*, 56 N. Y. 366, 370; 15 Am. Rep. 430; *Gervais v. Edwards*, 2 Dru. & War. 80; *Blackett v. Bates*, L. R., 1 Ch. App. 117; *Fargo v. New York etc. R. R. Co.*, 3 Misc. Rep. 205; *Pomeroy on Specific Performance*, sec. 312; *Fry on Specific Performance*, sec. 69. An exception to this rule, founded upon the rights of the public rather than those of the plaintiff, obtains with reference to contracts relating to the management and control of railroads and other agencies of transportation which enjoy special privileges conferred by statute and promote the general welfare: *Joy v. St. Louis*, 138 U. S. 1, 47; *Prospect Park etc. R. R. Co. v. Coney Island etc. R. R. Co.*, 144 N. Y. 152. When the inconvenience of the courts in acting is more than counterbalanced by the inconvenience of the public if they do not act, the interest of the public will prevail. But, even if, upon a trial of the action, specific performance of the contract in its entirety were refused as impracticable, still the bill should be retained as one permitting an injunction, in the sound discretion of the court, to restrain the defendants from violating the negative and severable covenant of the Siegel-Cooper Company that it would not "sell, or allow to be sold on its premises during the duration of this (the) contract any other make of paper patterns" than those of the plaintiff. The learned appellate division, one of the judges dissenting, overruled the demurrers on this ground, holding that the court should extend its remedy as far as it is able and thus prevent the principal defendant not only from making money by breaking its agreement, but from inflicting ^{or} a double wrong upon the plaintiff by depriving it of the right to sell and conferring that right on a business competitor. We think this is a sound and just conclusion, because it will compel the Siegel-Cooper Company to either perform its agreement, or lose all benefit from breaking it and at the same time will shield the plaintiff from part of the loss caused by the breach, if persisted in: *Lumley v. Wagner*, 1 De Gex, M. & G. 604; *Donnell*

v. Bennett, L. R., 22 Ch. Div. 835; *Montague v. Flockton*, L. R., 16 Eq. 189; *Singer Sewing Machine Co. v. Union Button-hole etc. Co.*, 1 Holmes, 253; *Chicago etc. R. R. Co. v. New York etc. Ry. Co.*, 24 Fed. Rep. 516, 521; *Goddard v. Wilde*, 17 Fed. Rep. 846; *Western Union Tel. Co. v. Union Pac. R. Co.*, 3 Fed. Rep. 423, 429; *Western Union Tel. Co. v. Rogers*, 42 N. J. Eq. 311.

The injunction, when granted, may not be absolute, but may be based on some equitable condition that will prevent either party from taking advantage of the other, such as the waiver by the plaintiff of the breach of the contract by the principal defendant. The question raised by the demurrer does not relate to any matter of discretion or propriety, but to the power of the court to grant any relief, conditional or otherwise. We are satisfied with the opinion below upon the subject, and should adopt it as our own without comment, but for a point, not thus far considered, which seems to us a conclusive answer to the demurrers, and which, if overlooked, might lead to some confusion. The action is for the specific performance of a lawful contract, duly executed by both the parties thereto. It is capable of performance by both, and there is no reason for nonperformance by either. A court of equity has jurisdiction of such actions, and the complaint sets forth the contract—readiness to perform on one side, a refusal to perform on the other, and facts showing no adequate remedy at law. A complete cause of action is, therefore, alleged, and the only reason for not awarding general relief to the plaintiff is that its nature is so complicated as possibly to require a multiplicity of orders by the court in its efforts ^{as} to superintend the details of an extensive and peculiar business. This fact does not deprive the court of jurisdiction, but justifies a refusal in its sound discretion to exercise it. It confers no right upon either party. The court does not refuse to act because the defendants object to its acting, for it would refuse, under the circumstances, if both parties requested it to proceed; but it refuses because the execution of its decree would require protracted supervision. It is the difficulty of enforcing, not of rendering judgment, that causes it to hesitate. The office of a demurrer is to sweep away a defective pleading, and in the case before us it attacks the substance of the complaint; yet the complaint is good in substance, for it sets forth a cause of action in equity. While it is true that the court, in its discretion, may not hear the cause, or, after a hearing, may refuse relief owing to the difficulty of enforcing its decree, still this does not make

the complaint defective, nor authorize a general demurrer, which "must be founded upon the absolute, certain, and clear proposition that, taking the charges in the bill to be true, the bill would be dismissed at the hearing": Beach on Equity Practice, sec. 225. Upon the facts before us, it is in the power of the court to enforce the agreement the same as in the case of railroad contracts, but the difficulties attending the enforcement are so great that the court would ordinarily refuse to undertake it, as there is no public interest involved. As there was complete jurisdiction and a perfect cause of action against both defendants, the demurrers must be overruled: *Coatsworth v. Lehigh Valley Ry. Co.*, 156 N. Y. 451.

The order of the appellate division should be affirmed, with costs, and the question certified answered in the affirmative.

All concur.

As to When Specific Performance of a Contract will not be Decreed, Owing to the Court's Inability to Enforce its Decree.*

There are two classes of cases in which, in a suit for the specific performance of a contract, equity will refuse to grant a decree, although there is no question as to the validity, certainty, mutuality, or justice of the contract, and although there is no doubt that the defendant is entirely able to, and in all justice should, perform his contract. The first class, of which instances are rare, embraces those cases in which, by reason of the nature of the subject matter of the contract sued upon, the court is unable to properly frame a decree for specific performance, as where the contract was to refrain from divulging the secret of an invention: *Newberry v. James*, 2 Meriv. 446; or of a patent medicine: *Williams v. Williams*, 3 Meriv. 157; or where it is sought to enforce the common covenants of husbandry: *Rayner v. Stone*, 2 Eden, 128; or where the contract is for the sale of a goodwill: *Baxter v. Connolly*, 1 Jacob & W. 576; *Coslake v. Till*, 1 Russ. 376. The second class, to the consideration of which we shall confine this note, embraces the numerous cases in which, by reason of the nature of the thing contracted to be done, a decree of specific performance must prove an ineffective or inexpedient remedy. While equity aims to supply a remedy wherever there is a right that cannot be adequately enforced at law, it refuses to be drawn into the absurdity of substituting for an imperfect legal remedy an equitable one less perfect and more cumbersome and inexpedient. Accordingly, where the enforcement of a decree of specific performance would unduly tax the attention and superintendence of the court; where it would necessitate the compelling of personal acts involving the exercise of special skill, taste, or judgment; where the performance of the contract must stretch over a considerable time; where the contract is so complex in its nature that

*REFERENCE TO MONOGRAPHIC NOTE.

Contracts between actors and theatrical managers, effect and enforcement of: 71 Am. Dec. 750.

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it would be difficult in any case to determine whether an alleged disobedience of the court's decree was in fact a disobedience, and where the interests of other suitors and the general administration of justice must suffer if the court were to give the necessary care and oversight to the enforcement of its decree—in all these cases, by the general rule, a decree of specific performance will be refused. But the decreeing of specific performance rests within the discretion of the court. It is not generally granted as a matter of right, and respect for precedent does not influence equity courts as it does those of law. Inadequacy of remedy, inexpediency, ineffectiveness, and cumbersomeness are relative terms which may mean different things to different courts, and one judge may undertake, without apprehension, the enforcement of a decree involving difficulties the mere contemplation of which would insure a refusal of a decree by another judge. In some cases, also, although a contract is of such a nature that its specific enforcement would not be attempted, injunction may be issued to restrain its breach, where courts are confident of their ability to accomplish by indirection what they cannot by direction. As a result of all this we find that uncontroverted general rules upon the subject of this note have been made to "speak a various language."

In General.—Before classifying and considering the cases which fall within our subject, we shall notice some general rules which have been laid down to guide equity courts in the exercise of this branch of their jurisdiction. Courts of equity will not attempt to enforce contracts which cannot be carried out by the machinery of a court: *Metropolitan Exhibition Co. v. Ewing*, 42 Fed. Rep. 198. It is a familiar doctrine that a court of equity will not exercise its jurisdiction to grant the remedy of an affirmative specific performance, however inadequate may be the remedy of damages, whenever the contract is of such a nature that the decree for its specific performance cannot be enforced, and its obedience compelled, by the ordinary processes of the court: *Knott v. Manufacturing Co.*, 30 W. Va. 790; nor where every case of alleged violation of the decree would involve the consideration of questions of fact depending upon the peculiar circumstances of each case: *Caswell v. Gibbs*, 33 Mich. 331; *Kidd v. McGinniss*, 1 N. Dak. 331. Specific performance of a contract will not be decreed where the contract is perpetual: *Texas etc. Ry. Co. v. Marshall*, 136 U. S. 393; *McCarter v. Armstrong*, 32 S. C. 203. The proposition is also settled, and will be found reiterated in many of the cases cited in future paragraphs herein, that equity will not decree specific performance of a contract where the enforcement of its decree would involve the direct superintendence of the court: *Ross v. Union Pac. Ry. Co.*, 1 Woolw. 26; *Fallon v. Railroad Co.*, 1 Dill. 121; *Blanchard v. Detroit etc. R. R. Co.*, 31 Mich. 43; 18 Am. Rep. 142; *Kidd v. McGinniss*, 1 N. Dak. 331; *Danforth v. Philadelphia etc. Ry. Co.*, 80 N. J. Eq. 12; *McCann v. Nashville R. R. Co.*, 2 Tenn. Ch. 773. In modification of the general rule just stated it is said that when the inconvenience of the courts in acting is more than counterbalanced by the inconvenience of the public if they do not act, the interest of the public will pre-

vall: *Standard Fashion Co. v. Siegel-Cooper Co.*, 157 N. Y. 60; ante, p. 749.

Building and Construction Contracts.—Perhaps the most important subdivision of the class of cases under consideration is that of building and construction contracts. The element of personal services runs through most of the cases that come within our subject. Consequently, any subdivision must be arbitrary to a certain degree, but we shall treat of purely service contracts later. It was early held in England that a court of equity might decree the specific performance of a covenant to build: *London v. Nash*, 3 Atk. 512; but it is now settled both in England and the United States that a decree of specific performance will be refused of a contract to construct a building or to make repairs therein: *Errington v. Aynsby*, 2 Dick. 692; *Paxton v. Newton*, 2 Smale & G. 437; *Rayner v. Stone*, 2 Eden, 128; *Hill v. Barclay*, 16 Ves. 402; *Beck v. Allison*, 56 N. Y. 366; *Mastin v. Halley*, 61 Mo. 196. Compare *Birchett v. Bolling*, 5 Munf. 442. Where the covenant sued upon was to make a good gravel pit, the master of the rolls, in refusing a decree, said: "As to cases upon building contracts, it is unnecessary to make observations upon them. . . . No instance of a specific performance of such a covenant as this has been produced. Therefore, I am at liberty to do what, upon principle, ought to be done, to dismiss this bill": *Flint v. Brandon*, 8 Ves. 159. Equity will deny the specific enforcement of a contract to construct a complex machine for the manufacture of speaking tubes, where the performance of the contract would require a high degree of mechanical skill, and the contract contains no specifications showing the method of construction: *Wollensak v. Briggs*, 119 Ill. 453.

The most interesting and important cases in this connection are those growing out of contracts for the construction, operation, and repair of railroads. Many of these contracts are most intricate and complex in their provisions, and extend their performance over long periods of time. Perhaps the leading case of this sort in the United States is that of *Ross v. Union Pac. Ry. Co.*, 1 Woolw. 26. The contract in that case was for the construction, completion, and equipment of a first class railroad from the mouth of the Kansas river to the westward a distance of about three hundred and sixty miles. After a masterly analysis of previous cases, Mr. Justice Miller said: "It seems to me that to establish the general doctrine that contracts for building may be specifically enforced in equity, would be to invite into litigation very many matters which are now generally settled by the parties on a basis much more beneficial to both; and that it would require the constant supervision of the court, through its officers, in the conduct of affairs it is poorly adapted to administer. The result of the court's drawing to itself such a jurisdiction would certainly be far less remedial than the ordinary action for damages." Referring to the contract before the court he continued: "Years must elapse before this work can be done and paid for. At every step in its progress, the interposition of the court, either by orders in this case, or by decrees in successive cases, may be invoked, if we are at this time to lend the aid of chancery to

either of the parties. It is not difficult to foresee the mischiefs of such a course."

Like quotations might be made from many cases. In *Texas etc. Ry. Co. v. Marshall*, 138 U. S. 393, specific performance was asked of a contract, made by a railroad company to permanently locate its terminus and shops in the town of Marshall, Texas. In refusing to grant the decree asked, Mr. Justice Miller said in part: "If the court had rendered a decree restoring all the offices and machinery and appurtenances of the road which have been removed from Marshall to other places, it must necessarily superintend the execution of this decree. It must be making constant inquiry as to whether every one of the subjects of the contract which have been removed has been restored. It must consider whether this has been done perfectly and in good faith, or only in an evasive manner. It must be liable to perpetual calls in the future for like enforcement of the contract, and it assumes in this way an endless duty, inappropriate to the functions of the court, which is as ill-calculated to do this as it is to supervise and enforce a contract for building a house or building a railroad, both of which have in this country been declared to be outside of its proper functions and not within its powers of specific performance." In *Blanchard v. Detroit etc. R. R. Co.*, 31 Mich. 43, 18 Am. Rep. 142, a bill was filed for the specific performance of a railroad company's contract to make and maintain on certain premises a depot or stationhouse, suitable for the convenience of the public; that during all future time, when trains run on the road, at least one train each way should every day stop thereat, and that in all future time freight and passengers should be regularly received and discharged at such depot. In denying the relief prayed for the court said: "Waiving all considerations of possible future action by government under the postal, war, police, or other power, inconsistent with any particular decree which might now be made, can the court see that in all coming time these requirements are carried out? Can it know or keep informed whether trains are running, and what accommodations are suitable to the public interest? Can it see whether the proper stoppages are made each day? Can it notice or legitimately and truly ascertain, from day to day, what amounts to regularity in the receipt and discharge of passengers and freight? Can it have the means of deciding at all times whether due regularity is observed? Can it superintend and supervise the business, and cause the requirements in question to be carried out? If it can, and if it may do this in regard to one station on the road, it may with equal propriety, and upon a like showing, do the same in regard to all stations on the road, and not only so, but in regard to all stations on the present and future roads of the state."

So it may be affirmed, as a general rule, that equity will not undertake the specific enforcement of contracts to construct, operate, or repair railroads; *South Wales Ry. Co. v. Wythes*, 1 Kay & J. 180; affirmed in 5 De Gex, M. & G. 880; *Kingston v. Kingston etc. Ry. Co.*, 28 Ont. Rep. 399; *Oregonian Ry. Co. v. Oregon Ry. & Nav. Co.*, 87 Fed. Rep. 733; 11 Saw. 33; *Fallon v. Railroad Company*, 1 Dill

121; *Lattin v. Hazard*, 91 Cal. 87; *Suburban Construction Co. v. Nangle*, 70 Ill. App. 384; *Atlanta etc. R. R. Co. v. Speer*, 32 Ga. 550; 79 Am. Dec. 305; *Danforth v. Philadelphia etc. Ry. Co.*, 30 N. J. Eq. 12; *McCann v. Nashville R. R. Co.*, 2 Tenn. Ch. 773. In *Suburban Construction Co. v. Nangle*, 70 Ill. App. 384, after a review of the authorities, the court thought it safe to conclude "that no case can be found (certainly none has been cited to us, and we are unable to find any), in which it is held that a building contract providing for the construction and operation as well of a railroad can be specifically enforced": See *Ross v. Union Pac. Ry. Co.*, 1 Woolw. 26. But the able discussion of the question in *Port Clinton R. R. Co. v. Cleveland etc. R. R. Co.*, 13 Ohio St. 544, in which specific performance of a covenant in a lease to operate a railroad was refused ends in the conservative conclusion that "the propriety of the exercise of the power to enforce specific performance in cases like the present is exceedingly questionable, and would require extreme care and delicacy in its application. If permissible at all, the demand for the exercise of the power should be stringent, and the circumstances of the case so peculiar as to authorize some limit to the extent and operation of any orders that might be made."

It is easy to find cases in which courts have not so strictly construed their equitable powers as to the specific performance of contracts of the sort under consideration, and which are not always reconcilable with the cases just cited. The cases of *Lucas v. Comerford*, 1 Ves. Jr. 335, and *Mosely v. Virgin*, 3 Ves. Jr. 185, are frequently noticed as setting forth contradictory doctrines. In the former Lord Chancellor Thurlow expressed the opinion that a covenant to build would no more be enforced in equity than one to repair, while in the latter Lord Chancellor Loughborough thought that Lord Thurlow's statement admitted of the qualification that "if the agreement is in its nature defined, perhaps there would not be much difficulty to decree specific performance; but if it is loose and undefined, and it is not expressed distinctly what the building is, so that the court could describe it as a subject for the report of the master, the jurisdiction could not apply." The decision in Lord Loughborough's case did not pass squarely upon this matter, a decree being denied because the covenant was too general and indefinite in its terms. In *Ross v. Union Pac. Ry. Co.*, 1 Woolw. 26, Justice Miller said: "I think that Lord Loughborough, in alluding to Lord Thurlow's decision, did not correctly state the grounds of it; yet it does not seem to me that he intended to overrule that decision, or that he said anything which could have that effect." In alluding to the same matter, Mr. Story, in his *Equity Jurisprudence*, thirteenth edition, section 727, considers the cases to be in conflict, and approves the opinion of Lord Loughborough in *Mosely v. Virgin*, 3 Ves. Jr. 185, which, having never been overruled, he thinks has left unsettled the question as to equity's jurisdiction to grant specific performance of contracts to build. Justice Miller, in *Ross v. Union Pac. Ry. Co.*, 1 Woolw. 26, after an exhaustive analysis of the cases which are in apparent conflict with *Lucas v. Comerford*, 1 Ves. Jr. 235, characterizes them in three propositions: 1. In each case the

building was to be done upon the land of the person who agreed to do it; 2. The consideration for the agreement in every instance was the sale or conveyance of the land on which the building was to be erected; and the plaintiff had already, by such conveyance on his part, executed the contract; 3. In all of them the building was in some way essential to the use, or contributory to the value of the adjoining land belonging to the plaintiff. Therefore, he considers them as reconcilable with *Lucas v. Comerford*, 1 Ves. Jr. 235, and in no way justifying a court of equity in decreeing specific performance of the contract before the court which was to construct and equip a railroad.

We have not the space to consider this question of conflict at greater length, but what we have said will be of value in considering the cases which will now be taken up. In addition to this weakness in the chain of authority, courts which have desired to justify the specific enforcement of contracts relating to the construction or operation of railroads, have appealed to interest of the public in such agencies. While recognizing the general rule that contracts which require the performance of varied and continuous acts, or the exercise of special skill and judgment, will not be enforced by courts of equity, it is maintained that an exception to this rule, founded upon the rights of the public rather than those of the plaintiff, obtains with reference to contracts relating to the management and control of railroads and other agencies of transportation which enjoy special privileges conferred by statute and promote the general welfare: *Standard Fashion Co. v. Siegel-Cooper Co.*, 157 N. Y. 60; ante, p. 749; *Joy v. St. Louis*, 138 U. S. 1; *Prospect Park etc. R. R. Co. v. Coney Island etc. R. R. Co.*, 144 N. Y. 152. The case of *Joy v. St. Louis*, 138 U. S. 1, is both interesting and important. The contract sued upon concerned the joint use by several companies of a railroad terminal running through Forest Park in St. Louis to the union depot. In decreeing the specific performance of the contract, the court thus stated the nature of the question presented: "Here is a great public park, one of the lungs of an important city, which, in order to maintain its usefulness as a park, must be as free as possible from being serrated by railroads; and yet the interests of the public demand that it shall be crossed by a railroad. But the evil consequences of such crossing are to be reduced to a minimum by having a single right of way, and a single set of tracks, to be used by all the railroads which desire to cross the park. The two antagonisms must be reconciled, and that can be done only by the interposition of a court of equity, which thus will be exercising one of its most beneficent functions." To the objection that were the court to decree specific performance of the contract it would be called upon to determine from time to time what were reasonable regulations by the Wabash company for the running of trains upon its tracks by the Colorado company, the court replied: "But this is no more than a court of equity is called upon to do whenever it takes charge of the running of a railroad by means of a receiver. Irrespectively of this the decree is com-

plete in itself and disposes of the controversy; and it is not unusual for a court of equity to take supplemental proceedings to carry out its decree and make it effective under altered circumstances."

The "Omaha bridge cases" presented a similarly strong demand for the interposition of equity in the exercise of its powers of specific performance. These cases, under the title of *Union Pac. Ry. Co. v. Chicago etc. Ry. Co.*, 51 Fed. Rep. 309, 10 U. S. App. 98, 163 U. S. 564, arose over two exceedingly complex contracts giving joint trackage rights to several railroad companies over the Union Pacific bridge across the Missouri river at Omaha, which rights were granted for a consideration, for the period of nine hundred and ninety-nine years. The contracts provided in minute detail the terms upon which the rights were to be enjoyed, the duties of the contracting parties as to the adoption of train schedules, et cetera, but their complexity, the length of the period through which they were to run, the magnitude of the burden which a decree of specific performance might place upon the shoulders of the court, none nor all of these considerations deterred the court, upon either of the three hearings of the cases, from following *Joy v. St. Louis*, 138 U. S. 1, and decreeing the specific performance of the contracts sued upon.

To the granting of the relief asked for, it was objected that by so doing the court must undertake the care, management, and operation of ten miles of railroad, with their numerous and complicated switches, sidetracks and signals for nine hundred and ninety-nine years; that no court could frame a single decree to accomplish such a purpose; that the case would have to be kept in court during this whole period in order that the court might, from time to time, modify and change any decree which it might make, so as to suit its decrees to the changing conditions of business and the growing needs of the railroads and the public. A decree for specific performance was nevertheless entered, and the supreme court, on the final hearing said, per Fuller, C. J.: "The jurisdiction of equity to decree the specific performance of agreements is of very ancient date, and rests on the ground of the inadequacy and incompleteness of the remedy at law. Its exercise prevents the intolerable travesty of justice involved in permitting parties to refuse performance of their contracts at pleasure upon electing to pay damages for the breach. . . . But it is objected that equity will not decree specific performance of a contract requiring continuous acts involving skill, judgment, and technical knowledge, nor enforce agreements to arbitrate, and that this case occupies that attitude. We do not think so. The decree is complete in itself, is self-operating and self-executing and the provision for referees in certain contingencies is a mere matter of detail and not of the essence of the contract."

In another instance the supreme court of the United States decreed the specific performance of a railroad lease covenanting for the payment of monthly rent and keeping the road in repair for the period of ninety-nine years: *Pennsylvania R. R. Co. v. St. Louis etc. R. R. Co.*, 118 U. S. 290. An agreement was ordered to be specifically performed between two railroad companies as to the

use of a crossing, stipulating as to priority of rights and that no unnecessary detention should be caused to the trains of either party, nor should such crossing be blocked by either party: Cornwall etc. R. R. Co.'s Appeal, 125 Pa. St. 232; similarly of a contract providing for the joint ownership and operation of the same line of road by several railroad companies, each having an undivided interest therein: Louisville etc. R. R. Co. v. Mississippi etc. R. R. Co., 92 Tenn. 681. See, also, Prospect Park etc. R. R. Co. v. Coney Island etc. R. R. Co., 144 N. Y. 152; South etc. Ala. R. R. Co. v. Highland Avenue etc. R. R. Co., 98 Ala. 400; 39 Am. St. Rep. 74. There has been no definite line established in this class of cases up to which it may be said that equity's powers of specific performance may go, yet may not go farther. That the necessity of minute oversight and superintendence by the court will not in all cases deter it from decreeing specific performance of these contracts must be apparent from the foregoing citations. From them it appears that such a criterion is giving way in importance to the demands of public interest; or, as it is stated in the principal case: "When the inconvenience of the courts in acting is more than counterbalanced by the inconvenience of the public if they do not act, the interest of the public will prevail." *Salus populi est suprema lex*, is a maxim of wide application in the evolution of the law.

Contracts Pertaining to Mines, Quarries, et cetera.—The specific performance of an agreement to let the workings of certain quarries and to account of moneys due for working the quarries in a particular manner was refused in Booth v. Pollard, 4 Younge & C. 61. A similar refusal was had where specific performance was asked of a contract to operate a colliery and deliver coal at a certain rate by designated installments, because the court did not care to undertake the direct superintendence of the colliery during the term of the contract: Pollard v. Clayton, 1 Kay & J. 462. The leading case of this class in the United States is Marble Co. v. Ripley, 10 Wall. 339, where the question as to specific performance arose over a contract to deliver marble of certain kinds and in blocks of certain size and shape. In refusing a decree, the court, per Strong, justice, said: "Another serious objection to a decree of specific performance is found in the peculiar character of the contract itself and in the duties which it requires of the owners of the quarries. These duties are continuous. They involve skill, personal labor, and cultivated judgment. It is, in effect, a personal contract to deliver marble of certain kinds, and in blocks of a kind, that the court is incapable of determining whether they accord with the contract or not. The agreement being for a perpetual supply of marble, no decree that the court can make will end the controversy. If performance be decreed, the case must remain in court forever, and the court to the end of time may be called upon to determine, not only whether the prescribed quantity of marble has been delivered, but whether every block was from right place, whether it was sound, whether it was of suitable size or shape, or proportion." That contracts for the operation of mines, the performance of which requires the exercise of skill, labor, and judgment, will not be specifically enforced by

equity courts, see *Clarno v. Grayson*, 30 Or. 111; *Campbell v. Rust*, 85 Va. 653. Contra, *Wharton v. Stoutenburgh*, 35 N. J. Eq. 286, where the court decreed the specific performance of a contract to execute a lease of mines to be worked in a specific manner.

Services Contracts.—There is a large class of cases which arise from contracts which are more purely contracts for personal services than those which we have noticed. The general statement of the rule governing this class of contracts might fairly be considered to include the cases noticed under the head of building and construction contracts. In both cases the principal ground upon which equity declines to decree specific performance is that the enforcement of a decree would unreasonably tax the superintendence of the court. It is generally held that courts of equity will decline jurisdiction to decree specific performance of contracts for personal services involving the exercise of special skill, judgment, and discretion, continuous in their nature, and running through an indefinite period of time: *Iron Age Pub. Co. v. Western Union Tel. Co.*, 83 Ala. 498; 3 Am. St. Rep. 758; *South & North Ala. R. R. Co. v. Highland Avenue etc. R. R. Co.*, 98 Ala. 400; 39 Am. St. Rep. 74; *Wakeham v. Barker*, 82 Cal. 46; *Cooper v. Pena*, 21 Cal. 404; *William Rogers Mfg. Co. v. Rogers*, 58 Conn. 356; 18 Am. St. Rep. 278; *Willingham v. Hooven*, 74 Ga. 233; 58 Am. Rep. 435; *Clark's case*, 1 Blackf. 122; 12 Am. Dec. 213, and note; *Ikerd v. Beavers*, 106 Ind. 483; *Haight v. Badgley*, 15 Barb. 499; *Standard Fashion Co. v. Siegel-Cooper Co.*, 157 N. Y. 60; ante, p. 749; *Buck v. Smith*, 29 Mich. 166; 18 Am. Rep. 64; *Campbell v. Rust*, 85 Va. 653; *McCarter v. Armstrong*, 32 S. C. 203; *Western Union Tel. Co. v. Union Pac. Ry. Co.*, 3 Fed. Rep. 423; *Blackford v. Davis*, 11 Fed. Rep. 549; *Marble Co. v. Ripley*, 10 Wall. 339.

Chancery has no jurisdiction to enforce the specific execution of a contract to cultivate a particular crop in a designated mode, and to cut, cure, and deliver it in a certain prescribed manner: *Starnes v. Newsom*, 1 Tenn. Ch. 239. It will not attempt to specifically enforce a contract between the managers of a theater and a theatrical company, whereby the manager of the theater bound himself, during the engagement of the company, to furnish stage-hands, flymen, regular ushers, property men, janitor, ticket seller, doorkeepers, and orchestra at the theater: *Welty v. Jacobs*, 64 Ill. App. 235; nor of a contract where a patentee licenses to another to manufacture the patented article, and the licensee agrees to pay royalty, to make monthly reports of sales, to admit the validity of the patent, and to give its co-operation in maintaining the patentee's business and the patent under which the license is issued, the patentee reserving the power to revoke the license: *Washburn etc. Mfg. Co. v. Freeman Wire Co.*, 41 Fed. Rep. 410. Compare *Pope Mfg. Co. v. Gormully*, 144 U. S. 224. Equity will not decree the specific performance of a city's contract to maintain land dedicated to it, as a public park, forever, in good repair, free from nuisances, and to place no improvements thereon not suitable to its use as a park: *Kidd v. McGinniss*, 1 N. Dak. 331. Contra, *Stuyvesant v. Mayor etc. of New York*, 11 Paige, 414. Where, however a contract between a city and a water company provided that all water admitted into the

company's mains must be properly filtered except when used in the extinguishment of fires, and under such contract the company held an exclusive franchise, had established its plant and laid its pipes in the streets of the city, and private consumers had, at large expense, conducted the water into their houses, it was held that, the company having failed to supply the city with filtered water as agreed, the city was entitled to a decree of specific performance of the contract: *Burlington v. Burlington Water Co.*, 86 Iowa, 266. The case just cited is another interesting illustration of the tendency of equity courts, in the exercise of their powers of specific performance, to subordinate their own convenience to the demands of public interest.

Contracts of Professional Performers, as Actors and Ball-players.—The question has frequently arisen as to the extent to which an actor or singer may be compelled to fulfill his contracts to perform for another, and was considered in the monographic note to *McCrea v. Marsh*, 71 Am. Dec. 750. It is, perhaps, safe to say that in no case has such a contract been actively enforced. On the contrary, specific performance has been frequently refused: *Sanguirico v. Benedetti*, 1 Barb. 315; *Carter v. Ferguson*, 58 Hun. 569; *Burton v. Marshall* 4 Gill, 487; 45 Am. Dec. 171; *Hamblin v. Dinneford*, 2 Edw. Ch. 529. Such a case being presented before Chancellor Walworth in *De Rivaflnoli v. Corsetti*, 4 Paige Ch. 264, 25 Am. Dec. 532, seems to have appealed strongly to the learned chancellor's sense of humor. In denying the relief asked, he said: "I am not aware that any officer of this court has that perfect knowledge of the Italian language or possesses that exquisite sensibility in the auricular nerve which is necessary to understand and enjoy with a proper zest the peculiar beauties of the Italian opera, so fascinating to the fashionable world. There might be some difficulty, therefore, even if the defendant was compelled to sing under the direction and in the presence of a master in chancery, in ascertaining whether he performed his engagement according to its spirit and intent. It would also be very difficult to determine what effect coercion might produce upon his singing, especially in the livelier airs; although the fear of imprisonment would unquestionably deepen his seriousness in the graver parts of the drama. But one thing at least is certain: his songs will be neither comic, nor even semi-serious, while he remains confined in that dismal cage, the debtors' prison of New York." Specific performance will not be decreed of a contract to perform as acrobats: *Cort v. Lassard*, 18 Or. 221; 17 Am. St. Rep. 728; nor of a professional base-ball player's contract to give his services to a certain team: *Allegheny Base Ball Club v. Bennett*, 14 Fed. Rep. 257; *Metropolitan Exhibition Co. v. Ewing*, 42 Fed. Rep. 198. In this class of contracts, as in those already considered, courts of equity, while refusing to decree their specific performance, often grant negative relief in the form of an injunction restraining a breach of the contract sued upon. To give this collateral matter thorough attention would expand this note beyond the limits of our space, so we refrain from taking up a question which comes properly under the subject of injunction rather than that of specific performance.

PEOPLE v. WARDEN OF PRISON.

[187 NEW YORK, 116.]

CONSTITUTIONAL LAW—TICKET BROKERAGE—STATUTES PROHIBITING.—A statute undertaking to make it a crime for a person to sell or offer for sale any passage ticket for passage or conveyance upon any vessel or railway train, unless he is an authorized agent of the owners or consignees of such vessel or corporation running such trains, provided that the authorized agent of any transportation company may purchase from the properly authorized agent of any other transportation company a ticket for a passenger, to whom he may sell a ticket to travel from any point on the line for which he is a properly authorized agent, so as to enable such passenger to travel to the place or junction from which his ticket shall read, is unconstitutional and void.

CONSTITUTIONAL LAW—POLICE POWER—DUTY OF THE COURTS TO EXAMINE WHETHER A STATUTE IS A PROPER EXERCISE OF.—Where a statute is sought to be upheld as a proper exercise of the police power, the court should examine it for the purpose of ascertaining whether the health, morals, safety, or welfare of the public justifies its enactment.

Samuel Untermeyer, Louis Marchall, and Abraham Gruber, for the appellant.

James D. McClelland and Charles E. Le Barbier, for the respondent.

¹¹⁸ PARKER, C. J. The statute that appellant insists is in derogation of the limitation placed upon the legislative power by the people, through the constitution of the state, reads as follows:

Section 1. The Penal Code is hereby amended by inserting therein a new section, to be known as section 615, ¹¹⁹ to read as follows: Sec. 615. Sale of passage tickets on vessels and railroads forbidden, except by agents specially authorized.—No person shall issue or sell, or offer to sell, any passage ticket, or an instrument giving or purporting to give any right, either absolutely or upon any condition or contingency to a passage or conveyance upon any vessel or railway train, or a berth or stateroom in any vessel, unless he is an authorized agent of the owners or consignees of such vessel, or of the company running such train, except as allowed by sections 616 and 622; and no person is deemed as authorized agent of such owners, consignees, or company, within the meaning of the chapter, unless he has received authority in writing therefor, specifying the name of the company, line, vessel, or railway for which he is authorized to act as agent, and the city, town, or village, together with the street and street number, in which his office is kept, for the sale of tickets."

"Sec. 2. Section 616 of the Penal Code is hereby amended so as to read as follows: Sec. 616. Sale by authorized agents restricted.—No person, except as allowed in section 622, shall ask, take, or receive any money or valuable thing as a consideration for any passage or conveyance upon any vessel or railway train, or for the procurement of any ticket or instrument giving or purporting to give a right, either absolutely or upon a condition or contingency, to a passage or conveyance upon a vessel or railway train, or a berth or stateroom on a vessel, unless he is an authorized agent within the provisions of the last section; nor shall any person, as such agent, sell, or offer to sell, any such ticket, instrument, berth or stateroom, or ask, take, or receive any consideration for such passage, conveyance berth, or stateroom, except at the office designated in his appointment, nor until he has been authorized to act as such agent according to the provisions of the last section, nor for a sum exceeding the price charged at the time of such sale by the company, owners, or consignees of the vessel or railway mentioned in the ticket. Nothing in this section or chapter contained shall prevent ¹²⁰ the properly authorized agent of any transportation company from purchasing from the properly authorized agent of any other transportation company a ticket for a passenger to whom he may sell a ticket to travel over any part of the line for which he is the properly authorized agent, so as to enable such passenger to travel to the place or junction from which his ticket shall read."

The remaining portion of the section relates to the redemption of tickets purchased from an authorized agent of a railway company, under certain contingencies, and within certain periods of time, and is not in anywise involved in this appeal.

Having observed how the statute reads, it will be well next to analyze it and see if we can find out what was intended to be accomplished, and is in fact accomplished, by the phraseology of the statute, in order that we may ascertain whether the statute is in contravention of any of the rights secured by the constitution to the citizen. It will be observed in the first place that it does not prohibit the sale of tickets absolutely, nor does it limit to the particular transportation company over whose route he desires to be conveyed the right to sell tickets to the traveler. It may be said, in passing, that the last assertion is in conflict with the position taken by the learned judge who wrote the opinion of the appellate division; for he assumes that as only persons appointed agent can sell, the effect of the provision is that a corporation "shall only sell through its agents, and is

merely a declaration that the corporation itself was to sell its tickets."

The first section and the first part of the second section do restrict the sale of passage tickets to agents specially authorized by transportation companies, and if there was nothing else in the statute upon the subject, it would bear the construction put upon it, that its only effect is to confine the right to sell passage tickets of a corporation to that corporation itself, which can act only through agents; but between the opening and the closing sentences of the second section may be found the following: "Nothing in this section or chapter contained shall prevent the properly authorized agent of any transportation ¹²¹ company from purchasing from the properly authorized agent of any other transportation company a ticket for a passenger to whom he may sell a ticket to travel over any part of the line for which he is the properly authorized agent, so as to enable such passenger to travel to the place or junction from which his ticket shall read." Thus we see that the moment a man becomes the agent of a transportation company he is by that designation authorized to buy tickets of any other transportation company in the United States or the world, and may sell such tickets to any person who applies for them. In the sale of tickets of the various transportation companies, other than those of the company of which he is an agent, he necessarily acts as a broker. He can buy the tickets and sell them again, making a profit that may, perhaps, depend more or less on the degree of competition between railroads in various parts of the country. Clearly, the agent of a transportation company, in the purchase and sale of tickets of foreign corporations, is not engaged in selling the passage tickets of the transportation company appointing him. It is not the sale of the tickets of the principal alone that the agent is thus engaged in; but when a transportation company appoints an agent to sell its tickets, then the state, by this statute, steps in and attempts to clothe him with the power which it takes from all other citizens to deal in the tickets of as many other transportation companies as he may be able to make satisfactory arrangements with.

This leads us to note another interesting feature of this remarkable statute. The buying and selling of passage tickets is not abolished; it is only condemned where the seller has not authority from some one of the transportation companies to act as its agent. It has happened before that for the protection of the people the lawmaking power has provided for an examination

for the purpose of ascertaining whether applicants possessed suitable qualifications as to character, intelligence, and financial responsibility to fill certain positions of trust, or to engage in a business which might prove dangerous to the people in the hands of a person either incompetent or ¹²² of bad character; but in no instance has it conferred a general and unlimited power of appointment upon a class of persons or corporations wholly unconnected with the state government. It may possibly be that there was such a situation as would have justified an enactment placing some restrictions upon those engaged in the selling of passage tickets and prescribing penalties by way of fine or imprisonment for those who should break over such restraints. Our excise legislation affords an illustration. By its provisions all are permitted to sell liquor within certain limitations that apply to all citizens alike, and for the violation of the regulations of the traffic are provided certain penalties that are expected to assure to the public some measure of protection from nonlaw-abiding citizens engaged in the business. But this act simply turns over to the transportation companies the selection of those who are hereafter to be permitted to sell tickets. It imposes no restraints whatever upon the appointing power, nor upon the agents selected, other than that in the purchase of tickets he must confine himself to the properly authorized agents of the transportation companies. The business of buying and selling tickets, as to such agents, continues to be a legitimate business, but to all citizens other than those who may be selected by the transportation companies, the right to buy and sell tickets is denied and an actual sale by them constitutes a felony. The act itself is silent as to the motive of its enactment by the legislature, and it contains no suggestion as to the public interests which its purpose is to subserve.

Ticket brokerage as a business has been in existence for many years. It is a matter of common knowledge that at great agencies such as Cook's and Gaze's tickets can be purchased over a great portion of the transportation routes of the world. Intending travelers in great numbers have gone to those agencies for advice as to choice of routes to be taken in contemplated journeys and to purchase the tickets for the trip, whether it should require days, or weeks, or months to make it. The traveling public in large numbers have come to make use of the facilities afforded by such agencies, of ¹²³ which there are now very many. And Cook's and Gaze's are among the agencies that must go out of business in this state if this statute can live, unless

some transportation company shall deem it wise to clothe them with the authority to act as its agents.

It is asserted by counsel that the traveling public and the transportation companies have been so defrauded by the acts of the brokers in the selling of unused or alleged to be unused passage tickets, as to call for legislation of a protective character, of which this statute is the outcome. The tendency of the times undoubtedly is to rush to the legislature for a cure for all the grievances of citizens, whether real or imaginary, and many novel experiments in legislation are the result. But usually in case of wrongs penalties have been provided. It is novel legislation indeed that attempts to take away from all the people the right to conduct a given business because there are wrongdoers in it, from whose conduct the people suffer. But where in the statute is to be found the evidence that its purpose is to prevent fraud? "In the title of the act," answers counsel, and with that answer he has to be content. For while the act is entitled "Frauds in the sale of passage tickets," the body of the statute does not contain any reference to forged, altered, used or stolen tickets. The sale of such tickets is made a punishable offense under other sections of the Penal Code. The provisions of the act, therefore, have reference to the selling of valid tickets, regularly issued by a transportation company. Can the legislature declare such sales to be fraudulent, or prohibit them on the ground that it tends to prevent fraud? If the act prohibited is fraudulent, there can be no doubt that the legislature, under its police power, may provide for its punishment; but whether it may, under such power, interdict the sales of a valid ticket by one person to another upon the pretext that fraud will thus be prevented, presents a very different question. I confess I am unable to see how such a sale defrauds a transportation company. If a transportation company sells a ticket from New York to San Francisco, it undertakes to carry the holder from one ¹²⁴ place to the other. It costs the company no more to carry one person than it does the other. How then can it be defrauded or in any way prejudiced by the transfer of such a ticket by the purchaser to another person? It is said that the prohibition of such a sale tends to protect the traveler from being defrauded. If it is a sale of a valid ticket, no fraud can possibly result, and if it is not a sale of a valid ticket, then the sale is fraudulent and is prohibited by other provisions of the Penal Code.

Only one prop remains which it is pretended can support the weight of this statute, and that is, that the penal laws not having

proved sufficiently efficacious to wholly prevent fraud, an emergency is presented which justifies the taking away from the general public the right to engage in the business of ticket selling.

It is not contended that the business of ticket brokerage is in itself of a fraudulent character. The business can be honestly conducted; it has been so conducted in the past by honest men engaged in it; and the most that is asserted is that there are some men engaged in the business who have imposed on the public. The same assertion can be made with equal truth of every business, trade, and profession. Because some coal dealers and vendors in sugar cheat in weight, and dealers in paints and oil in measurements, and in tobacco in quality, it has not hitherto, we venture to say, been thought the proper remedy to make it a felony for persons to hereafter engage in such business, unless they shall have been duly appointed as agents by the corporations manufacturing or producing the product.

Still another motive for this enactment is suggested, and that is that its real purpose is to enable transportation companies to compel others with which they may enter into pooling arrangements to preserve their agreement from secret violation, which is frequently the outcome under the present ticket brokerage system, which offers an avenue by which the weaker corporation to such an agreement can dispose of its tickets at a price lower than that agreed upon. The subject received ¹²⁵judicial attention in Nashville etc. Ry. Co. v. McConnell, 82 Fed. Rep. 65, and State v. Corbett, 57 Minn. 345, where statutes, having apparently the same object in view as this one, were under consideration, as will appear from the following extract from the opinion: "It was also commonly believed that, in order to evade statutes designed to secure uniformity of rates and to prevent discriminations, some carriers of passengers were in the habit of placing large blocks of their tickets with 'scalpers,' ostensibly not their agents, for sale at cut rates. To remedy these and similar abuses, real or supposed, this statute was passed. That all its provisions have some relation to, and tendency to accomplish, this end, is quite clear."

Counsel argue that the helpfulness of the ticket broker in securing to the traveling public the benefits of such competition was of such a fraudulent character as to wholly justify the legislation, and appeal to the decisions quoted from in support of such contention. But we pass for the present the subject of motive, to be again referred to when we come to consider

whether, under the police power, the legislation can be justified. Whatever the legislature's motive, the fact is, that it has passed an act which does not declare ticket brokerage unlawful, for it allows any person who may be fortunate enough to secure an appointment as agent for a transportation company to engage in ticket brokerage; but the act does declare that if any person, other than an agent of a transportation company, undertakes to engage in the passenger ticket brokerage business he shall be guilty of a felony; in other words, that it is unlawful for all citizens of New York to engage in the buying and selling of passage tickets unless empowered to do so by the written appointment of a transportation company.

Much has been said in argument with reference to this statute in a more agreeable vein, placing the statute in a somewhat more attractive form, but it is as well to go beneath the surface and get at the truth, which is that the statute was intended to, and does in fact, vest the control of the sale of ¹²⁸ ~~126~~ passage tickets within this state, not only of transportation companies doing business in this state, but throughout the world, exclusively in the hands of such companies.

The business of selling passage tickets continues, therefore, to be regarded as a lawful and legitimate business. Public policy is still declared to favor a business which recognizes the propriety of the middleman between the passenger and the transportation company, but the right to engage in it is denied to the general public.

The question, then, is whether the organic law prohibits legislation of this character.

Before referring to the provisions of the constitution that it is confidently asserted condemn such legislation, it may not be out of place to note that the granting of monopolies or exclusive privileges to corporations or persons has been regarded as an invasion of the rights of others to follow a lawful calling and an infringement of personal liberty, from the times of the reigns of Elizabeth and James. The statute of 21 Jacobus, abolishing monopolies, has been from the time of its enactment regarded as a statutory landmark of English liberty, and that nation has jealousy preserved it. It was a part of that inheritance which our fathers brought with them and incorporated into the organic law, to the end that the lawmaking power should be restrained from interference with it.

In this connection the language employed by Mr. Justice Field in *Butcher's Union Co. v. Crescent City Co.*, 111 U. S. 746, 756,

757, is most instructive. "As in our intercourse with our fellow-men certain principles of morality are assumed to exist, without which society would be impossible, so certain inherent rights lie at the foundation of all action, and upon a recognition of them alone can free institutions be maintained. These inherent rights have never been more happily expressed than in the Declaration of Independence, that new evangel of liberty to the people: 'We hold these truths to be self-evident'—that is, so plain that their truth is recognized upon their mere statement—'that all men are endowed'—not by ¹²⁷ edicts of emperors, or decrees of parliament, or acts of Congress, but 'by their Creator, with certain inalienable rights'—that is, rights which cannot be bartered away, or given away, or taken away except in punishment of crime—and that among these are life, liberty, and the pursuit of happiness, and to secure these—not grant them but secure them—'governments are instituted among men, deriving their just powers from the consent of the governed.' Among these inalienable rights, as proclaimed in that great document, is the right of men to pursue their happiness, by which is meant the right to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others, which may increase their prosperity or develop their faculties, so as to give to them their highest enjoyment. The common business and callings of life, the ordinary trades and pursuits, which are innocuous in themselves, and have been followed in all communities from time immemorial, must, therefore, be free in this country to all alike upon the same conditions. The right to pursue them, without let or hindrance, except that which is applied to all persons of the same age, sex, and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright. . . . In this country it has seldom been held, and never in so odious a form as is here claimed, that an entire trade and business could be taken from citizens and vested in a single corporation. Such legislation has been regarded everywhere else as inconsistent with civil liberty. That exists only where every individual has the power to pursue his own happiness according to his own views, unrestrained, except by equal, just, and impartial laws."

From the opinion of Mr. Justice Matthews in *Yick Wo v. Hopkins*, 118 U. S. 356, 370. the following is taken: "But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims

of constitutional law which are the monuments showing the victorious progress of the race in securing to men ¹²⁸ the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts bill of rights, the government of the commonwealth 'may be a government of laws and not of men.' For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

These principles have also been incorporated into the organic law of this state. Article 1, section 1 of the state constitution reads as follows: "No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers."

Article 1, section 6, of the state constitution provides that "no person shall . . . be deprived of life, liberty, or property without due process of law." The word "liberty," as employed in the provision of the constitution quoted was considered by this court in *In re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636, in a masterful opinion by Judge Earl. He said: "So, too, one may be deprived of his liberty and his constitutional rights thereto violated without the actual imprisonment or restraint of his person. Liberty, in its broad sense as understood in this country, means the right, not only of freedom from actual servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation. All laws, therefore, which impair or trammel these rights, which limit one in his choice of a trade or profession, or confine him to work or live in a specified locality, or exclude him from his own house, or restrain his otherwise lawful movements (except as such laws may be passed in the exercise by the legislature of the police power, which will be noticed later), are infringements upon his fundamental rights of liberty, which are under constitutional protection."

¹²⁹ In *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, this court declared unconstitutional a statute that prohibited the manufacture and sale of any substitute for butter or cheese produced from pure unadulterated milk or cream. Judge Rapallo, speaking for the court, said: "Among these no proposition is now more firmly settled than that it is one of the fundamental

rights and privileges of every American citizen to adopt and follow such lawful industrial pursuits, not injurious to the community, as he may see fit. The term 'liberty,' as protected by the constitution, is not cramped into a mere freedom from physical restraint of the person of the citizen, as by incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare."

In *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, a statute was declared to be unconstitutional which prohibited the sale of any article of food, or offering or attempting to do so, upon any representation or inducement that anything else would be delivered as a prize, premium or reward to the purchaser. Judge Peckham, in delivering the opinion of the court, after considering the statute, said: "A liberty to adopt or follow for a livelihood a lawful industrial pursuit, and in a manner not injurious to the community, is certainly infringed upon, limited, perhaps weakened or destroyed, by such legislation."

Argument certainly is not needed in the light of these decisions to support the assertion that the "liberty" of this relator and other citizens of this state to engage in the business of brokerage in passage tickets is sought to be interfered with by the statute under consideration, for brokerage in such tickets has been a lawful business in this state for many years, and many persons have pursued it. It is still a lawful business, although the right to engage in it is limited to such persons as may be appointed by the transportation companies. The statute is, therefore, in contravention of the state constitution, and is void unless its enactment by the legislature constituted ¹³⁰ a valid exercise of the police power. That power is very broad and comprehensive, and has not as yet been fully described or its extent plainly limited, but it is exercised to promote the health, comfort, safety, and welfare of society. In each of the last three cases cited it was invoked by counsel to sustain a statute, and it received very careful consideration at the hands of this court. It was held that the power, however broad and extensive, is not above the constitution, in obedience to the commands of which the courts will protect the rights of individuals from invasion under the guise of police regulations, when it is manifest that such is not the object and purpose of the regulation; and while it is the general province of the legislature to determine what laws and regulations are needed to protect the public health,

comfort, and safety, courts must be able to say, upon a perusal of the enactment, that there is some fair and reasonable connection between it and the ends above mentioned. Unless such relation exists, an enactment cannot be upheld as an exercise of the police power.

The doctrine of these cases was very recently considered and reasserted by this court in *Colon v. Lisk*, 153 N. Y. 188, 60 Am. St. Rep. 609, and its further discussion at this time would be a work of supererogation. Under the law of this state, therefore, it is the duty of the courts to examine legislation complained of as in violation of the rights secured to the citizens by the constitution for the purposes of ascertaining whether the health, morals, safety, or welfare of the public justifies its enactment. In passing, it may be observed that while it is undoubtedly the rule that railroads, steamboats, warehouses, and other associations of that nature, impressed with a public duty and intended to perform certain quasi public functions, may be the subject of legislative control and regulation so long as the legislature does not transcend the limit of state or federal constitution, still that rule is without application to the features of the statute before the court on this review. This inquiry involves such portion of the statute only as undertakes to prohibit citizens of the state from engaging in the brokerage ¹³¹ business in passage tickets. That portion of the statute certainly places no burden upon transportation companies, nor does it in any way regulate the manner in which transportation companies shall conduct their business or any part of it. The legislature has no jurisdiction to regulate the methods of business of foreign transportation companies, nor can it prevent them from selling their passage tickets in this state, but by this act it does undertake to prevent any citizen of this state from purchasing the passage tickets of foreign companies for sale to others, unless such citizen shall have been regularly appointed an agent by some transportation company. The right hitherto exercised by citizens to deal in passage tickets over transportation routes without, as well as within, this state, is sought to be cut off.

Again, it may be conceded that it is within the power of the legislature to regulate the manner in which certain kinds of business may be conducted; that it may require one seeking to engage in a given pursuit to secure from the state, or one of its agents, a license; that it may require one pursuing any particular occupation to pay a tax for the privilege of conducting his business; and that, as a condition to the right of carrying on a

business that, in the hands of incompetent persons, may be productive of injury to others, the legislature may require that before engaging therein, one must satisfy the public authorities that he is competent and morally qualified to conduct it. But none of these methods was adopted. No attempt is made to exclude persons of bad character from engaging in the business, nor are the public authorities given the right to determine, by examination or otherwise, the character of the person to be engaged in it; but the transportation companies alone are invested with the power to allow whomsoever they will to engage in the business.

Nor can the contention be tolerated that because there have been, in times past, dishonest persons engaged in the ticket brokerage business, with the result that frauds have been perpetrated on both travelers and transportation companies, therefore the legislature can deprive every citizen ¹³² engaged therein of the "liberty" to further conduct such business. Stringent rules undoubtedly may be enacted to punish those who are guilty of dishonest practices in the conduct of such a business and the machinery of the law put in motion for its rigorous enforcement; but to cut up, root and branch, a business that may be honestly conducted to the convenience of the public and the profit of the persons engaged in it, is beyond legislative power.

If the law were otherwise, no trade, business, or profession could escape destruction at the hands of the legislature if a situation should arise that would stimulate it to exercise its power, for in every field of endeavor can be found men that seek profit by fraudulent processes. Transportation tickets have been forged, it is said; so have notes, checks, and bank bills. Railroad companies are no more bound to honor forged tickets than the alleged maker of a forged note is bound to pay it. An innocent person who suffers by parting with his money on a forged ticket has his remedy against the vendor just the same as has the bank that discounts a forged note. Such instances might be multiplied, but it would serve no good purpose, for it is well known that no business can be suggested through which innocent parties may not be occasionally victimized. But, because of that fact, honest men cannot be prevented from engaging in their chosen occupations.

Again, it is said that ticket brokers enable the railroads to engage in unfair competition. This is accomplished by the sale to the broker by a competing railroad, at much less than the regular rates, of a block of tickets that the broker is enabled to sell to

his customers, and this to a certain extent takes travel from its competitors. An opinion is cited in which the court in another jurisdiction denounces the ticket scalper for engaging in a business of this character and pronounces such business fraudulent alike in its conception and operation; but we pass this opinion without other comment than to say that whatever may be regarded as the law in other jurisdictions, in this one it is well established that the public ¹³³ welfare is best subserved by the encouragement of competition (*People v. Sheldon*, 139 N. Y. 263; 36 Am. St. Rep. 690; *Judd v. Harrington*, 139 N. Y. 105), and hence this so-called reason furnishes no support to the claim that this legislation was for the public good.

I have now called attention to all the arguments that have been advanced in support of the claim that the provisions of the statute under consideration are so evidently intended for the public good as to constitute a valid exercise of the police power by the legislature, and those arguments seem so wholly without merit as to suggest that they constitute a mere pretext put forward to uphold legislation hostile to the liberty of the citizen, as that word is used in the constitution. If the views expressed be well founded, it follows that it is the duty of the court to declare that portion of the statute we have considered to be in contravention of the constitution and void.

The order should be reversed and the prisoner discharged.

JUDGE BARTLETT dissented. He claimed that similar legislation had been sustained in other states: *Burdick v. People*, 149 Ill. 600; 41 Am. St. Rep. 829; *State v. Corbett*, 57 Minn. 345; *Commonwealth v. Wilson*, 14 Phila. 384; that the only question presented for decision was, "Is it competent for the legislature, in the exercise of the police power and in regulating the sale of passage tickets by common carriers, to prohibit sales by ticket brokers, unless they are duly authorized to make such sales by the owners or charterers of the vessel, or by the company running the railway train upon which passage tickets are offered for sale"; that it was a reasonable inference from the declaration "on the face of the statute that the legislature was moved to act in order to prevent frauds upon passengers and common carriers"; that it is competent for the legislature in the exercise of the police power, in order to prevent frauds in the sale of passage tickets by land and water, to confine their sales to the individuals and corporations issuing them, or their duly authorized agents; that it is difficult and undesirable to define the limits of the police power, but it includes the general power of government to preserve and promote the general welfare, even at the expense of private rights, and is coextensive with the right of self-protection, and hence enables the state to prohibit all things hurtful to the comfort, safety, and welfare of society; that it is a reasonable and proper exercise of the police power by the legislature when

seeking to put an end to frauds in the sale of passage tickets to require carriers to sell their own tickets directly or through duly authorized agents; that the question before the court does not require it to determine whether the law is applicable to a purchaser in good faith of a ticket with intent to use it, but who, being unexpectedly prevented from so doing, desires to sell it; that the relator has no vested right as a ticket broker to traffic in the purchase and sale of these symbols or tokens, which are the property of the carriers, as has a merchant dealing in goods, wares and merchandise; that the assailed statute, while it does affect brokers engaged in interstate commerce, cannot properly be held to be an effort on the part of the state to regulate commerce within the meaning of the federal constitution.

JUDGE MARTIN also dissented. He affirmed that many statutes similar to the one in question had been passed and had remained for years unrepealed; that they showed a legislative policy which had been acquiesced in by the departments of government and amounted to a practical construction of the constitution; that the purpose of the statute was to compel the different transportation companies to sell their own passage tickets; and was the only efficient means of accomplishing the ends sought; that railway and steamboat tickets are not property within the common acceptation of that term, when in the hands of others than passengers; that the purpose of the statute was to prevent fraud in the sale of passage tickets; that it was a matter of common knowledge that the sale of tickets by brokers had long been a source of fraud upon the traveling public and the companies issuing them; that though every person has a right to pursue in a legitimate manner any lawful calling he may select, and the state cannot prohibit him from adopting such calling, nor compel him to adopt some other, still, in the exercise of the police power, it may subject all occupations to such restraint as may be necessary to prevent their becoming harmful to the public, and may even prevent the pursuit of an occupation when it threatens to become a public injury; that the only effect of the statute is to require railroad and steamboat companies to sell their own tickets in a manner which will render them responsible to the purchaser for any fraud or mistake that may occur or be perpetrated.

STATUTES—CONSTITUTIONALITY—REGULATION OF SALE OF RAILROAD TICKETS.—A statute prohibiting the sale of railroad tickets, or parts thereof, except by authorized agents, or by parties who have purchased tickets with the bona fide intention of traveling thereon, is not unconstitutional. It does not deprive an unauthorized holder of a ticket of the property without due process of law: *Burdick v. People*, 149 Ill. 600; 41 Am. St. Rep. 329.

POLICE POWER—REGULATIONS WITHIN—POWER OF COURTS.—Laws and regulations necessary for the protection of the lives, morals and safety of society are strictly within the legitimate exercise of the police power of the state, if reasonable and not prohibited by either the state or the national constitutions: *Ford v. State*, 86 Md. 465; 60 Am. St. Rep. 337, and note. A determination by the legislature as to what is a proper exercise of the police power is not final and conclusive, but is subject to the supervision of the courts: *Colon v. Lisk*, 153 N. Y. 188; 60 Am. St. Rep. 609.

WARREN v. UNION BANK OF ROCHESTER.

[157 NEW YORK, 252.]

GUARDIAN AND WARD—POWER TO ENGAGE IN BUSINESS.—The general guardian of a minor has no authority to embark in, or conduct the business of, brewing, or the purchase and sale of barley or other merchandise in the name of his ward, and employ therein the capital or credit of the latter. The employment of trust property in trade or speculation, or in manufacturing, is a gross breach of the trust.

TRUST FUNDS, RETENTION OF CHARACTER OF.—Trust funds invested by trustees in the hands of third persons having knowledge of their character, still remain impressed with the obligation of the trust in the hands of the holder, and are subject to be reclaimed and restored to the trust fund.

A TRUSTEE OR GUARDIAN CANNOT BIND the estate he represents to any use of its funds by contracts with third persons who have knowledge of the character of the property transferred, except in the ordinary and usual course of administration of the trust, and in furtherance of its object.

GUARDIAN'S MORTGAGE, WHEN VOID.—A mortgage made by a guardian for the purpose of imposing a liability on the estate of his ward for losses resulting in conducting a business in the latter's name to a mortgagee charged with notice of the facts, is void.

COLLUSION is an agreement between two or more persons to defraud another of his rights by the forms of law, or to secure an object forbidden by law.

GUARDIAN'S MORTGAGE, ORDER OF COURT, WHEN DOES NOT VALIDATE.—If a guardian of a minor and a corporation collude to obtain a mortgage of the property of the minor to secure a liability for which his estate is not answerable, and an order of court is secured by them purporting to authorize such mortgage, relief may nevertheless be granted in equity from such order and mortgage.

EQUITY—RELIEF FROM ORDER OF COURT.—If an order of court, purporting to authorize a guardian to mortgage property of his ward is procured by collusion and fraud, and when the estate of the ward is not liable for the debt secured by the mortgage, equity has jurisdiction to relieve the ward from such order and the mortgage made pursuant thereto.

PLEADING FRAUD.—If facts are alleged which were wrongful or necessarily fraudulent, they need not be charged to have been wrongfully or fraudulently performed. Where the law presumes fraud because it is the necessary consequence of alleged acts, they need not be characterized as fraudulent or otherwise.

GUARDIAN—MORTGAGE BY—JURISDICTION OF COURT TO ORDER.—If a statute prescribes the circumstances in, and the purposes for, which a court may authorize a guardian to mortgage the estate of his ward, an order purporting to authorize such a mortgage, when the petition, proofs, and all the papers in the proceeding show that the purpose is not one sanctioned by the statute, is beyond the jurisdiction of the court, and hence void. In such a proceeding the requirements of the statute must be strictly pursued.

COURT—SPECIAL AND LIMITED JURISDICTION.—A court, in proceedings to authorize a guardian to mortgage the prop-

erty of his ward, is exercising a special and limited jurisdiction, wholly dependent upon the statute, and no presumption can be indulged in favor of that particular jurisdiction, though the court is one of general jurisdiction.

JUDGMENT—DIRECT ATTACK UPON, FOR WANT OF JURISDICTION.—A suit to obtain relief from an order authorizing a mortgage, on the ground that such order was obtained by fraud and collusion, is a direct attack thereon, though the complainant also seeks in the same suit relief from such mortgage.

Suit by a minor against the Union Bank of Rochester, G. H. Perkins, and Holmes B. Stevens, to set aside a mortgage of real property and the order of court authorizing it. It was made on behalf of the plaintiff by his general guardian, Holmes B. Stevens, to secure a debt claimed to be due the mortgagee, Perkins. The guardian, without any authority, had conducted in the name of his ward the business of a brewer, buying and selling barley, and manufacturing beer, malt, and ale, and in doing so borrowed money of, and became indebted to, the bank. To secure this indebtedness, it was agreed between him and the bank that he should apply to the supreme court and obtain an order authorizing him to mortgage his ward's real estate. He accordingly, in February, 1895, presented his petition to that court, averring the indebtedness of his ward to the bank, its threat to sue therefor if not paid, and that the ward's real property was in danger of sacrifice if such suit should be prosecuted, that his income was not sufficient to pay the debt, and that W. S. Kimball was willing to loan the moneys required. An attorney of the bank was appointed special guardian of the infant to represent him in these proceedings. Kimball was president of the bank. He died, and defendant Perkins, a director and vice-president of the bank, took his place in the proceeding. An order was procured authorizing the borrowing of Perkins, and the execution of a mortgage to him. It was executed accordingly, and Perkins paid over to the guardian the amount of the loan, which he, in turn, paid to the bank. Soon afterward it repaid Perkins and took an assignment of the mortgage. On these facts the trial court entered a decree in favor of the complainant granting him the relief sought. The appellate division of the supreme court, on appeal, reversed this decree. The complainant appealed from the judgment of reversal.

Charles J. Bissell, for the appellant.

George F. Danforth, for the respondent.

MARTIN, J. It is obvious that the sole purpose and object of the proceeding to mortgage the infant's real estate was

to obtain about twenty-five thousand dollars with which to pay the debt of Holmes B. Stevens to the defendant bank. It is equally apparent that the proceeding was commenced and continued to its conclusion, and that the assignment of the mortgage to the bank was made, under and in pursuance of an agreement between the officers of the bank and the general guardian that the real estate of the infant should be mortgaged to secure the debt of the former, and that the mortgage thus obtained should be submitted as security for and in place of his debt to the bank.

Stevens, as the general guardian of the infant plaintiff, had no right or authority to embark in, or conduct the business of, brewing, or the purchase and sale of barley or other merchandise ~~ses~~ in the name of his ward, and employ therein the capital or credit of the latter. It is a well-established and elementary principle of the law relating to the rights and liabilities of trustees that, in the absence of an express and sufficient authority therefor, the employment of trust property in trade or speculation, or in manufacturing, is a gross breach of trust upon the part of the trustee. This rule applies even where he simply continues the business or trade of a testator. It is the duty of a trustee to close up the trade or business; to withdraw the funds and invest them in proper security at the earliest convenient moment: *Perry on Trusts*, sec. 454.

The employment by trustees of the property or credit of an infant in trade, or in the prosecution of manufacturing or speculative enterprises, has been uniformly condemned as illegal, and constituting a devastavit of the estate: *Wilmerding v. McKesson*, 103 N. Y. 329, 336; *King v. Talbot*, 40 N. Y. 76, 90; *Fellows v. Longyor*, 91 N. Y. 324; *Wetmore v. Porter*, 92 N. Y. 76.

Another principle firmly established by the cases is, that trust funds invested by trustees in the hands of third persons who have knowledge of their character, still remain impressed with the obligation of the trust in the hands of the holder, and are subject to be reclaimed and restored to the trust fund: *Wilmerding v. McKesson*, 103 N. Y. 329; *Wetmore v. Porter*, 92 N. Y. 76; *Rogers v. Squires*, 98 N. Y. 49; *Clark v. Hougham*, 2 Barn. & C. 149; *Perry on Trusts*, secs. 828, 832; *Williams on Executors*, 801; *Field v. Schieffelin*, 7 Johns. Ch. 150; 11 Am. Dec. 441.

It is beyond the power of a trustee to bind the estate he represents to any use of its funds by contract with third persons who have knowledge of the character of the property transferred,

except in the ordinary and usual course of administration of the trust, and in furtherance of its object: *Deobold v. Oppermann*, 111 N. Y. 581, 588; 7 Am. St. Rep. 760.

That these rules apply with much greater force where a trustee seeks to dispose of the real property of his cestui que trust who is an infant of tender years, to pay losses of a business ²⁰⁰ carried on by himself without any semblance of authority, there can be no manner of doubt. The relation which existed between Stevens as guardian and his infant ward was that of trustee and cestui que trust. Therefore, the debt for which the real estate of the infant was mortgaged was not the debt of the infant at all, but was the debt of the guardian, for which, so far as the record discloses, he had no claim against the infant or his estate either in law or in equity.

This transaction, plainly and correctly stated, is, that Stevens was individually indebted to the bank in the sum of about twenty-five thousand dollars. For the purpose of imposing a liability upon the property of the infant for what must be regarded as his own debt, and to relieve himself from its burden, he entered into an agreement with his creditor, by which it was agreed that a proceeding in court should be instituted to secure a transfer of the individual debt of the guardian to the property of the infant, and thus obtain the payment of the guardian's debt to the bank from the infant, who was in no way liable therefor. This was a clear and palpable fraud upon his rights. The guardian was guilty of a breach of his trust in embarking the property of his ward in business. When it proved disastrous he, in conjunction with his creditor, sought to impose the consequences of his own disaster upon his infant ward. This purpose was obvious. It is equally manifest that the bank and its officers must have understood that the purpose of the proceeding to mortgage was to wrongfully deprive the infant of his legal rights and property. That such was the effect of the transaction is clear, and it must be presumed that the parties who conferred and acted in concert in instituting and prosecuting the proceeding intended the natural consequences of their acts. Therefore, it must be regarded as conclusively established that, in pursuance of a plan or scheme contemplated and agreed upon, the officers of the bank and the general guardian intended to substitute and procure the property of the infant to be substituted in place of the debt of the guardian, and, thus, to that extent, defrauded the former of his rights in the property.

²⁷⁰ It was the plain legal duty of the general guardian not to

waste the property of his ward, or suffer it to be wasted, and, above all, not to be instrumental in effecting its loss. It was his duty to protect and not to destroy. Utterly disregarding that duty, he entered into an agreement with his own creditor to inaugurate a proceeding which would necessarily and wrongfully deprive his ward of his property. This arrangement between the officers of the bank and the general guardian amounted to collusion. Collusion, as defined by Bouvier, is, "An agreement between two or more persons to defraud a person of his rights by the forms of law or to obtain an object forbidden by law." Thus, the mortgage was secured in pursuance of a collusive agreement between the defendants, the purpose of which was to deprive the infant of his property without sufficient consideration and for their own benefit. Having entered into a collusive agreement to illegally deprive the infant of his property, in furtherance of it the general guardian alleged in his verified petition that unless the property of the infant was mortgaged it would be sacrificed, and that the interests of the infant would be promoted by paying the debt to the bank. The guardian in no way apprised the court of the collusive agreement between himself and the officers of the bank, or that the debt for which he sought to mortgage the infant's property was his own and not that of the infant. On the other hand, he employed language in the petition which was well calculated to convey the idea to the court that the debt was the debt of the infant, although that fact was not directly alleged.

It is not seriously denied by the respondents that the infant's just rights have been imperiled by the execution and delivery of this mortgage. Nor is it claimed that he has no remedy for the injury he has sustained. Their principal contention is, that a court of equity had no authority in this case to award the relief to which the infant plaintiff was entitled. It is difficult to believe that a court of equity is so impotent or its arms so paralyzed that it cannot reach out and remedy this wrong. More than twenty years since this court ²⁷¹ declared: "It is the just and proper pride of our matured system of equity jurisprudence that fraud vitiates every transaction; and, however men may surround it with forms, solemn instruments, proceedings conforming to all the details required in the laws, or even by the formal judgment of courts, a court of equity will disregard them all, if necessary, that justice and equity may prevail": *Warner v. Blakeman*, 4 Keyes, 487, 507.

There seems no doubt of the general power of a court of equity, in proper cases, in one suit to grant relief from a decree or order in another, either by a bill of review, or by a supplemental bill in the nature of a review, or by an original bill. The general grounds upon which the interposition of a court of equity may be successfully invoked do not include cases where the sole ground of relief is that the former decision was contrary to equity or good conscience. While the courts of England and of this country have, with great uniformity, refused aid in all cases where their action would involve either the usurpation of appellate jurisdiction or the granting of a second opportunity of presenting a cause upon its merits, they have, upon the other hand, invariably extended it over a large and well-defined class of cases, to prevent the retention of an unconscientious advantage by a party in a court of law or equity, through his own fraud or through some excusable mistake or unavoidable accident on the part of his adversary. Where it appears to be against conscience to execute a judgment, which the injured party could not have prevented, or where he might have prevented it except for fraud or accident, unmixed with any fault or negligence of himself, a situation is presented which will justify a court of equity in granting the necessary relief. Without pursuing this subject farther to ascertain all the cases in which a party may avail himself of such an action where his defense was not available in the original action, or he was without fault on his part prevented from asserting it, it is sufficient for the determination of this case that the rule is firmly established that a judgment of either a legal or equitable tribunal may be ²⁷² vacated by a court of equity if obtained by fraud or collusion: *Smith v. Nelson*, 62 N. Y. 288; *Ward v. Southfield*, 102 N. Y. 287; *Freeman on Judgments*, c. 22.

The proposition upon which the respondents rely to uphold the judgment of reversal relates to methods and procedure rather than to substantive rights or existing equities. They contend that in no aspect of the case does the complaint herein state facts sufficient to constitute a cause of action. Examining it, we find that it is alleged that the plaintiff Warren is an infant; that he owned real estate of which the brewery and mortgaged property constituted a part; that the defendant Stevens carried on the business of a brewer there, and borrowed money as general guardian of the infant for that purpose; that he conducted the business in the name of the infant without any authority, and contracted individual debts at the Union Bank for which

the infant was in no wise liable; that he and the officers of the bank entered into an agreement by which proceedings to mortgage the real estate of the infant were to be undertaken, and the premises mortgaged, for the purpose of discharging the indebtedness of the guardian, and for no other purpose; that in pursuance thereof the general guardian as such presented to the court a petition, setting forth such indebtedness as the debt of the estate, and praying that the real estate of the infant might be mortgaged for its payment; that upon that petition proceedings were had which resulted in a mortgage upon the infant's real property to secure twenty-five thousand dollars, and interest, and that the moneys secured thereby were employed to pay the expenses of that proceeding and the debt of the guardian; that the mortgage was given and the money was paid for those purposes and those alone, and that in pursuance of the original agreement between them, the mortgage was assigned to the bank with full knowledge in both the mortgagee and assignee that the moneys paid to the special guardian were obtained for and applied to the indebtedness of Stevens.

Thus, the complaint shows that the guardian, as trustee of his ward, was guilty of a breach of his trust, thereby incurring ²⁷³ an individual liability of about twenty-five thousand dollars. This was known to the bank and its officers. Notwithstanding these facts, the guardian and officers of the bank entered into an agreement to employ the processes and machinery of the court to mortgage the real estate of the infant to pay the individual debt of the guardian. This was a fraud upon the court as well as upon the infant and his rights. We think the complaint fully sets forth all the wrongful acts of the parties, and as fully states a cause of action as it would if it had charged all the acts thus alleged to have been fraudulently and wrongfully performed. The code only requires a plain and concise statement of the facts constituting a cause of action. That the complaint in this action contained. If the acts charged were wrongful or necessarily fraudulent, it was not essential to a cause of action that they should be charged as having been wrongfully or fraudulently performed. The acts charged were not less fraudulent because the word "fraud" or "fraudulent" was not employed by the pleader in characterizing them: Warner v. Blakeman, 4 Keyes, 487.

Where, as in this case, the law presumes fraud because it is the necessary consequence of the acts alleged, and they carry in themselves inevitable evidence of fraud, independently of the motive of the actor, it is unnecessary to characterize the acts

alleged as fraudulent or otherwise. Whether or not fraud exists, is a conclusion of law derived from facts and circumstances: 9 Ency. Pl. & Pr. 688; Beach's Modern Equity Jurisprudence, sec. 72. Therefore, an allegation in a complaint of facts from which such a conclusion necessarily results must be regarded as sufficient. In *Maier v. Hibernia Ins. Co.*, 67 N. Y. 290, there was no specific allegation of mistake of facts, but facts were averred in the complaint showing that the parties were mistaken as to the effect of the language employed, and it was held that this was a sufficient allegation to justify a reformation of the contract. In *Whittlesey v. Delaney*, 73 N. Y. 575, the facts substantially as proved upon the trial and found by the court were averred in the complaint, although the precise and particular charge of fraud as a ground of relief was ^{not} specifically, and in terms, put forth. It was there held that it was not necessary to employ the word "fraud" or "fraudulent" in order to characterize the transaction or specify the ground of relief. We think the general doctrine of these cases is applicable here, and that the absence of the word "fraud" or "collusion" does not render the averments of the complaint less sufficient to constitute a cause of action for the fraud or collusion of the defendants to deprive the infant of his property. In the language of Judge Finch, "calling names does not alter facts." We are of the opinion that the respondents' claim that the complaint was insufficient cannot be sustained.

Moreover, as the proof in the case established all the facts set out in the complaint, we think it was amply sufficient to justify the special term in setting aside the mortgage and proceedings to mortgage the infant's real estate upon the ground that they were procured by the fraud and collusion of the defendants.

The question whether the court before which the proceeding to mortgage was instituted acquired jurisdiction to grant the order directing the mortgage or to confirm the action of the special guardian in making it is also presented. The jurisdiction of a court to direct the execution of a mortgage upon an infant's real estate is derived wholly from the provisions of the Code of Civil Procedure relating to that subject: Code Civ. Proc., tit. 7, art. 4, c. 17. It can only be exercised in such cases, under such circumstances, and in the manner in which the statute directs. Section 2348 of the code specifically points out the cases in which the real property of an infant may be sold, mortgaged, or leased. The first is, "Where the personal property, and the income of the real property, of the infant, . . .

are, together, insufficient for the payment of his debts, or for the maintenance and necessary education of himself and his family." This is the only provision which has any application to this case, and the one under which the general guardian sought to mortgage the infant's real estate. It is to be observed that it is only in case the personal property and ²⁷⁵ the income of the real property are insufficient to pay the debts, or for the maintenance and education of the infant and his family, that his property may be mortgaged. When we turn to the petition in the proceeding to mortgage, we find that the only debt for the payment of which it was sought to mortgage the infant's property was the debt of the guardian and not the debt of the infant at all. There was no allegation in the petition, nor proof upon the hearing, of the existence of any debt of the infant which the income of his property was not amply sufficient to pay. Indeed, it appears in the petition that he had sufficient personal property and income from his real property to pay all his debts, and, hence, the condition necessary under the statute to authorize the mortgage was not shown to exist.

The precise question presented is, whether, where the petition, proofs, and all the papers in a proceeding under this statute show, without dispute or contradiction, that its sole purpose is to mortgage the property of an infant to pay the debt of another, and there is no proof or claim that the personal property and income of the infant are insufficient for the payment of all his own debts and for the necessary education of himself and family, but, on the contrary, the proof tends to show that they are sufficient, a court acquires jurisdiction to direct his property to be mortgaged. We are of the opinion that the court acquired no jurisdiction in that proceeding to direct the property of the infant to be mortgaged for the debt of the guardian, and that there were no facts in the petition which would have justified the court in mortgaging the infant's property even for the payment of his own debts. The action of the court was invoked therein for a single purpose, which was to direct a mortgage upon the infant's real estate for an object which was wholly unauthorized by the statute. That it had no jurisdiction to do. The filing of a petition which disclosed the existence of a valid outstanding debt of the infant, which required the mortgaging of his property to pay it, was, under this statute, necessary to confer jurisdiction upon the court of the subject matter: *Agricultural Ins. Co. v. Barnard*, 96 N. Y. 531. In such a proceeding the requirements of the statute must be strictly fol-

lowed. This court has repeatedly held proceedings instituted under this statute to be void when not taken in conformity with it: *Battell v. Torrey*, 65 N. Y. 294; *Matter of Valentine*, 72 N. Y. 184; *Ellwood v. Northrup*, 106 N. Y. 172; *Losey v. Stanley*, 147 N. Y. 560, 573. It has also held that a court of equity has no inherent power to direct a mortgage of the real property of infants. If we are correct in our conclusion that the court had no jurisdiction of the proceedings to mortgage, then the proceedings and mortgage are open to collateral attack for that reason, and should be set aside: *Risley v. Phenix Bank*, 83 N. Y. 318; 38 Am. Rep. 421; *Losey v. Stanley*, 147 N. Y. 560.

If it be said that the court before which this proceeding was taken was a court of general jurisdiction, still, as the proceeding does not fall within the ordinary proceedings of a court of common law, its jurisdiction is yet special and limited, wholly dependent upon the statute, and no presumption can be indulged in favoring that particular jurisdiction. In that class of cases the statute must be strictly pursued, whatever jurisdiction the court may possess.

The respondents also insist that as the purpose of this action was to set aside the mortgage and not solely to set aside the proceedings to mortgage, the attack upon the proceedings was collateral, and falls within the rule which prohibits a court from re-examining its decision upon the same subject, and cite *Black on Judgments* as sustaining the claim: *Black on Judgments*, sec. 252. The authority cited is to the effect that to constitute a direct attack upon a judgment it is necessary that a proceeding be instituted for that very purpose. But if the action has an independent purpose, and contemplates some other relief or result, although the overturning of the judgment may be important or even necessary to its success, then the attack upon the judgment is collateral and falls within the rule. On the other hand, a complaint alleging that a judgment is void, but is apparently a lien upon land described, is said by that author ²⁷⁷ to be a direct, and not a collateral, attack upon it. This action was to obtain a judgment declaring all the proceedings void, including the mortgage. The mortgage was at most a part of the proceeding, and had no validity independently of it. It was as much a part of the proceeding as any paper or order in it. Hence, we find nothing in the fact that the plaintiff asked to have the mortgage, as well as the other proceedings, set aside, which in any way changes the character of the action or deprives the plaintiff of the right to the relief sought.

It is also claimed that the learned appellate division seems to have in effect held that the guardian might have had some equitable claim against the infant, and, hence, he could properly maintain a proceeding to mortgage his real estate to secure or pay it. We do not perceive any ground upon which such a doctrine can be upheld. We not only find nothing in the statute which authorizes the inauguration of such a proceeding to obtain an accounting in equity between a guardian and his ward, and then impose upon his real estate a mortgage to secure the amount found due, but we find nothing in the record to show even the existence of any equity as a basis for such a claim. The equities of the guardian were in no way involved in that proceeding. It was a special proceeding under a special statute for a single purpose, which certainly did not include an accounting between the guardian and his ward.

The appellants claim that, under a well-established principle or rule in equity, where an important decree which deprives an infant of his inheritance has been rendered against him, either with or without actual fraud or surprise, the infant has a remedy during his minority, either by a bill of review, original bill in the nature of a bill of review, or by original bill directly attacking the decree for error, and cite as sustaining that proposition: *Cooper's Equity Pleading*, 97; *Richmond v. Tayleur*, 1 P. Wms. 734; 1 *Daniell's Chancery Pleading and Practice*, 164; *Freeman on Judgments*, sec. 513; *Bank of U. S. v. Ritchie*, 8 Pet. 128; *Savage v. Carroll*, 1 Ball & B. 548; *McLemore v. Chicago etc. R. R. Co.*, 58 Miss. 278 514; *Loyd v. Malone*, 23 Ill. 43; 74 Am. Dec. 179; *Kuchenbeiser v. Beckert*, 41 Ill. 172; *Lloyd v. Kirkwood*, 112 Ill. 329; *Kingsbury v. Sperry*, 119 Ill. 280; *Allison v. Drake*, 145 Ill. 500; *Wright v. Miller*, 1 Sand. Ch. 103; *Wright v. Miller*, 8 N. Y. 9; 59 Am. Dec. 438; *Losey v. Stanley*, 147 N. Y. 560; *Matter of Price*, 67 N. Y. 231; *Lefevre v. Laraway*, 22 Barb. 167; *McMurray v. McMurray*, 66 N. Y. 175.

It is impossible, within the proper limits of this opinion, to review these authorities in detail. But a careful examination of them discloses that, while some are not applicable to the question here, yet the weight of their authority sustains the contention of the appellants, at least so far as they claim to be authorized to maintain an original action in equity to set aside the order and mortgage in this case as being in fraud of the infant's individual or property rights, and being procured by fraud and collusion of the parties. Those authori-

ties fully justify this action, and authorize its maintenance upon the ground that the agreement between the defendants to obtain the infant's property to pay the debt of the guardian was collusive, and their action under it was in fraud of his rights, and as the rights of a bona fide purchaser, without notice, were not involved, they fully sustain the judgment of the special term in this case. In those cases many similar questions have arisen, and the courts have, with great uniformity, held that, under circumstances similar to those existing in this case, a court of equity has the right, by original bill, to set aside a judgment thus obtained.

As illustrative of the principle of these authorities, we may refer to a few in this state which seem to bear upon the legal questions involved in this controversy. In *Wright v. Miller*, 8 N. Y. 9, 59 Am. Dec. 438, it was said that the jurisdiction of a court of chancery to set aside a decree obtained by fraud, upon an original bill filed for that purpose, has long been unquestioned. In that case an action had been commenced against infants, and a decree obtained setting aside a conveyance made in trust for their benefit, without giving them a day to show cause after they became of age, and it was held that such a decree was ²⁷⁹ erroneous, and that the infants, by an original bill filed, might be relieved against it. When that case reached this court, it was again held that the infants were authorized to bring an action in equity to avoid the fraudulent disposition of the trust property, and that equity would entertain a suit to vacate a decree obtained by collusion between the trustees and tenants in possession of a trust estate to defeat the rights of persons entitled to equitable interests therein in remainder. In the *McMurray* case, a party died seised of certain premises which were mortgaged to the defendant. The former devised to his widow, whom he made his executrix, a life estate in a portion of the premises, with remainder to the plaintiffs. The balance, with his personal property, he directed his executrix to sell, and with the proceeds pay and discharge his debts, including the mortgage. After the testator's death the mortgagees commenced an action of foreclosure, making the widow and the plaintiffs, who were infants, parties. They were served with process, but no guardian ad litem was appointed. The widow answered, but, under an arrangement with the defendant that he would lease to her for life, at a nominal rent, a portion of the mortgaged premises, executed a deed to him of a portion of the premises directed to be sold. She withdrew her answer

and stipulated that the defendant might take judgment, which he did, taking judgment by default against the plaintiffs, under which the premises were sold and bid in by the defendant. An original action was brought to set aside the judgment and sale, and it was held that the facts sustained a finding of fraud and collusion, and that the plaintiffs were entitled to have the decree of foreclosure avoided as to them, and could maintain an original action in equity for that purpose. In *State of Michigan v. Phoenix Bank*, 33 N. Y. 9, 27, it was said: "It is needless to multiply cases showing that the courts, upon bill filed, will set aside as a nullity a judgment, decree, or award obtained by fraud." In *Hackley v. Draper*, 60 N. Y. 92, where it was conceded that the special term had authority to hear a motion and grant the relief sought, it was held ²⁸⁰ that, even if the motion could have been made, an equitable action would lie to vacate an order of a court, obtained for a fraudulent purpose, and a sale made in pursuance of it. In *Tiernan v. Wilson*, 6 Johns. Ch. 411, a sheriff's sale of real estate was set aside in an action brought for that purpose, upon the ground that it was fraudulent in law, as the sheriff was charged with a gross act of negligence and abuse of trust. The same question was again considered by this court in *Stevens v. Central Nat. Bank*, 144 N. Y. 50, which was an action to set aside a judgment in the United States circuit court, and it was held that as it was fraudulent as against the plaintiffs, they might maintain an original action to set it aside.

Under the doctrine of these cases, it is obvious that the plaintiffs had a right to institute this suit to set aside the proceedings and mortgage which were the result of a collusive agreement between the defendants, and which was obtained by a palpable fraud upon the rights of the infant, which presumably was known to all the defendants.

The contention of the respondents, that the same questions were before the supreme court in the proceedings to mortgage as are presented in this action, cannot be sustained. Surely there was no proof in the original proceeding of the collusion between the defendants to procure an appropriation of the infant's property to pay the guardian's debts.

After a full and careful examination of the facts and law applicable to the questions presented upon this appeal, we have reached the conclusion that the special term possessed abundant authority to entertain this action, and was fully justified by the facts in setting aside the proceedings to mortgage and the mortgage made therein, and that the learned appellate division erred in reversing the judgment of that court.

In reaching this conclusion we have recognized the correctness of the rule invoked by the respondents, that the judgment of the appellate division should not be reversed unless there was no error of law committed by the trial court to justify it. We have found nothing in the record to indicate the commission of any such error which authorized a reversal of ²⁸¹ the judgment entered upon its decision. It follows that the judgment of the appellate division should be reversed, and that of the special term affirmed, with costs to the plaintiffs in all the courts.

All concur, except Parker, C. J., and Gray, J., not voting.

GUARDIAN AND WARD—POWERS OF GUARDIAN—DUTIES OF PERSONS DEALING WITH HIM WITH NOTICE OF TRUST.—One who assumes the relation of guardian cannot take advantage of the confidence reposed to speculate with the property of his quasi ward: *Hanna v. Spots*, 5 B. Monr. 362; 43 Am. Dec. 132. A guardian can do nothing to prejudice his ward: *Weeks v. Weeks*, 5 Ired. Eq. 111; 47 Am. Dec. 358; nor may he act for his own benefit in dealing with the trust: See monographic note to *Fessenden v. Jones*, 75 Am. Dec. 448. Under some circumstances he may make a valid mortgage of the ward's estate: *Northwestern Guaranty Loan Co. v. Smith*, 15 Mont. 101; 48 Am. St. Rep. 662, and note. Persons dealing with a trustee must take notice of the scope of his authority: See monographic note to *Day v. Brenton*, 63 Am. St. Rep. 468, 469.

FRAUD—SUFFICIENT ALLEGATION OF.—A complaint alleging facts which, if proved, would establish fraud as a conclusion of law, sufficiently alleges fraud, without a specific declaration that such facts are fraudulent: *Andrews v. King County*, 1 Wash. 46; 22 Am. St. Rep. 136, and note.

JUDGMENT—DIRECT ATTACK UPON.—An attack upon a judgment by the judgment defendant, on the ground of want of actual notice, and fraud in its procurement, constitutes a direct attack: *Thompson v. McCorkle*, 136 Ind. 484; 43 Am. St. Rep. 334. A motion to set aside a judgment is a direct, and not a collateral attack thereon: *People v. Greene*, 74 Cal. 400; 5 Am. St. Rep. 448. See monographic note to *Morrill v. Morrill*, 28 Am. St. Rep. 104.

WARD v. PETRIE.

[187 NEW YORK, 301.]

EXECUTION—SUPPLEMENTAL PROCEEDINGS.—A receiver appointed in proceedings supplemental to execution represents the judgment debtor, and may bring any action relating to property rights that he might bring, and the receiver also represents the judgment creditor in equity, to the extent necessary to bring actions in the nature of creditors' suits to set aside fraudulent transfers.

EXECUTION—SUPPLEMENTAL PROCEEDINGS.—A receiver appointed in supplemental proceedings does not, by virtue of his appointment and qualification, acquire the legal title to property previously transferred by the judgment debtor in fraud of his

creditors, though he may maintain a suit to set aside such a transfer. Until then he has an equitable right, but no title.

EXECUTION—SUPPLEMENTAL PROCEEDINGS—PROPERTY ACQUIRED BY A RECEIVER.—A receiver appointed in proceedings supplemental to execution does not acquire any right of action belonging to the judgment creditor, other than the right to sue to avoid fraudulent transfers.

EXECUTION—SUPPLEMENTAL PROCEEDINGS.—A receiver appointed in supplemental proceedings does not acquire the right of the judgment creditor to maintain an action at law for damages suffered from a conspiracy entered into between the judgment debtor and others to prevent the collection of the debt.

DEMURRER — CHALLENGING CAPACITY TO SUE — WHEN UNNECESSARY.—If a receiver sues upon a cause which did not vest in him, it is not necessary to interpose a demurrer questioning his capacity to sue. There is a difference between capacity to sue, which is a right to come into court, and a cause of action, which is the right to relief in court.

Wayland F. Ford, for the appellants.

Watson M. Rogers, for the respondent.

306 VANN, J. This action is an excursion by a receiver into a new field. It is an action at law brought by the plaintiff, as receiver in supplementary proceedings, to recover damages from the judgment debtor and another for a fraudulent conspiracy to prevent the collection of the judgment creditor's debt, which, although in existence, was not in judgment at the time the conspiracy was formed and executed. As the authority of the plaintiff to maintain such an action is challenged, it becomes necessary to examine the statute authorizing his appointment and governing his powers.

The Code of Civil Procedure, by section 2464, authorizes the appointment of "a receiver of the property of the judgment debtor." Section 2468 provides that "the property of the judgment debtor is vested in a receiver, who has duly qualified, from the time of filing the order appointing him," subject to certain exceptions not now material. When the receiver's title to personal property has thus become vested "it also extends back by relation, for the benefit of the judgment creditor in whose behalf the special proceeding was instituted, . . . so as to include the personal property of the judgment debtor, at the time of the service of the order": Code Civ. Proc., sec. 2469. If it appears from due proof that the judgment debtor has in his possession, or under his control, money or personal property belonging to him, or that a third person has possession or control of the same, and the right of the judgment debtor is not substantially disputed, an order may be made by the judge in charge of the pro-

ceeding in his discretion, for the payment of the money or the delivery of the property to the sheriff or to a receiver if one has been appointed: Code Civ. Proc., sec. 2447. The receiver is subject to the control of the court out of which the execution was issued (Code Civ. Proc., sec. 2471), and his duties, subject to such control, are to take possession of the tangible property of the judgment debtor, not exempt by law, and convert it into money to the best advantage; to collect the intangible assets, and out of the proceeds to pay fees and expenses and apply the balance upon the debt of the judgment creditor, returning the remainder, if any, ³⁰⁷ to the judgment debtor. He represents the judgment debtor, and can bring any action relating to property rights that he might bring because he has his title. He also represents the judgment creditor in equity to the extent necessary to bring actions in the nature of a creditor's bill to set aside fraudulent transfers, for "he comes in by the act of the law and not by the act of the party": *Porter v. Williams*, 9 N. Y. 142, 149; 59 Am. Dec. 519; *Underwood v. Sutcliffe*, 77 N. Y. 58, 62; *Mandeville v. Avery*, 124 N. Y. 376, 385; 21 Am. St. Rep. 678. He is trustee for the judgment creditor to receive, and to remove obstacles by equitable procedure so that he may receive, the property of the judgment debtor and apply the proceeds on the debt which is the foundation of his authority. He takes the legal title to all the personal property of the debtor, whether in his own hands or in the hands of others, as of the date of the service of the order in supplementary proceedings, but not so as to affect the title of a purchaser in good faith or the payment of a debt in good faith: Code Civ. Proc., sec. 2469; *McCorkle v. Herrman*, 117 N. Y. 297, 302. The title to property, however, transferred by the judgment debtor in fraud of creditors, prior to the service of the order for examination upon him, is good as against the receiver until he has caused the transfer to be set aside by a decree in equity: *Bostwick v. Menck*, 40 N. Y. 383. Until then he has an equitable right, but no title. While the title of a fraudulent transferee is not good as against the sheriff armed with an execution against the property of the judgment debtor, as he may levy upon the property, sell it, and run the risk of being able to prove the fraudulent nature of the transaction when he is sued, it is good as against the receiver, who has no legal process, until the transfer is formally set aside. The receiver can maintain an action against the judgment debtor in conversion, where the debtor has converted property after it became vested in the receiver: *Gardner v. Smith*, 29 Barb. 68; but it has been held that he cannot

maintain replevin to recover articles of personal property which were transferred by the debtor in fraud of his creditors, prior to the appointment ²⁰⁸ of the receiver: *Pettibone v. Drakeford*, 37 Hun, 628.

In *Metcalf v. Del Valle*, 64 Hun, 245, it was held that the title of a receiver in supplementary proceedings extended only to the property which the judgment debtor had when the receiver was appointed, and that it did not include property which the judgment debtor had fraudulently transferred prior to such appointment. When the case reached this court it was affirmed on the authority of *Bostwick v. Menck*, 40 N. Y. 383. So an administrator does not take legal title to chattels fraudulently assigned by his intestate, and can only avoid the transfer by proceeding in equity under the statute authorizing it: *Osborne v. Moss*, 7 Johns. 161; 5 Am. Dec. 252; *Brownell v. Curtis*, 10 Paige, 210.

If the plaintiff can maintain this action at law, it must be because the title to the cause of action vested in him by virtue of his appointment as "receiver of the property of the judgment debtor": Code Civ. Proc., sec. 2464.

What does a receiver in supplementary proceedings receive? He receives simply "the property of the judgment debtor," according to the express command of the statute. The title to the property of the judgment debtor is vested in him, and he is entitled to "receive" all of it, except such as is exempt from execution. The property belonging to, and in the possession of, the judgment debtor he is entitled to take without legal process, and, if the judgment debtor resists, to apply to the court for an order compelling him to deliver it. In addition to this, however, he has an equitable right to property fraudulently transferred by the judgment debtor, and can reinstate the title in him by a suit in equity and then receive it. If such property is voluntarily surrendered by the transferee upon demand, he is entitled to take it and dispose of it the same as if it had never been transferred. If it is not voluntarily surrendered, he cannot take it by force, but by virtue of the statute he is entitled to maintain an action in equity to set aside the fraudulent transfer, so that he may receive the property which in equity and good conscience belongs ²⁰⁹ to the judgment debtor. Such an action, however, cannot be maintained in a county court for the want of jurisdiction of an equitable action of that kind: Code Civ. Proc., sec. 340. There is no statute and no rule of law that entitles him to "receive" anything that does not belong to the judgment debtor, who, in the case before us, had parted with title, possession, and

the right of possession before the receiver was appointed. He is not entitled to receive any right of action belonging to the judgment creditor, although he is authorized to bring an action to set aside fraudulent transfers, the same as the judgment creditor himself might have done. We find no case holding that he represents the judgment creditor to the extent of bringing an action at law, even if the judgment creditor might have brought one, to recover damages for a fraudulent conspiracy to prevent the collection of his debt, carried into effect before the proceedings were commenced which resulted in the appointment of the receiver. He is the receiver of the property of the judgment debtor, not of the judgment creditor, and such a right of action is the property of the latter, not of the former. He represents the creditor only with reference to the property of the debtor, who cannot have a cause of action against himself. The defendants did nothing to affect the title of the receiver after his appointment, for the fraudulent transfer was complete even as to possession before supplementary proceedings were commenced. What they did would be ineffectual as against his equitable right to the property transferred when asserted in the proper manner, for he could follow the property in equity, at least until it reached the hands of a bona fide purchaser: Code Civ. Proc., sec. 181. So far, however, as the action of the defendants gave a right of action at law to anyone, it was to the judgment creditor only, and that right did not pass to the plaintiff on his appointment, nor did he represent the creditor with reference to it. The judgment creditor could not assert that right through the plaintiff, who could receive under the statute the property of the judgment debtor only. The receiver could not receive a right of action for a tort that accrued, if ³¹⁰ at all, before the judgment was recovered upon which his title was founded.

Whether the judgment creditor could maintain an action at law to recover damages on account of the fraudulent transfer made before he recovered judgment or had any lien, legal or equitable, it is not necessary to decide. The following cases are relied upon by the plaintiff as justifying such an action: *Yates v. Joyce*, 11 Johns. 136; *Van Pelt v. McGraw*, 4 N. Y. 110; *Quinby v. Strauss*, 90 N. Y. 664; *Findlay v. McAllister*, 113 U. S. 104. On the other hand, the defendants insist that such an action cannot be maintained, because their acts, when done, did not injure any security of the creditor, for he had none at the time, and in support of this position they cite the following: *Braem v. Merchants' Nat. Bank*, 53 Hun, 638; 6 N. Y. Supp. 846;

affirmed, 127 N. Y. 508; *Adler v. Fenton*, 24 How. 407; *Hutchins v. Hutchins*, 7 Hill, 104; *Brinkerhoff v. Brown*, 4 Johns. Ch. 671; *Hurwitz v. Hurwitz*, 10 Misc. Rep. 353. We do not think it necessary to decide the question in this case, because, as we have already held, such a right of action could only be asserted, if at all, by the creditor himself in his own name and not through a receiver.

It is, however, insisted that this action is authorized by chapter 314 of the Laws of 1858, as amended by chapter 740 of the Laws of 1894. It has been held that the class of receivers referred to in this act are those who are vested as such with all the property of the insolvent for the benefit of all the creditors and not to a receiver appointed in supplementary proceedings for the benefit of a single creditor only: *Pettibone v. Drakeford*, 37 Hun, 628. This, if not so held, was plainly intimated in *Underwood v. Sutcliffe*, 77 N. Y. 58, 62. But, whether this is so or not, we do not think that said statute authorizes any receiver, however appointed, to maintain such an action as the one under consideration. This action does not attempt to follow the property and recover it, or the value thereof, so that the receiver may apply the proceeds upon the debt in question. It is not an action to replevy the property or to recover damages for the conversion thereof or ³¹¹ to set aside the fraudulent mortgage. It treats the property as a mere incident to the cause of action, and is founded on the theory of a fraudulent conspiracy to prevent the collection of a debt held at the time by a simple contract creditor. The statute under consideration enables a receiver or other trustee of an estate to follow specific property transferred in fraud of the rights of creditors, and makes the persons receiving such property liable in the proper action for the same or its value. This liability is not imposed upon the one making the fraudulent transfer, but upon the transferee alone, and hence it is evident that this action, which seeks to make both liable, the one as much as the other, was not brought under that statute. The property transferred is not the subject of the action, but the conspiracy to defraud and the transfer pursuant thereto. The result of the action, if successful, would not affect the property, for the plaintiff could not take it nor sell it nor do anything with it that he could not have done if the action had not been brought.

The plaintiff claims that, as the defendants did not raise the question of his capacity to sue by demurrer or answer under sections 488 and 490 of the Code of Civil Procedure, they thereby waived the right to claim that the receiver cannot maintain this

action. There is a difference between capacity to sue, which is the right to come into court, and a cause of action, which is the right to relief in court. Incapacity to sue exists when there is some legal disability, such as infancy or lunacy or a want of title in the plaintiff to the character in which he sues. The plaintiff was duly appointed receiver and has a legal capacity to sue as such, and hence could bring the defendants into court by the service of a summons upon them even if he had no cause of action against them. On the other hand, an infant has no capacity to sue, and, hence, could not lawfully cause the defendants to be brought into court even if he had a good cause of action against them. Incapacity to sue is not the same as insufficiency of facts to sue upon. The Code of Procedure contained provisions similar in all respects now material to the sections above cited from ³¹² the Code of Civil Procedure, and referring to those provisions in *Bank of Havana v. Magee*, 20 N. Y. 355, 359, this court, through Judge Denio, said: "Certain persons, as infants, idiots, lunatics and married women, cannot sue except by guardians, next friends, committees, or, in the case of married women, by joining their husbands in certain cases. This, I think, was what the provision refers to," et cetera. We think that the plaintiff had capacity to sue, but that his complaint stated no cause of action of which the county court had jurisdiction.

The judgment appealed from should be reversed and a new trial granted, with costs to abide the event.

All concur, except O'Brien, J., not voting, and Martin, J., not sitting.

RECEIVERS—RIGHTS OVER PROPERTY—AGENCY FOR INTERESTED PARTIES.—The object of appointing a receiver is to preserve the property for the benefit of all parties interested: *Knickerbocker v. McKindley Coal etc. Co.*, 172 Ill. 536; 64 Am. St. Rep. 54. He is not an agent, but an indifferent person holding the property for those ultimately entitled to it, and his possession is that of the court: *Wildberger v. Hartford Fire Ins. Co.*, 72 Miss. 338; 48 Am. St. Rep. 558, and note. A receiver appointed in supplementary proceedings in New York is vested with the legal title to all the personal property of the judgment debtor, and has the right to prosecute all actions to set aside all transfers of property made by the debtor to defraud creditors. For the purpose of maintaining such actions he represents the creditors, and possesses the same rights as the creditor, under whose judgment he was appointed, would have had: *Mandeville v. Avery*, 124 N. Y. 376; 21 Am. St. Rep. 678. Such a receiver is a trustee for and represents all the creditors as well as the debtor: See extended note to *Chautauqua County Bank v. White*, 57 Am. Dec. 451.

WILLIAMS v. HAYS.

[157 NEW YORK, 541.]

NEGLIGENCE—INSANITY OR MENTAL INCOMPETENCY AS A DEFENSE TO ACTIONS TO RECOVER FOR.—If the master of a vessel becomes, by reason of his long continuance on duty during a storm, exhausted and mentally incompetent, and the vessel and cargo are lost through his failure, while in such condition, to take measures the omission of which on the part of a sane and competent master would be negligence, he is not answerable.

NEGLIGENCE—WHEN NOT A QUESTION OF LAW.—Whether the mate of a vessel, on the master's becoming exhausted and mentally incompetent, is guilty of negligence in not taking command from him, instead of obeying his orders, is a question of fact for the jury which the court should not undertake to determine.

Henry W. Goodrich, for the appellant.

Lawrence Kneeland, for the respondent.

⁵⁴² **HAIGHT, J.** This action was brought by the plaintiff, as assignee of the Phoenix Insurance Company, to recover the ⁵⁴³ amount of insurance paid by the company to Parsons and Loud under a policy of insurance issued to them as the owners of one-sixteenth of the brig "Emily T. Sheldon."

The brig had been wrecked on Peaked Hill bar on Cape Cod, near Provincetown, Massachusetts, and it is alleged that the loss occurred through the negligence of the defendant, who was the master and part owner of the brig, and who commanded her at the time of the loss.

The plaintiff claims the right to recover in this action upon the theory that the insurance company became subrogated to the rights of the owners, whom it had insured. The answer denied the allegations of the complaint that the loss was caused through the negligence, carelessness, misconduct, and improper navigation of the defendant, and alleges that at the time of the wreck he was unconscious of his acts and irresponsible therefor, and was not in a condition to navigate the brig on account of sickness, et cetera. At the conclusion of the evidence the trial court directed a verdict in favor of the plaintiff, holding that the insanity of the defendant furnished no defense. The defendant's counsel objected to the direction of the verdict and asked to go to the jury upon the questions: "1. Whether or not the defendant became insane solely in consequence of his efforts to save the vessel during the storm; 2. Whether the defendant became insane solely in consequence of a sickness occasioned by his efforts to save the vessel during the storm and the quinine which

was taken therefor; 3. Whether the mate was so cognizant of the condition of the master, of the insanity or other incompetency of the master, as to require him to take the command of the vessel away from the master; 4. Whether the mate exercised due judgment in regard to the condition of the master; 5. Whether the defendant, in consequence of his efforts to save the vessel during the storm, became mentally and physically incompetent to give the vessel any further care than he did." These requests were refused by the court and a verdict was directed, to which rulings the defendant's counsel duly excepted.

⁵⁴⁴ On Thursday, the eighteenth day of March, 1886, the brig "Emily T. Sheldon" left Boothbay, Maine, with a cargo of ice, bound for Annapolis, Maryland. At the time of sailing the weather was fair and remained so for about sixteen hours, at which time a storm commenced with high winds and rain, with a light snow. At the time of the commencement of the storm the vessel was in George's channel, and the defendant tacked to work her about, trying to find his way out, until it became practically impossible to tell where he was. He headed her in what was supposed to be the direction of Cape Cod, but not being able to make the cape, she was hove to to ride out the gale. This was about 4 o'clock in the afternoon of the 20th, and she remained hove to until about that time in the afternoon of the 21st, and then the defendant stood her off for what was supposed to be Cape Cod. On Monday morning, the 22d, between 4 and 5 o'clock, Thatcher island lights were sighted by the defendant. The storm had then abated, but there was a heavy roll of the sea. The defendant then turned the vessel over to the mate, telling him to keep her by the wind until he made Cape Cod light. He then went below and laid down upon a lounge in his cabin, but, before doing so, took fifteen grains of quinine. It appears that during the storm he had had but little rest; had not gone to his berth or undressed; had eaten but little, and that for the last forty-eight hours he had been constantly upon deck; that he was worn out, exhausted, felt sick, and feared he was to have an attack of malaria. At about 11 o'clock, the second mate, to whom the vessel had been turned over, called the mate, saying that the vessel did not act very well. The mate then went upon deck, and about half-past eleven the steward called the defendant. He was lying, dressed, upon the lounge. He did not get up at the first call, and subsequently the steward pulled him off from the lounge in order to arouse him. He then got up, but within a few minutes was again found lying upon the lounge, and the

steward went to him again and finally succeeded in getting him up on the deck of the vessel. There is some little difference in the testimony ⁵⁴⁵ of the witnesses in reference to the order of events thereafter occurring. According to the recollection of some of the witnesses, the captain came on deck about half-past twelve, after the crew had been at dinner. After he came on deck, the tug "Storm King" came up on their weather quarter and said that the rudderpost of the brig was split, and asked the captain if he did not want a tow. He said that he did not; that he guessed "we are all right." The "Storm King" then went away, and about 1 o'clock another boat came up under the stern of the brig and offered a tow, but was refused by the captain. McDonald, who kept the log of the vessel, testified: "After the boats went away, the vessel began to go off and come to, and she would not mind her helm at all, and the sea was edging her into the beach all the time. Then I went over and looked over the stern, but I could see nothing; then I got into the bowline, that is a rope with a noose in it, being around my waist, and I was let down over the stern, and I looked at the rudderpost and it was split, but I could not tell how badly. I went back on deck and said that the rudderpost was split, and the captain said he didn't think it was, and said 'I can't see it and you can't, I think.' Then I began to think there was something wrong with the captain, that he did not act as he used to; still, I could not see anything wrong with his manner, except when he spoke to me about the vessel, and he then told me to square the yards to see if the vessel would go off again, and we did, and she did go off, but she came right back again, and I lowered the main trysail down again and hove the helm up again, but she did not go off, she went sideways in on to the beach and struck," at about 2:30 o'clock.

Considerable evidence was taken with reference to the condition of the captain, all of which tends to show that he staggered about the vessel, making irresponsive answers to questions, appeared to be in a dazed condition, and to be either drunk or insane. After the brig struck, a life-saving boat came alongside and offered to take him ashore, but he refused to go, and the crew of the lifeboat had to remain for several ⁵⁴⁶ hours before they finally succeeded in coaxing him to go with them. He was taken ashore, but, according to his testimony, remembers nothing that occurred until the next day. The brig became a total wreck.

This action was considered in this court on a former review (*Williams v. Hays*, 143 N. Y. 442, 42 Am. St. Rep. 743) at which time the law of the case was settled, except upon two points. It was then held that the defendant, as charterer of the brig, was liable for losses which occurred through his want of care or skill in the navigation of the vessel; that he was required to exercise such care and skill as a reasonably careful and prudent owner would ordinarily give to his own vessel, and that an insane person is responsible for his torts the same as if sane. The opinion contains some comments of the judge, which have been understood as indicating an intention to do away with any distinction between misfeasance and nonfeasance, and to hold that lunatics and infants were just as liable for their failure to act as they were for their affirmative torts. But when the judge comes to sum up the result of his examination of the authorities, he concludes by stating the rule to be that, if the defendant "caused her destruction by what in sane persons would be called willful or negligent conduct, the law holds him responsible." The final conclusion reached by the judge we accept as the law of this case. Whether a lunatic or a person mentally incapacitated should be held responsible in all instances for his nonfeasance or failure to act we will not now stop to consider.

The judge, then, proceeds in his opinion to say: "If the defendant had become insane solely in consequence of his efforts to save the vessel during the storm, we would have had a different case to deal with. He was not responsible for the storm, and, while it was raging, his efforts to save the vessel were tireless and unceasing; and if he thus became mentally and physically incompetent to give the vessel any further care, it might be claimed that his want of care ought not to be attributed to him as a fault. In reference to such a case we do not now express any opinion. . . . If it should be ⁵⁴⁷ found upon the new trial of this action that the defendant's mental condition was produced wholly by his efforts to save the vessel during the storm, and it should, therefore, be held that no fault could be attributed to him on account of what he personally did or omitted to do, then the question would still remain whether the carelessness of his mate and crew, who were his servants, could not be attributed to him, and his liability be thus based upon their carelessness." We thus have two questions presented for consideration: 1. Did the defendant become mentally and physically incompetent to care for and navigate the vessel solely in consequence of his efforts to save the vessel during the storm? and, 2. If he was thus mentally

and physically incapacitated, were his mate and crew guilty of negligence in not taking the command of the vessel and procuring a tow?

Upon directing a verdict in favor of the plaintiff the trial court said: "Assuming, as we must, for such purpose, that the condition of the defendant was the result of exhaustion, caused by his efforts to save the ship from the perils of the storm and the heavy dose of quinine which he took as a remedy, I fail to see how that presents any exception to the principle laid down by the court of appeals that a person of unsound mind is responsible for the consequences of acts which in the case of a sane person would be negligent. In other words, the standard by which he is to be judged is the same as that which must be applied to the actions of a sane person. It certainly seems to be a cruel doctrine, but as it is apparently based upon the principle that, as between two innocent persons, the loss must fall upon him who caused it rather than upon the other, the best that can be said about it that it is a rule which serves the convenience of the public to which individual rights must give way."

It will thus be observed that the case was disposed of below upon the ground that the defendant was liable, even though assuming that his condition was the result of exhaustion caused by his efforts to save the ship from the perils of the storm, and the question as to whether the mate was guilty of ⁵⁴⁸ negligence was not considered. The appellate division has affirmed, following in its opinion the reasoning of the trial judge.

We cannot give our assent to such a view of the law. To our minds, it is carrying the law of negligence to a point which is unreasonable, and, prior to this case, unheard of, and is establishing a doctrine abhorrent to all principles of equity and justice. In this case, as we have seen, the storm commenced on Friday, continued through Saturday and Sunday, and it was not until 5 o'clock Monday morning that the defendant was relieved from the care of his vessel. For three days and nights he had been upon duty almost continuously, and for the last forty-eight hours had not been below the deck. The man is not yet born in whom there is not a limit to his physical and mental endurance, and when that limit has been passed, he must yield to laws over which man has no control. When the case was here before, it was said that the defendant was bound to exercise such reasonable care and prudence as a careful and prudent man would ordinarily give to his own vessel. What careful and prudent man could do more than to care for his vessel until overcome by

physical and mental exhaustion? To do more was impossible. And yet we are told that he must, or be responsible. Among the familiar legal maxims are the following: The law intends what is agreeable to reason; it does not suffer an absurdity. Impossibility is an excuse in law, and there is no obligation to perform impossible things: Coke on Littleton, 29, 78; 9 Coke, 22; 1 Pothier on Obligations, pt. 1, c. 1, s. 4, sec. 3. Applying these maxims to the case under consideration, we think the fallacy of the reasoning below is apparent, and that it cannot and ought not to be sustained.

As to whether the mate should be chargeable with negligence is a question which has not, as yet, been determined. It is said that he did nothing to save the vessel. It appears that he was on deck obeying the orders of the captain. The circumstances surrounding him were peculiar. Possibly he might have put the captain in irons and taken the command ⁵⁴⁹ of the vessel, but mutiny at sea is criminal and heavily punished. In order to justify such action he must be satisfied of the derangement of his superior officer, and be able to command the assistance of the crew. Whether the condition of the captain was so apparent at the time as to charge the mate with negligence in not resorting to strong measures we think was a question of fact for the determination of the jury, and that it was not within the province of the court to dispose of it as a question of law.

The judgment should be reversed and a new trial granted, with costs to abide the event.

DISSENTING OPINION.

BARTLETT, J., dissenting. I am of opinion there was no question for the jury in this case.

The learned counsel for the defendant asked to go to the jury on two questions: 1. "Whether or not the defendant became insane solely in consequence of his effort to save the vessel during the storm."

It is true that Judge Earl, writing in this case for the court on the former appeal, stated that if the defendant had become insane solely in consequence of his efforts to save the vessel during the storm, we would have had a different case to deal with.

It is, however, undisputed that the record now before us is identical in all essential respects with the one then under examination, and it therefore follows that the determination of this court that the insanity of the defendant was no defense is the law of this case, and was properly followed by the trial judge when he directed a verdict for the plaintiff.

2. "Whether the defendant became insane solely in consequence of a sickness occasioned by his efforts to save the vessel during the storm, and the quinine which was taken therefor."

Judge Earl stated in his opinion upon the former appeal that if it were found upon a new trial that the defendant's mental condition was produced wholly by his efforts to save the vessel during the storm, and it should, therefore, be held ⁵⁵⁰ that no fault could be attributed to him on account of what he personally did, or omitted to do, then the question would still remain whether the carelessness of his mates and crew, who were his servants, could not be attributed to him, and his liability be thus based upon their failure to act.

There is no conflict of evidence on this latter point, and only a question of law is presented to this court on undisputed facts, whether the captain was not liable for this loss, not only on account of his insanity, but for the reason that the mates and crew, having full knowledge of the captain's mental incapacity, and that the rudder was useless, failed to intervene and save the vessel, but allowed her to drift with the dead swell upon the beach, with all sail set and no anchors out, in a light wind blowing off shore, in the middle of a pleasant afternoon, with two steam tugs lying by and offering a tow to a port nine miles distant. There was no request to go to the jury as to the conduct of the crew.

The liability of the captain for the acts of his mates and crew is well settled.

Story on Agency, section 314, states: "The policy of the maritime law has, therefore, indissolubly connected his (the master's) personal responsibility with that of all the other persons on board, who are under his command and are subjected to his authority."

With the same record before us as on the former appeal, I am unable to understand why the decision of this court should not be followed: *Williams v. Hays*, 143 N. Y. 442; 42 Am. St. Rep. 743.

I vote for affirmance.

All concur, with Haight, J., for reversal, except Bartlett, J., who reads for affirmance.

INSANE PERSONS—LIABILITY FOR NEGLIGENCE.—An insane person is just as responsible for his torts as a sane person: *Morse v. Crawford*, 17 Vt. 499; 44 Am. Dec. 349. The principal case was before the New York court of appeals, in 143 N. Y. 42, 42 Am. St. Rep. 743, and in a note appended thereto we noticed the few decisions bearing upon the question as to an insane person's liability for negligence. Aside from the decisions of the principal

case little is to be found directly upon the question: See extended note to *Williams v. Hays*, 42 Am. St. Rep. 754.

NEGLIGENCE—WHEN A QUESTION FOR JURY.—It is only when the evidence and all reasonable inferences to be drawn therefrom are in one way in respect to a fact in issue that the trial court is warranted in taking it from the jury: *Borden v. Daisy Roller Mill Co.*, 98 Wis. 407; 67 Am. St. Rep. 818; *Wade v. Columbia Electric etc. Power Co.*, 51 S. C. 296; 64 Am. St. Rep. 676, and note.

MATTES v. FRANKEL.

[157 New York, 603.]

APPURTENANCES—WHAT MAY PASS AS.—A right of way or other easement may pass by a conveyance as appurtenant to the land conveyed.

ESTOPPEL—CREATING RIGHT OF WAY BY.—If a landowner, seeking to sell a parcel of his real property, represents to the purchaser that a right of way exists from it over his other real property, he subjects the latter to such right of way, and, though the conveyance subsequently made does not mention such right, the grantor is estopped from denying its existence.

ESTOPPEL—STATUTE OF FRAUDS DOES NOT PREVENT THE ENFORCEMENT OF.—The fact that the party to be estopped made representations in hostility to his record title does not prevent the court from enforcing as against him the general rule, that when a party, either by his declarations or conduct, has induced a third person to act in a particular manner, he will not afterward be permitted to deny the truth of his representations, if the consequences work an injury to such third person or some one claiming under him. Hence, an easement in land may be created by estoppel, though the statute of frauds requires a title or interest in real estate to pass only by operation of law or by a conveyance in writing.

Peter Cantine and Charles Davis, for the appellant.

Carroll Whitaker, for the respondents.

006 **BARTLETT, J.** This is an action to recover damages for an alleged trespass, the plaintiff thereby seeking to test the validity of defendants' claimed right of way to reach the barn on the rear of their premises over his lands. By the verdict of the jury and the affirmance of the general term all the material and controverted facts are conclusively found against the plaintiff, and we are called upon to consider the questions of law.

In March, 1889, the plaintiff conveyed to the defendants improved real estate on Partition street, in the village of Saugerties, Ulster county, being a lot nineteen feet three inches in front and rear, and four hundred and seventy feet deep. The buildings consisted of a store and dwelling in front the full width of the lot, and a barn and shed about one hundred feet in the rear of

the front buildings. These buildings were over thirty years old at the time of the conveyance.

The barn on the defendants' premises had been reached by a right of way that was open and notorious for more than thirty years, and one witness swearing he had known the "alleyway" for "forty odd years."

The undisputed facts as to title will make this matter of the right of way clear. In 1853 one John Glennon owned the lot which now lies next north of defendants' lot, and is at present owned by the plaintiff. In 1853 one Abigail Heath owned the lot immediately north of John Glennon's lot.

Glennon and Mrs. Heath, in August, 1853, by deed, laid out a lane between their two lots eight feet wide and one hundred and fifty feet deep; six feet of the width of this lane was conveyed by Mrs. Heath and two feet by Glennon, the latter paying Mrs. Heath one hundred dollars in addition. The record does not disclose when this way was first laid out, but the evidence shows an alley of some kind prior to 1853.

It was through this lane and over the lot now owned by the plaintiff that defendants and their predecessors in title reached the barn on defendants' premises.

Plaintiff took title to the lot he now owns, on the north of defendants' lot, in May, 1867, and of defendants' premises in April, 1869.

1867 Plaintiff conveyed the latter to defendants in March, 1889, the deed making no mention of the right of way.

It is to be taken as established against plaintiff on this appeal that during the negotiations that led up to this conveyance he walked through the lane and over his own lot to the barn with defendant, Schwartz, and a third party, and pointed out that route as the right of way to the barn—not a new right of way he was then creating, but as an existing one, visible to the eye, and over which they had passed.

It is further to be taken as established that defendants relied upon this statement and representation when they received the conveyance from plaintiff.

It thus appears that the plaintiff stands before the court in a position destitute of all equity, and seeking to inflict great injury upon defendants by invoking certain technical legal principles, which he insists enable him to accomplish his purpose.

It is argued in his behalf that the deed being silent as to the right of way, the plaintiff's representations in respect thereto are immaterial and merged in the written instrument.

It is further insisted that defendants seek to establish a title or interest in real estate by estoppel in contravention of the statute that requires that such title or interest must pass by operation of law, or by a deed or conveyance in writing.

It is also urged that the title to the dominant and servient estates being vested in the plaintiff, the latter estate was merged in the former.

The learned trial judge submitted the case to the jury with the statement that defendants had shown no right of way by prescription or necessity, but allowed the jury to determine whether the representations alleged to have been made by the plaintiff as to the right of way were in fact made, and charged them that if they so found, "the plaintiff so practically located what he sold as to give the defendants such a license, coupled with an interest to go through this alley, that he cannot and ought not to be permitted to revoke it."

We are of opinion the charge of the trial judge, that the right of way under the circumstances did not pass by the use of the word "appurtenances" in the deed, was more favorable to plaintiff than he was entitled to ask.

No principle of law is better settled than that some things pass by a conveyance of lands as incident and appurtenant thereto, though not named therein. This is the case with a right of way or other easement appurtenant to land: *Voorhees v. Burchard*, 55 N. Y. 98.

In the case cited, the grantor, owning certain premises upon which there was a sawmill, conveyed by metes and bounds the portion thereof upon which the mill was located, with appurtenances, describing it as his mill property. Between the premises conveyed and the highway was a piece of land for many years used as a way to the mill and as a millyard for storing logs. There was no other access from the mill to the highway, and the use of the land was necessary to the mill as a millyard.

This court held that an easement in said land for a way and a millyard was carried by the principal thing conveyed.

In the case at bar, we have the defendants' entire front on the street occupied by the building, and no possible way of reaching their barn from Partition street, except by removing a portion of the building, or purchasing a new right of way.

When the plaintiff sold these premises and made the representations he did as to the right of way, the general rule comes in that everything is granted by which the grantee may have and enjoy such use: 3 Kent's Commentaries, 420, 421.

The plaintiff, by his representations as to the right of way, clearly consented to subject his remaining land to the easement of defendants', and elected to make it a servient estate to that extent: *Lampman v. Milks*, 21 N. Y. 505. This is in addition to such rights as defendants and their predecessors in title had acquired by more than twenty years' use of the right of way as appears by the undisputed evidence.

We are also of opinion that the plaintiff is estopped from denying the defendants' right of way by reason of his declarations and representations in respect thereto.

*** The fact that the party to be estopped made representations in hostility to his record title existing at the time does not prevent the court from enforcing against him the general rule that when a party, either by his declarations or conduct, has induced a third person to act in a particular manner, he will not afterward be permitted to deny the truth of the admission, if the consequence would be to work an injury to such third person or to some one claiming under him: *Trustees etc. v. Smith*, 118 N. Y. 641, and cases cited. In the case just cited, it was held by the second division of this court that if one is induced to purchase lands on representations of another designed to influence his conduct and creating a reasonable belief on his part that he is thereby acquiring a valid title to the same, under which he acts, the party who thus influenced him is estopped from setting up title to himself, existing at the time of the purchase, against that of the purchaser.

The enforcement of this principle in no way contravenes the statute that requires title or interest in real estate to pass by operation of law, or by a deed or conveyance in writing.

In *De Herques v. Marti*, 85 N. Y. 609, this view of the law of estoppel is fully sustained.

Folger, C. J., said: "The fact that it is real estate that is concerned, the title to which and the rights in which are generally to be affected by instruments in writing formally executed, does not prevent the operation of the estoppel. Looking on in silence and not asserting a right, when other parties are making purchase and transfer of lands, will estop from asserting an antagonistic right therein."

We are of opinion that the defendants' right of way passed to them under the deed they received from plaintiff, and that the latter is also estopped from interfering with the same by his representations acted upon by the defendants.

It follows that the judgment appealed from should be affirmed, with costs.

CHIEF JUSTICE PARKER dissented, saying: "There are few older principles or rules of law than that of estoppel, which for centuries has been employed to bar a party from alleging or denying a fact to the injury of another contrary to his own previous allegation or denial. It signifies that a man, for the sake of fair and honest dealing, should be prevented from declaring that to be false which through his instrumentality has been accredited and acted upon as true. But the party who invokes the doctrine must have acted not only on the faith of the representation, but must have been justified in doing so. Now, assuming, as we must, that the plaintiff said, 'Here is the right of way to this barn,' or 'pointed out the said route as the right of way to the barn,' we note that he did not assert that it was annexed in any way to the lot that he was about to convey to the defendants, nor that he would convey it, and certainly these defendants, like all other parties, are presumed to have known the law, and hence they knew at the time this statement was made that the only way that they could acquire an easement in the remaining lot of the plaintiff was by grant. Such was the statute; and, as they were presumed to know the law, for the purpose of the disposition of this question, they did in fact know it, and knowing it they were not deceived by the alleged misrepresentations of the plaintiff."

"The defendants were about to purchase real estate, and they knew, or at least were bound to know, that the contract of the parties would be expressed in the deed; that all prior negotiations would be merged in it and that they would receive nothing except that which would be expressly granted by deed; that they could not, as the outcome of negotiations with this plaintiff, secure one lot by deed and still another or any part or interest therein by estoppel. If the deed failed to convey to the defendants all that they bought, their remedy was to bring suit for a reformation of the deed on the ground of mutual mistake, or of mistake on their part and fraud on the part of the other party. They have concluded instead to be pioneers in a hitherto unexplored field of alleged legal rights and remedies, and keep the lands acquired by deed, while they attempted to wrest other lands, or an interest therein, from their grantor through the doctrine of estoppel, because of something said pending the negotiations which finally ripened into a deed.

"The matter really does not seem to admit of discussion, but it has been forced upon us by an attempt to apply here certain decisions which were made for entirely different situations. It is said: 'That if some person other than this plaintiff had owned the lot sold to the defendant, and he had stood by when that person offered to sell the premises, together with the right of way, and he had not asserted his title to the right of way, he would have been estopped from claiming title thereto': Citing *DeHerques v. Marti*, 85 N. Y. 609; *Trustees v. Smith*, 118 N. Y. 641, and other cases. True, and if this plaintiff were a third party instead of being a party to the contract, the cases cited would be applicable, for in such a case the plaintiff

would have been in the position of having assented to a statement of fact which might, perhaps, have been true, and which the purchaser could have believed, namely, that there was a right of way over the plaintiff's land and annexed to the premises which the defendants were about to buy, a right which would pass by conveyance of the dominant estate as an appurtenant to the lands: *Jones on Easements*, sec. 18; *Pierce v. Keator*, 70 N. Y. 419; 26 Am. Rep. 612. It would, therefore, be a duty to speak and prevent fraud, and a failure to perform that duty prevents a party from asserting something different from the representation that induced the situation complained of, but this plaintiff is not a third party; instead, he is a party to a contract which presumably embraces all the negotiations between the parties. To such a situation totally different rules apply. It is to the contract that each must resort, not only to ascertain, but to protect, whatever right or interest he may have. The contract may be done away with for fraud. If it does not express the real agreement of the parties, it may be so reformed in equity that it will, but while it stands it must be treated by the parties and the courts as containing the entire agreement upon the subject.

"The judgment should be reversed and a new trial granted, with costs to abide the event."

DEEDS—APPURTENANCES—EASEMENT PASSING BY ESTOPPEL.—An appurtenance is a thing used with, and related to, or dependent upon, another thing more worthy and agreeing in its nature and quality with the thing whereunto it is appendant or appurtenant: *Jarvis v. Seele Milling Co.*, 173 Ill. 192; 64 Am. St. Rep. 107. Appurtenances will pass by a deed or grant of conveyance, even if the word "appurtenance," or a similar expression, is not used in the instrument: *Jarvis v. Seele Milling Co.*, 173 Ill. 192; 64 Am. St. Rep. 107. As to whether easements, to pass by implication, must be necessary, the cases disagree: See monographic note to *Elliott v. Rhett*, 57 Am. Dec. 762; note to *Grace M. E. Church v. Dobbins*, 84 Am. St. Rep. 708; note to *Jarvis v. Seele Milling Co.*, 64 Am. St. Rep. 109, 110. But easements may pass by implication on principles of estoppel: See monographic note to *Elliott v. Rhett*, 57 Am. Dec. 760.

ESTOPPEL—CONVEYANCE OF INTEREST IN LAND BY—STATUTE OF FRAUDS.—Title to land may be conveyed by estoppel regardless of the statute of frauds: *Cross v. Weare Commission Co.*, 153 Ill. 499; 46 Am. St. Rep. 902; *Springle v. Morrison*, 3 Litt. 52; 14 Am. Dec. 41.

ORVIS v. CURTISS.

[157 NEW YORK, 657.]

THE DEFENSE OF USURY CANNOT BE SUSTAINED UNLESS there was a loan or forbearance of money.

USURY — TRANSACTIONS RESPECTING DEALING IN STOCKS.—If an agreement is entered into whereby a firm of brokers are to purchase a specified amount of stocks and furnish a designated amount of money therefor, and they and the person for whose account the stocks are purchased are to be entitled to share equally in the profits of the transaction, except that he guarantees that the profits shall reach a sum specified, which sum is in excess of the amount which might lawfully be charged for interest on the advances made, the transaction is not tainted with usury, because there is no borrowing or lending of money, but only an agreement to deal in stocks.

Herman Aaron, for the appellant.

Abram I. Elkus, for the respondent.

⁶⁵⁹ O'BRIEN, J. This action was originally brought in a district court of the city of New York to recover one hundred dollars, being six months' interest upon a promissory note of four thousand dollars, made by the defendant on the third day of January, 1893, and payable to the order of the plaintiff three years after date, with semi-annual interest at five per cent. While the action nominally involves only the interest on this note for six months, yet it in effect, from the nature of the defense, involves the right of the plaintiff to recover the principal sum, as well as the interest. The pleadings in the trial court were oral, and, consequently, quite informal. The defense was, in substance, a general denial, want of consideration, and usury.

The origin of the note was as follows: On the 3d of January, 1887, the plaintiff, who is a member of a firm of stockbrokers, and defendant entered into a written agreement for the purpose of purchasing in the market and carrying five hundred shares of the capital stock of the American Cotton Oil Trust. By this instrument it was agreed: 1. That a joint account should be opened with the firm of brokers of which the plaintiff was a member, in which the plaintiff and defendant should be equally interested; that upon their joint order, or the order of the defendant, the account might purchase or sell at any time any portion of five hundred shares of the stock, but at no time in excess of that amount. The defendant agreed to furnish at once to the plaintiff's firm such sums of money as might represent the difference between the price paid for the stock and forty-five per cent of the

par value. 2. The plaintiff guaranteed that the account should be carried for the period of six months from date, and agreed to furnish four thousand five hundred dollars for each one hundred shares, the account to be closed up and settled in full on or before July 3, 1887. The plaintiff also agreed to set aside with his firm the necessary money to pay for the stock whenever called upon for that purpose, the account to pay to plaintiff's firm interest at six per cent from the date of the agreement, besides broker's commissions on each transaction. 3. It was ~~also~~ also stipulated between the parties that such net profits as might accrue to the account by reason of the transaction should be equally divided, but the defendant guaranteed that the share of the profits of the plaintiff should not be less than five thousand dollars, and agreed, further, that when the account was closed he would pay over and make good to the plaintiff any deficiency in the account for that purpose, so that the plaintiff should, within the period of six months from the date of the agreement, receive either from the account or from the defendant, as guarantor, the sum of not less than five thousand dollars.

It will be seen that the plaintiff was, by the terms of this instrument, secured from all loss, and not only that, but the defendant expressly guaranteed that his profits should not be less than five thousand dollars. There was, in fact, a large loss in the transaction, amounting to about eleven thousand dollars, which, it is conceded, the defendant paid. The account remained unsettled until about the time of the execution of the note in controversy, and then there appeared to be due to the plaintiff, under the terms of the contract, seven thousand eight hundred dollars. The parties agreed to settle and compromise this claim by the execution and delivery of the note in question, and that it was given to settle and adjust the plaintiff's claim, originating as above stated, is not disputed.

Waiving the question whether the note in controversy was not executed and delivered in pursuance of an accord and satisfaction between the parties, based upon a disputed claim, the defense of usury, which constituted the ground upon which the learned court below reversed the judgment, must be considered. It is proper to observe at the outset that there is no proof in the record of any preliminary negotiations to show that the agreement was not intended for the purpose indicated upon its face, but as a mere device or subterfuge to conceal a loan of money. A transaction of this character may be assailed as a device to cover a usurious loan; and when facts and circumstances are established to warrant a

finding that such was its purpose, it is quite possible that the defense ^{was} of usury could be sustained. But in this case, not only is the testimony to support such a theory absent, but it appears that since the trial court rendered judgment in favor of the plaintiff, the existence of such facts was expressly negatived. The order of the general term reversing the judgment does not appear to have been founded upon the facts, and hence we must presume that it was upon the law. Therefore, the only question that is before us for review is whether the agreement referred to, and out of which the claim compromised and represented by the note grew, was, as matter of law, usurious.

It is a fundamental doctrine governing the law of usury that the defense must be founded upon a loan or forbearance of money. If neither of these elements exists, there can be no usury, however unconscionable the contract may be. The law declares that no one shall loan money, exacting for its use more than legal interest, or, having loaned money, he shall not exact a greater rate as a condition of postponing payment: *Meaker v. Fiero*, 145 N. Y. 165. There must exist, in fact or in law, a corrupt purpose or intent on the part of the person who takes the security to secure an illegal rate of interest for the loan or forbearance of money. There must be a lender and a borrower, and it must appear that the real purpose of the negotiations and transactions was, on the one side, to loan money at usurious interest reserved in some form by the contract, and, on the other side, to borrow upon the usurious terms dictated by the lender. These principles governing the law of usury are so well settled that it is unnecessary to cite authorities in support of them. I think it is impossible to find these conditions in the transaction in question. It is plain that the defendant's purpose was not to borrow money, but to deal in stocks. There is no proof or claim in the record that he ever applied to the plaintiff for a loan. He did apply to him for the purpose of entering into a joint transaction to speculate in property. There is nothing in the case to warrant the assertion that the plaintiff intended, by entering into the transaction, to loan money to the defendant ^{was} in the sense in which such transactions are commonly understood. The plaintiff's purpose was to buy stocks at the defendant's risk, securing to his firm the brokerage commissions and the interest on the investment. He took care also to make such an agreement with the defendant as would exempt him from all possible loss, and not only that, but should secure to him a large profit. He may have made a hard and unconscionable bargain

with the defendant, but it is evident that both parties dealt with each other at arms' length, and, whatever else may be said about the transaction, the usury statute has no application whatever to it. It was a joint venture or partnership between two persons to deal in property in order to make profit. One of them was more cautious than the other, and not only protected himself by the terms of the contract against the uncertain fluctuations of the stock market, but stipulated that whether the stock went up or down he should be guaranteed a profit in the transaction. The defendant relied entirely upon the fluctuations of the market, and he not only lost by these fluctuations, but by his confidence that the stock would have a large advance, which was no doubt his reason for so doing, guaranteed to the broker a profit of at least five thousand dollars. If there had been a large profit in the transaction instead of a loss, no one, I think, could then assert that the parties were not entitled to share in these profits equally. Certainly, the plaintiff could not then allege that the defendant was not entitled to share in the profits for the reason that the transaction was a simple loan of money. An agreement between two parties to enter into a joint venture in the purchase or sale of stocks or other property is a very common transaction. The fact that one of them may have advanced the capital and the other has agreed that, in consideration of such advance, he should participate more largely in the profits, does not convert such an agreement into a loan of money or conflict with the statute against usury. The contract is still one of partnership: *Clift v. Barrow*, 108 N. Y. 187; *Hackett v. Stanley*, 115 N. Y. 629; *Curry v. Fowler*, 87 N. ~~Y.~~ ^{N. Y.} 38; 41 Am. Rep. 343; *Richardson v. Hughitt*, 76 N. Y. 55; 33 Am. Rep. 570; *Leggett v. Hyde*, 58 N. Y. 272; 17 Am. Rep. 244; *Reid v. Hollinshead*, 4 Barn. & C. 867; *Richards v. Grinnell*, 63 Iowa, 44; 50 Am. Rep. 727; *Musier v. Trumbour*, 5 Wend. 275. The defense of usury involving crime and forfeiture is not applicable to such transactions. For these reasons the order of the general term should be reversed, and the judgment of the trial court affirmed, with costs.

All concur, except Gray, J., dissenting, and Haight, J., not voting.

Order reversed and judgment accordingly.

USURY—WHAT CONTRACTS ARE INFECTED WITH.—One of the essential elements of a usurious contract is that there must be a loan or forbearance of money. There must be a borrowing and a lending, for, if there be neither, the agreement to pay interest in excess of that specified by statute is not usury: See monographic note

to *Bank of Newport v. Cook*, 46 Am. St. Rep. 182, as to what transactions are usurious; *Miller v. Life Ins. Co.*, 118 N. C. 612; 54 Am. St. Rep. 741, and note; monographic notes to *Davis v. Garr*, 55 Am. Dec. 892, and *Sylvester v. Swan*, 81 Am. Dec. 733.

CASES

IN THE

SUPREME COURT

OF

NORTH CAROLINA.

STAFFORD v. GALLOPS.

[128 NORTH CAROLINA, 19.]

AN ERRONEOUS JUDGMENT is one rendered according to the course and practice of the courts but contrary to law; that is, based upon an erroneous application of legal principles.

A VOID JUDGMENT is, in legal effect, no judgment. It neither binds nor bars anyone, and all proceedings founded upon it are worthless. A judgment rendered against a party without service on him, or an appearance, is void.

AN IRREGULAR JUDGMENT is one contrary to the course and practice of the courts, and is held valid until vacated or reversed.

JUDGMENT—INSUFFICIENCY OF NOTICE—EFFECT OF. A judgment in an action in which the required number of day's notice was not given to the defendant is erroneous and irregular, but not void, and cannot be collaterally attacked.

ACTION — INSUFFICIENCY OF NOTICE — PRACTICE.— When the time between the service and the return day of a summons is less than the time allowed by law, the action ought not to be dismissed, but the defendant should be allowed the statutory time for an appearance.

Civil action for trespass brought by A. F. Stafford, administrator, against Isaac Gallops, Alfred Gallops, and Lot Gallops. The objection of the defendants to the introduction of the record, mentioned in the opinion, was sustained, and the proposed evidence was excluded. The plaintiff excepted, submitted to a nonsuit, and appealed.

G. W. Ward, for the appellant.

E. F. Aydlett, for the appellees.

20 **FAIRCLOTH, C. J.** Action for trespass by cutting wood,

et cetera, involving title to the locus in quo. The plaintiff, in deducing his title, offered in evidence a certain record and judgment, presently referred to, which was excluded by his honor, and the plaintiff took a nonsuit and appealed. The competency of said judgment is the only question we have to consider, and that ²¹ raises the question whether the judgment was void, or irregular and voidable only.

In 1887, H. C. Harris and wife, Laura T., executed their promissory notes payable to Sarah E. Harris, and conveyed the land to John A. Harris in trust to secure the payment of said notes, and subsequently the payee assigned said notes to the plaintiff's intestate. Before the trust was closed the trustee died. The plaintiff applied to the clerk to have another trustee appointed, and the clerk issued a summons on December 8, 1891, notifying the trustors and Sarah E. Harris to appear before him on December 19, 1891, and answer the plaintiff's complaint. The officer's return on the summons was, "Executed December 11, 1891." On the return day of the summons the defendants failed to appear, answer, or demur, and the clerk appointed a trustee with all the powers of the first trustee. The trustee, on proper notice, sold the land, and the plaintiff's intestate was the purchaser.

The defendant's position is that, as they had not the ten days' notice required by the code, sections 279 and 1376, the judgment of the clerk appointing a trustee was void, and that the trustee's sale and deed conveyed no title. That is the point.

Much has been written on the character and force of judgments, and we find them to be erroneous, irregular, or void.

An erroneous judgment is one rendered according to the course and practice of the courts, but contrary to law; that is, based upon an erroneous application of legal principles: *Wolfe v. Davis*, 74 N. C. 597; *McKee v. Angel*, 90 N. C. 60.

A void judgment is in legal effect no judgment. No rights are acquired or divested by it. It neither binds ²² nor bars anyone, and all proceedings founded upon it are worthless: 1 *Freeman on Judgments*, 4th ed., sec. 117; *Black on Judgments*, sec. 170; as if judgment be rendered without service on the party, or his appearance: *Armstrong v. Harshaw*, 12 N. C. 187; *Stallings v. Gulley*, 48 N. C. 344; *Condry v. Cheshire*, 88 N. C. 375.

An irregular judgment is one contrary to the course and practice of the courts, and is held valid until vacated or reversed: *Wolf v. Davis*, 74 N. C. 597; *McKee v. Angel*, 90 N. C. 60; *Black on Judgments*, sec. 170; 1 *Freeman on Judgments*, sec. 116 et seq.

The question of jurisdiction lies behind all judgments, decrees, and orders. If they are entered by a court without jurisdiction, they are nullities and may be disregarded by anyone, whether relied upon directly or collaterally.

Every court, before it can enter a lawful judgment, must have jurisdiction: 1. Of the subject matter; and 2. Of the person. Jurisdiction of the subject is conferred by the constitution, statutes, and the law of the land; that is, by sovereign authority: *Black on Judgments*, sec. 240; *Cooper v. Reynolds*, 10 Wall. 308. Jurisdiction of the person is acquired by service of process. A court, thus having acquired jurisdiction, is clothed with power to hear and determine, and its orders and decrees are binding upon all the parties, until reversed or vacated by some direct proceeding, because public policy requires it and because a judgment is a record, and a record imports in it such uncontrollable credit and verity, as it admits no averment, plea, or proof to the contrary: *Coke on Littleton*, 260 a. Defective service has given rise to many irregularities in the course of the courts, but it will be found that they do not render the ²³ final judgment void but only irregular, unless the defect is such as to amount to no service. The instances found in the opinions of this court of such irregularities are too numerous to mention here. Examples: A judgment exceeding the amount demanded in the writ is not void, but irregular and erroneous, but has full force until reversed by a direct proceeding: *Savage v. Hussey*, 48 N. C. 149. A judgment against an infant with no guardian to represent him; held, irregular only: *Keaton v. Banks*, 32 N. C. 381; 51 Am. Dec. 393. A constable returned his warrant "executed," but did not sign his name to his return; held, that the judgment was not void: *McElrath v. Butler*, 29 N. C. 398. "A judgment in an action to which the required number of days' notice was not given to the defendant is erroneous, but not void, and cannot be questioned in a collateral proceeding": *Ballinger v. Tarbell*, 16 Iowa, 491; 85 Am. Dec. 527; *Glover v. Holman*, 3 Heisk. 519; *West v. Williamson*, 1 Swan, 277; *Hendrick v. Whittemore*, 105 Mass. 23; *Pope v. Hooper*, 6 Neb. 178; 1 *Freeman on Judgments*, sec. 126; *Isaacs v. Price*, 2 Dill. 351.

When the time between service and the return day of the summons is less than the time allowed by the code, the clerk is not bound to dismiss the action, but should allow the time, allowed by the code, to the defendant for an appearance: *Guion v. Melvin*, 69 N. C. 242. The object of service of process is to

advise the defendant of the plaintiff's action and that he must appear at the time and place named and make his defense, and in default therein judgment will be prayed. If he attends, as he should, he can defend on the merits or have irregularities corrected. Failing in this does not affect the jurisdiction or judgment as long as it stands unreversed. A service of four days' notice, when ²⁴ the law required five, is sufficient to support a justice's judgment: *Ballinger v. Tarbell*, 16 Iowa, 491; 85 Am. Dec. 527; 1 Freeman on Judgments, sec. 126.

Applying these principles to the present case, his honor committed error in excluding the judgment of the clerk appointing a trustee. That judgment, although irregular, is valid until reversed or vacated by a direct action, and cannot be collaterally attacked.

New trial.

JUDGMENT UPON INSUFFICIENT SERVICE.—Summons served but two days before trial, where the statute requires three, confers no jurisdiction of the person of the defendant, and a judgment rendered against him upon such a service is utterly void, and can be questioned at any time and in any proceeding, direct or collateral, and no title can be diverted or transferred under such judgment: *Johnson v. Baker*, 88 Ill. 98; 87 Am. Dec. 298, and note.

POWELL v. DEWEY.

[123 NORTH CAROLINA, 103.]

INSURANCE, LIFE—PARTNERS—INSURABLE INTEREST.—If two partners have no capital invested, and neither is indebted to the other, one of the copartners has no insurable interest in the life of the other, and, if a policy is issued thereon, it is void.

INSURANCE, LIFE—PARTNERS—NO RIGHT OF ACTION UPON A VOID POLICY.—No action can be sustained upon a void policy of insurance. Hence, if one partner is made the beneficiary and assignee of such a policy upon the life of his copartner, pays the premiums, and receives the insurance money upon the death of the insured, no action for such money can be maintained by the personal representative of the insured, either against the beneficiary or the insurance company. Neither could the beneficiary have maintained an action on the policy to enforce the payment of the insurance money.

Civil action to recover the amount of an insurance policy upon the life of A. H. Powell, deceased. The action was brought by Emma H. Powell, executrix of the deceased, against Thomas W. Dewey and the Mutual Benefit Life Insurance Company. Powell and Dewey had been equal partners in a general life and fire insurance business in Newbern, North Carolina. No capital was

invested, and neither was indebted to the other. Each gave personal attention to the business of the firm. About two months before the termination of the partnership, the policy in question was issued, and immediately assigned, in writing, by Powell to Dewey, who paid all premiums. After Powell's death, but prior to the payment of the money, the company received a written protest from the plaintiff against payment of the insurance money to Dewey. Subsequently, the company paid Dewey the amount due on the policy, nineteen hundred and four dollars. The trial court concluded, upon all the facts, that the plaintiff was not entitled to recover, and she appealed.

Simmons, Pou & Ward, and M. De W. Stevenson, for the appellant.

W. W. Clark, O. H. Guion, P. H. Pelletier, and Shepherd & Busbee, for the appellees.

¹⁰⁴ MONTGOMERY, J. This case differs from that of *Albert v. Mutual Life Ins. Co.*, 122 N. C. 92, 65 Am. St. Rep. 693, in the most material respect. In that case the person whose life was insured paid all the premiums, and the court did not find it necessary to decide whether the beneficiary had an insurable interest in the life of the insured person. In the case before us, at the very time when the policy was issued, in which the life of the plaintiff's intestate was insured, ¹⁰⁵ there was an assignment of the policy to the beneficiary (the defendant Dewey) who paid the first and all of the premiums.

The first question that presents itself in the case is, Did the defendant have an insurable interest in the life of Powell, the plaintiff's intestate? The defendant avers that he did, and that the policy was duly and legally assigned to him by the intestate. The ground of this averment is that the plaintiff and intestate were copartners. No particulars of the partnership are set out. There is no averment that the deceased copartner, Powell, was indebted to the defendant or to the partnership in any amount, or that the deceased was to furnish any labor, skilled or otherwise, as his contribution in lieu of money.

Upon such conditions we are of the opinion that the defendant had no insurable interest in the life of the deceased partner. In the case of *Trinity College v. Travelers' Ins. Co.*, 113 N. C. 244, this court said that, "under certain conditions, a partner has an insurable interest in the life of his copartner," and cites *Connecticut etc. Ins. Co. v. Luchs*, 108 U. S. 498. There, the

fact was that Luchs had furnished to the copartnership fund for his copartner Dillingburgh, five thousand dollars, which was unpaid. We suppose that was the condition referred to in the opinion in the Trinity College case, under which a partner might have an insurable interest in the life of his copartner. It is true that in Connecticut etc. Ins. Co. v. Luchs, 108 U. S. 498, the court said that the continuance of the partnership was also a reasonable expectation of advantage to Luchs and gave him an insurable interest in the life of his copartner. But we are of the opinion that that position is against the weight of authority. The policy being void, then, because the defendant had no insurable interest in the life ¹⁰⁰ of Powell, no action could have been maintained on it by the defendant against the insurance company: Burbage v. Windley, 108 N. C. 358. Neither can the plaintiff maintain this action, for, looking at it in any view, it has its foundation on the policy, which is void: Windley v. Burbage, 108 N. C. 358.

The plaintiff's counsel cited to us Cheeves v. Anders, 87 Tex. 287, 47 Am. St. Rep. 107, and 3 American and English Encyclopedia of Law, page 592, to show that the next of kin or the personal representative of the assignor of a void policy could, in an action against the beneficiary in such a policy, recover the amount which had been paid to him by the insurance company. But we cannot see the principle upon which these authorities are based, and the decisions themselves do not give reasons for their existence. Besides, that position has been condemned in Burbage v. Windley, 108 N. C. 358.

No error.

LIFE INSURANCE—INSURABLE INTEREST—PARTNERS.—A party insuring must have an interest in the life to be insured, when the insurance is effected for his own benefit, or the policy will be void: Mitchell v. Union Life Ins. Co., 45 Me. 104; 71 Am. Dec. 529. Compare Prudential Ins. Co. v. Jenkins, 15 Ind. App. 297; 57 Am. St. Rep. 228. But a person has such an insurable interest in his own life that he may insure it for the benefit of a stranger: Northwestern etc. Aid Assn. v. Jones, 154 Pa. St. 99; 35 Am. St. Rep. 810. A partner has an insurable interest in the life of his copartner: Notes to Morrell v. Trenton Ins. Co., 57 Am. Dec. 98; Currier v. Continental Life Ins. Co., 52 Am. Rep. 140; Continental Life Ins. Co. v. Voiger, 46 Am. Rep. 190; but the insurable interest which one partner has, as such, in the life of another ceases on the dissolution of the firm: Cheeves v. Anders, 87 Tex. 287; 47 Am. St. Rep. 107.

LIFE INSURANCE—VALIDITY OF POLICY PAYABLE TO ONE HAVING NO INSURABLE INTEREST.—When a person whose life is insured, voluntarily, without the request or solicitation of the person to whom the policy is made payable, procures an insurance on his own life, and then has the loss made payable even to one having no insurable interest in his life, the policy is valid: Note

to *Ourrier v. Continental Life Ins. Co.*, 52 Am. Rep. 141. A policy of life insurance payable to one who has no interest in the life of the insured is valid and enforceable when the policy is taken out in good faith and the premium paid thereon by the insured: *Albert v. Mutual Life Ins. Co.*, 122 N. C. 92; 65 Am. St. Rep. 698.

OWENS v. SOUTHERN RAILWAY COMPANY.

[128 NORTH CAROLINA, 188.]

TRIAL—POLL OF JURY—RIGHT OF JUROR TO DISSENT.—Any juror may dissent from a verdict to which he has agreed in the jury-room at any time before it is received and entered up.

NEW TRIAL—RECEIVING VERDICT AFTER DISSENT OF JUROR.—If unanimity in the verdict of a jury is required by law, the dissent of one juror, when the jury is polled, is as fatal as that of all, and a new trial must be awarded where the verdict is received after such dissent.

Civil action for damages for personal injury. The answer alleged contributory negligence. Upon the coming in of the verdict, one of the jurors dissented, as stated in the opinion, but the verdict was received and recorded, and the jury separated. There was a judgment for the plaintiff, and the defendant appealed.

F. H. Busbee, for the appellant.

C. M. Stedman and L. M. Scott, for the appellee.

¹⁸³ CLARK, J. Any juror may dissent from a verdict, to which he has agreed in the jury-room, at any time before it is received and entered up, and this is true ¹⁸⁴ even of a sealed verdict: *Weeks v. Hart*, 24 Hun, 181; *Root v. Sherwood*, 6 Johns. 68; 5 Am. Dec. 191; *Rothbauer v. State*, 22 Wis. 468; *Bishop v. Mugler*, 33 Kan. 145; 2 Thompson on Trials, sec. 2635.

In the present case, the verdict was rendered as to the second issue (contributory negligence) "No." Before it was entered and before the jury was discharged, the court, at the request of defendant, permitted them to be polled; whereupon one of the jurors responded to the second issue, "I think she [plaintiff] was to blame in part." This was certainly not a response of "No." He was then asked if he had not consented in the jury-room that the issue might be answered "No." To this he replied, "I did."

It was error to permit the verdict to be received after the juror's dissent, in part at least, without ascertaining whether,

notwithstanding he adhered still to the assent given in the jury-room. The force of this would be better seen if each of the jurors on being polled had responded as this juror did. On a poll of the jury each "tub stands on its own bottom," and the dissent of one is as fatal as that of all. Unanimity in the verdict of a jury is still required in this state, though abolished in some other jurisdictions, and the judge should have directed the jury to retire and consider further of their verdict. For the reception of the verdict under these circumstances over the objection of the defendant, there must be a new trial.

TRIAL.—RIGHT TO HAVE JURY POLLED exists, whether the verdict is oral or sealed: Note to *James v. State*, 30 Am. Rep. 497; and a denial of this right is reversible error. If any of them then dissent, the verdict cannot be received: *Rigg v. Cook*, 4 Gilm. 836; 46 Am. Dec. 462; *James v. State*, 55 Miss. 57; 30 Am. Rep. 496. Compare *Norvell v. Deval*, 50 Mo. 272; 11 Am. Rep. 413.

CHAPPELL v. ELLIS.

[123 NORTH CAROLINA, 259.]

DAMAGES FOR "MENTAL SUFFERING" CANNOT BE AWARDED in an action to recover damages for the unlawful seizure and detention of personal property. If the act was accompanied by circumstances of aggravation, exemplary damages may be allowed, but the doctrine of "mental anguish" is not applicable to it.

Civil action for damages brought by Elizabeth Chappell against Milton Ellis and others, for the wrongful seizure of plaintiff's personal property, under process against her husband. There was a verdict for the plaintiff, assessing her damages at one hundred dollars, and the defendants appealed from a judgment thereon.

B. F. Long, for the appellants.

Armfield & Turner, for the appellee.

²⁶⁰ **DOUGLAS, J.** This is an action to recover damages for the unlawful seizure and detention of personal property, and also for mental suffering caused thereby. The plaintiff alleges that a writ of possession was issued in favor of the defendant Ellis against her husband and herself, and also directing the sheriff to make the sum of one hundred and ninety-seven dollars with interests and costs out of her said husband; that her said husband had not been living with her for two years, having abandoned

her and removed to the state of Indiana; that the defendant Thorpe, deputy sheriff, in obedience to said writ, removed her from the premises; and also, under the direction of the defendant Ellis, levied upon the following personal property belonging to her, to wit, "About thirty-five bushels of corn, five bushels of peas, one yearling calf, and two shotes, and delivered the same to the defendant Ellis against the will and over the protest of the plaintiff, she at the time informing Thorpe that she was the sole owner of said property; that the said Ellis took the said property to his home and kept it for more than a week, when he returned a part of the corn and peas, the yearling and one shote; and that the property not returned was reasonably worth twenty dollars." She further alleges "that she is old and infirm, having reached the age of sixty-four years, and has to depend upon her own labor and exertion for a support; and after the removal of the said property by Thorpe and Ellis, she had nothing upon which to live and no home to shelter her body; that by the wrongful act of Thorpe and Ellis in taking from her the said property, contrary to the writ aforesaid and without authority in law, and depriving her of the only means ²⁶¹ of support she then had in her advanced age in life, she has suffered greatly in body and mind, to her damage five hundred dollars."

It is unnecessary to consider the answers or the general testimony, as the jury evidently believed the plaintiff, as they found every issue in her favor. We see no error in the charge of the court of which the defendants can complain, as it appears from the record that every instruction asked by them was given. Therefore, their third assignment of error, "For that his honor failed to instruct the jury as prayed by defendant in the prayers numbered 1 to 9 inclusive, and failed, except the eighth, given," cannot be considered by us. The record states that "the defendants asked the following special instructions in writing, which were given by the court." Then follow immediately eight numbered prayers, one or two of which it would be difficult to sustain under exception by the plaintiff.

But there is one exception by the defendants which we think must be sustained, and that is to the testimony of the plaintiff's witness Reavis. He was asked, "What was the condition of the plaintiff next day?" and answered, "She was crying and going on considerably; seemed to be in great deal of trouble, and was in trouble for weeks afterward." As this testimony tended to show mental suffering, and as it is evident that the greater part of the damages awarded was based upon such suffering alone, the

exception becomes of vital importance. The doctrine of mental suffering or "mental anguish," as we prefer to call it, as indicating a higher degree of suffering than arises from mere disappointment or annoyance, contemplates purely compensatory damages, and, as far as we are aware, has never been applied to cases like that at bar. This case would come ²⁶² under the rule of exemplary, punitive, or vindictive damages, as they are variously denominated. Such damages, which look not only to the loss sustained by the plaintiff, but still more to the conduct of the defendants, can be allowed only where there is shown, on the part of the defendants, malice, wantonness, oppression, brutality, insult, gross negligence, or certain cases of fraud: Hale on Damages, secs. 85, 86; 1 Sedgwick on Damages, 520; 7 Am. & Eng. Ency. of Law, 450, 451; Duncan v. Stalcup, 18 N. C. 440; Gilreath v. Allen, 32 N. C. 67; Hansley v. Jamesville etc. R. R. Co., 117 N. C. 565; 53 Am. St. Rep. 600. These matters of aggravation need not all concur, as any one will be sufficient if it exists in sufficient degree; but, in the absence of them all, exemplary damages cannot be allowed, no matter how great may be the mental suffering of the plaintiff. The question of exemplary damages does not appear to have been raised in the trial of the action, as no such issue of instruction was asked by either party. The theory of the plaintiff was the recovery of compensatory damages for mental anguish under the rule laid down in Young v. Western Union Tel. Co., 107 N. C. 370; 22 Am. St. Rep. 883, and analogous cases. This rule cannot be extended to the case at bar. The plaintiff is entitled to recover all her actual damages sustained from the wrongful act of the defendants, including not only the value of the property not returned, but also whatever damages may have accrued from its seizure and detention. Furthermore, she may be allowed exemplary damages, in the discretion of the jury, if such circumstances of aggravation are shown as would bring her within the rule; but her case does not come within the doctrine of "mental anguish." It is true the two doctrines are somewhat similar, inasmuch as they recognize suffering other than physical or pecuniary, but they are so widely distinguished ²⁶³ in their application that they are universally recognized as distinct principles, wherever they are recognized at all.

It is urged on behalf of the plaintiff that this case should be governed by the principles laid down in Cashion v. Western Union Tel. Co., 123 N. C. 267. We see no resemblance. Our opinion in Cashion's case was hinged on the solemn fact of death

and the associations inseparable from the final severance of all earthly ties by an immortal Spirit. The anguish of a mother bending over the body of her child, every lock of whose sunny hair is entwined with a heart string, and kissing the cold lips that are closed forever, cannot come within the range of comparison with any mental suffering caused by the loss of a pig.

We are not insensible to the pitiable condition of the plaintiff, thrown upon the highway without shelter and with but little to eat, but we must remember that her shelterless condition, which probably caused the greater part of her distress, was the result of a lawful eviction. Charity would have dictated a different course, but that great virtue is not enforceable in a court of law.

But it is urged that the principle of the *Cashion* case, if carried out to its fullest extent, would directly lead to the recovery of damages for all kinds of mental suffering. It may be, but we feel compelled to carry out a principle only to its necessary and logical results, and not to its furthest theoretical limit, in disregard of other essential principles.

The one universal law of nature is that all action, animate as well as inanimate, is the result of conflicting forces. The orbit of the earth depends upon the exquisite adjustment of two conflicting forces, the centripetal power of attraction and the centrifugal force of momentum. The preponderance of either would lead ²⁸⁴ to inevitable destruction. The trajectory of every shot is governed by three opposing forces, momentum, friction, and gravitation—the speed with which it leaves the gun, the resistance of the atmosphere, and the attraction of the earth. It is so with human action. Government itself is recognized as springing from the love of personal liberty on the one hand and the desire for personal protection on the other. It is said that their just equilibrium produces a government of liberty without license and of law without tyranny, but that its disturbance would lead to anarchy or to despotism.

We do not feel at liberty to adopt any one principle as the sole guide of our decisions and to carry it out to extreme and dangerous limits, regardless of other great principles, of justice and of law, so firmly established by reason and precedent.

For the error of his honor in admitting evidence which tended simply to show the mental suffering of the plaintiff, disconnected with any allegation of malice or wantonness on the part of the defendants, a new trial must be granted.

DAMAGES FOR "MENTAL SUFFERING"—AWARDING OF.—
Damages for mental suffering alone cannot be recovered, as a gen-

eral rule; but the cases are in conflict upon this question: Note to *Kalen v. Terre Haute etc. R. R. Co.*, 63 Am. St. Rep. 351. Mental anguish, in some of the states, is alone an element for which damages may be recovered for delay or failure to deliver a message, when the face of the dispatch suggests the necessity for prompt delivery: Note to *Ewing v. Pittsburgh etc. Ry. Co.*, 30 Am. St. Rep. 711, 712; note to *Young v. Western Union Tel. Co.*, 22 Am. Rep. 896, 897; but there seems to be no satisfactory authority allowing a recovery for mental suffering alone in actions for the commission of an ordinary tort: See note to *Western Union Tel. Co. v. Nations*, 27 Am. St. Rep. 918; *Meagher v. Driscoll*, 99 Mass. 281; 96 Am. Dec. 759; monographic note to *West v. Western Union Tel. Co.*, 7 Am. St. Rep. 534, on mental anguish as an element of damages, though it has been held that mental suffering is a proper element of damage, when it is one of the direct, proximate, and natural consequences of an actionable wrong: Note to *Lombard v. Lennox*, 31 Am. St. Rep. 529.

THE PRINCIPLE laid down in *Cashion v. Western Union Tel. Co.*, 123 N. C. 267, cited in the principal case, is that damages may be recovered for mental anguish, irrespective of any physical injury, caused by the negligence of a defendant in failing to exercise reasonable care and diligence in the delivery of a telegram. This doctrine, though of comparatively recent origin, is there considered to be founded upon a sound public policy, as well as natural justice, and to be sustained equally by reason and precedent. In support of this holding the court cites the following cases: *Young v. Western Union Tel. Co.*, 107 N. C. 370; 22 Am. St. Rep. 883; *Thompson v. Western Union Tel. Co.*, 107 N. C. 449; *Sherrill v. Western Union Tel. Co.*, 109 N. C. 527; 117 N. C. 353; *Havener v. Western Union Tel. Co.*, 117 N. C. 540; *Lyne v. Western Union Tel. Co.*, 123 N. C. 129; *Logan v. Western Union Tel. Co.*, 84 Ill. 468; *So Relle v. Western Union Tel. Co.*, 55 Tex. 308; 40 Am. Rep. 805; *Reese v. Western Union Tel. Co.*, 123 Ind. 294; *Western Union Tel. Co. v. Coffin*, 88 Tex. 94; but it also adds that mental anguish must be something more than mere disappointment, and like every other material allegation relied upon by the plaintiff, must be alleged and proved.

In the close relations of life, such as husband and wife, parent and child, and brothers and sisters, tender ties of affection usually exist, and mental anguish may be presumed, as a natural consequence, where they are injuriously affected through the negligence of another; but such presumption is not made in the more distant relations of life, such as that of brother in law or friend. It must then be a matter of proof. And this is why the presumption was allowed in *Cashion v. Western Union Tel. Co.*, 123 N. C. 267. In this case, the plaintiff's husband was killed while at work, and, having no near relations at the place, to whom she could apply for assistance for herself and child, she sent a telegram to her brother in law, telling him of her husband's death and requesting him to come at once. The telegram was not promptly delivered, and the plaintiff brought an action against the telegraph company to recover damages for mental anguish suffered by her from such neglect. The court held that,

while she might recover damages for mental anguish actually resulting from the absence of her brother in law, it was first necessary for her to prove that his absence caused her mental anguish, as it would not be presumed.

DAVENPORT v. GANNON.

[123 NORTH CAROLINA, 322.]

JURISDICTION — LAND IN ANOTHER STATE.—A court must have jurisdiction of the subject matter, before it can adjudge anything; and a court of one state is without jurisdiction of land in another state because it lies beyond the territorial line of jurisdiction.

EVIDENCE — LAWS OF ANOTHER STATE — HOW PROVED.—The law of another state must be proved like any other matter of fact.

ELECTION—WHEN NOT ENFORCEABLE—CONFLICT OF LAWS — INSOLVENCY — PREFERRED CREDITOR HOLDING A JUDGMENT LIEN ON LAND IN ANOTHER STATE.—If a debtor in one state makes an assignment in trust for his creditors, including therein lands in another state, a creditor who has been provided for, and preferred, in such assignment, who, after the date of the trust deed, but before it is recorded in such other state, has a judgment confessed to him there, and has it docketed, and who is proceeding to enforce it against the land, has a right to file his whole claim and receive from the trustees his proportion of the fund in their hands, and to satisfy the balance out of the sale of the lands in such other state, if he can, paying the balance of the proceeds of the land, if any, to the trustees. He cannot, under the doctrine of election, be required to surrender his judgment lien on the land, before claiming his preference under the assignment, as the doctrine does not apply to such a state of facts.

TRUSTS.—THE DUTY OF A TRUSTEE is to perform the trust he has undertaken according to the provisions of, and in the manner directed by, the deed of trust.

Controversy without action upon agreed facts. It was adjudged that the plaintiffs, Davenport & Morris, were entitled to prove their entire claim, as set forth in the deed of assignment of H. H. Reynolds, against the assets in the hands of the assignees for distribution among the creditors of the fourth class; and, further, that in case of recovery by the plaintiffs out of the Virginia lands of a sum more than sufficient to pay the remainder of the debts and costs, the plaintiffs account with and to the defendants, the assignees or trustees, for such excess. It was also decreed that the plaintiffs recover costs, and the defendants appealed.

Glenn & Manly and Jones & Patterson, for the appellants.

Watson, Buxton & Watson, for the appellees.

³⁰³ FAIRCLOTH, C. J. Controversy without action upon the following agreed facts: On May 26, 1893, H. H. Reynolds made an assignment in North Carolina to J. W. Gannon in trust for his creditors, conveying all his real and personal property, including all his land in Patrick county, Virginia. By consent, another was admitted as cotrustee with Gannon. The trust deed provided for certain creditors in the fourth class, of which the plaintiffs were preferred for fifteen hundred dollars. The deed of assignment was recorded in the clerk's office of Patrick county, Virginia, on June 16, 1893. The plaintiffs, on May 29, 1893, recovered a judgment by confession in Virginia against Reynolds for their debt (the same debt referred to in the assignment) and had their judgment docketed in Patrick county, Virginia, on May 30, 1893, which it is stated became a lien on his land in Virginia. At that time, the plaintiffs knew that Reynolds had made an assignment, but did not think that it conveyed the Virginia lands. The plaintiffs have a suit pending in the court of chancery in Virginia to sell said lands. They have not received anything on their judgment, but expect to receive seven hundred dollars or eight hundred dollars from that source when a final sale is made. The defendants have in hand funds enough to pay about fifty per cent on the claims of the fourth class creditors. The plaintiffs, as fourth class creditors, claim the right to file their whole claim and receive from the trustees their proportion of the fund now in hand, and satisfy the balance out of the sale of the Virginia lands if they ³⁰⁴ can, and pay any balance of the said land proceeds to the said trustees. The defendants refuse to pay the plaintiffs any part of the fund now in their hands. The fourth class creditors are not parties to this controversy, the trustees being the only defendants.

The defendants' contention is, that the plaintiffs, having taken judgment and levied on the Virginia lands, have not the right now to receive any part of the fund in hand, held for the fourth class creditors.

It is a general rule in law and in equity that a person cannot reject and accept the same instrument—he cannot claim under and against it, and the rule applies to every instrument whether a deed or a will; the doctrine of election does not apply to the agreed state of facts in this case, and the first call of the law is that it shall fit the facts. This is not, however, the point of difficulty in the case.

We are without jurisdiction over the Virginia lands, because they lie beyond the territorial line of our jurisdiction. Every

court must have jurisdiction of the subject, at least, before it can adjudge anything.

But it is argued that we can withhold from the plaintiffs any benefit out of the fund now in the hands of the defendants, upon the agreed fact that the plaintiffs have acquired a lien on the Virginia lands. But to do that we must assume to know the status of the lands—the nature and effect of the lien, which is a question of law, and the disposition of the proceeds of the sale that will be made by the courts of that state having jurisdiction thereof, in other words, the statute law of Virginia. As to these matters we are not informed. We do presume that the common law prevails in Virginia in the absence of proof to the contrary, but, according to that law, the lands of a debtor were not liable to the satisfaction ³⁶⁵ of a judgment against him, and no lien was acquired thereon by a judgment. A judgment creditor has no *jus in re*, but only the power to make his judgment effectual by following the steps of law, by an execution and levy on the lands. The alleged lien in this case was not obtained in this way, but by a docketed judgment, and that is a statutory regulation in each state, and what that regulation is in Virginia we are not informed. The law of another state must be proved like any other matter of fact.

When the defendants accepted the trust created by the assignment, they agreed to administer the proceeds of the property according to the provisions and in the manner directed by the deed, and we do not see any reason why they should not perform their contract. Whilst we cannot and do not undertake to make any order affecting the rights of the fourth class creditors in the Virginia lands, we do not see any reason why they may not litigate with each other, in respect thereto, in any court having authority to act, if they are so disposed.

The only exception is to the judgment entered by his honor and we see no error therein, and it is affirmed.

DOUGLAS, J., dissented. The assignor, Reynolds, he said, could not, by any possibility, be presumed to have intended a duplicate security to the plaintiffs. His expressed intention was to the contrary. "In his assignment, he expressly conveyed all his land in Virginia to his trustee for the purposes of the assignment. At that time, the plaintiffs had no lien upon the Virginia land, and their subsequent levy was in derogation of the assignment by diverting a large and valuable part of the assets therein conveyed. After defeating the assignment to the utmost extent of their ability, they now claim their full pro rata share of that repudiated conveyance. I do not think this can be done, certainly not, if equity is equality,

or if clean hands mean anything but full hands. I think they should be put to their election, and required either to surrender to the trustee the property which they have taken from him, or keep that property and relinquish all claim under the assignment."

JURISDICTION—LAND IN ANOTHER STATE.—The courts of one state have no jurisdiction over land in another state: See monographic note to *Alley v. Caspari*, 6 Am. St. Rep. 182, on jurisdiction of the courts of one state or country over citizens of another.

EVIDENCE.—THE STATUTES OF ANOTHER STATE must be pleaded and proved as any other fact. The courts will not take judicial notice of them: Note to *Myers v. Chicago etc. Ry. Co.*, 65 Am. St. Rep. 584.

ELECTION.—ONE WHO ACCEPTS BENEFITS under an instrument must adopt the whole of it, conforming with all its provisions and renouncing all rights inconsistent therewith: *Fox v. Windes*, 127 Mo. 502; 48 Am. St. Rep. 648.

ASSIGNMENT FOR BENEFIT OF CREDITORS—CONFLICT OF LAWS—PROCEEDINGS IN ANOTHER STATE.—In some instances, an assignment in insolvency, or for the benefit of creditors, is not operative beyond the state in which it is made, and in those cases it has been held that a creditor of the insolvent may, notwithstanding his voluntary assignment or compulsory proceedings against him, sue him in another state and subject his property found therein to attachment or execution: Notes to *Kendall v. McClure Co.*, 61 Am. St. Rep. 692; *Bank of Little Rock v. Frank*, 58 Am. St. Rep. 92; *Sturtevant v. Armsby Co.*, 66 N. H. 557; 49 Am. St. Rep. 627. But the better opinion is, that as to residents within the state where the assignment is made and where it, though voluntary, is operative, they will not be permitted, by proceedings in another state, to obtain an advantage over the other creditors: *Kendall v. McClure Coke Co.*, 182 Pa. St. 1; 61 Am. St. Rep. 688, and note; *Hayden v. Yale*, 45 La. Ann. 362; 40 Am. St. Rep. 232.

SLOCOMB v. RAY.

[128 NORTH CAROLINA, 571.]

DOWER—MORTGAGE BY WIFE ALONE DOES NOT CONVEY OR RELEASE.—Under constitutional and statutory provisions requiring the assent of a husband to any instrument of conveyance which affects the property of his wife, such assent must be expressed in the instrument itself. It cannot be manifested by a separate conveyance. Hence, a mortgage executed by a wife alone, of her interest in her husband's land, is not sufficient to convey or release her right of dower, where her husband alone has previously mortgaged the land.

H. L. Cook, for the appellant.

N. W. Ray, for the appellees.

572 DOUGLAS, J. This is an action for the foreclosure of a mortgage executed on the eighteenth day of January, 1892, to the plaintiff by the defendant, J. C. Ray, in which his wife and codefendant, Mary A. Ray, did not join. Subsequently to its

execution, on the third day of November, 1892, the said Mary A. Ray executed to the plaintiff a similar mortgage upon her dower interest in the same property to secure the same debt of her husband. In this mortgage the husband did not join.

Upon the trial of the action the defendants demurred to the complaint *ore tenus*. "Upon the ground that the complaint showed upon its face that the defendant John C. Ray executed the note and mortgage on the 18th of January, 1892, and that the defendant Mary A. Ray, wife of John C. Ray, did not sign and execute the same mortgage at the same time with her husband, but on November 3, 1892, she executed a paper releasing her dower interest and all other interest she might have in said lands by virtue of her marital or other rights, in favor of the note and mortgage executed by her said husband." The defendants filed no answer.

573 The court sustained the demurrer as to Mary A. Ray, and gave judgment against the other defendants for the debt and foreclosure of the mortgage on the land, discharging the defendant, Mary A. Ray.

The plaintiff appealed from that part of the judgment sustaining the demurrer as to Mary A. Ray only.

This presents the sole question in the case, whether the mortgage of the wife, executed by her alone, is sufficient to convey or release her right of dower. We think not.

Article X, section 6, of the constitution is as follows: "The real and personal property of any female in this state acquired before marriage, and all property, real and personal, to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations, or engagements of her husband, and may be devised and bequeathed, and with the written assent of her husband, conveyed by her as if she were unmarried."

Section 1256 of the code provides that: "Every conveyance, power of attorney, or other instrument affecting the estate, right, or title, of any married woman in lands, tenements, or hereditaments must be executed by such married woman and her husband."

This clearly contemplates that the same instrument of writing shall be executed by both. Chapter 136 of the laws of 1895 in no way alters this requirement, as that act simply refers to the acknowledgment and not to the execution of the instrument.

This court has well said in *Ferguson v. Kinsland*, 93 N. C.

337, 339, that the requirement that the husband should execute the same deed with the wife was to afford her his protection against the wiles and insidious ⁵⁷⁴ arts of others, while her separate and private examination was to secure her against coercion and undue influence from him." Approved in *Green v. Bennett*, 120 N. C. 394.

The wife is legally presumed to be always under the protection of the husband, whose stronger character renders him less liable to sinister influences and whose wider range of experience gives him a better knowledge of business affairs. The particular act by which her property is affected must meet his concurrent assent expressly given in the instrument itself. Otherwise the instrument is a nullity, as coming within the express prohibition of the statute and opposed to the letter and spirit of the constitution. The constitution includes "all property, real and personal"; while the statute relates to "every instrument affecting her estate, right, or title." Both clearly include her right of dower, which although inchoate, is none the less vested.

The legal assent of the husband cannot be presumed from any other instrument. It must be expressed in the instrument itself to which it alone can give validity. Under the statute it is the joinder of the husband and wife that makes the instrument which without such joinder would be the deed of neither as far as the wife's interest is concerned.

We think that these conclusions, based upon the letter of the law, are in harmony with the uniform current of our decisions: *Harris v. Jenkins*, 72 N. C. 183, 186; *Southerland v. Hunter*, 93 N. C. 310, 311; *Ferguson v. Kinsland*, 93 N. C. 337, 339; *Lineberger v. Tidwell*, 104 N. C. 506, 510; *Green v. Bennett*, 120 N. C. 397. The opinion in *Barrett v. Barrett*, 120 N. C. 127, does not conflict with these cases, as there the husband and wife executed the same deed, and the opinion says on ⁵⁷⁵ page 130, that the sole defect is that the privy examination was taken a few minutes or hours before the husband's acknowledgment on the same day of the execution of the deed by him. It was therefore held that this defect was cured by chapter 293 of the Laws of 1893.

For the reasons stated in this opinion the judgment is affirmed.

CLARK, J., dissenting. The husband executed his deed with full covenants of warranty. In a subsequent deed the wife executed a release of her contingent right of dower. Her privy examination was duly and regularly taken. The only defect that can be urged is that "the written consent" of her husband

was not taken, but the conveyance is not of her own land, and even if it were the previous deed of the husband with warranty was a written consent given with all solemnity. There is no statute anywhere which requires that the husband's assent shall be in the same deed with the wife's release of her dower. When it is the husband's land, and he has conveyed it by deed with full warranty, and subsequently the wife releases her dower right by deed with privy examination, the warranty in the husband's deed is not only an assent to the wife's subsequent release of dower, but a solemn contract that she shall make the release, and is a liability of his estate should he die before his wife and without procuring her to execute such release.

There was a line of decisions all quoted in *Barrett v. Barrett*, 120 N. C. 127, to the effect that where the privy examination of the wife was taken before the proof of the execution by the husband, the probate was ⁵⁷⁶ insufficient, but that was not the case here, and even that was held so exceedingly technical that chapter 293 of the Laws of 1893 was enacted: "That in all cases when the acknowledgment of a husband has been taken before or subsequent to the acknowledgment and privy examination of his wife" it shall be "valid and binding," and chapter 136 of the acts of 1895, recognizing the inconvenience that might arise from the previous technical construction, further provides that the acknowledgment of the husband and wife may be before different officers and even in different states.

As already stated, the release of dower, being by deed with privy examination duly taken, was not only with written assent of her husband, but in performance of his contract of warranty under seal. If it was a conveyance of her property, held by her independent of any control of her husband, the case is that of two joint owners of an interest in property, which can be conveyed by them in separate deeds, and construing the two papers together, the court should hold there was a conveyance of the entire title, each assenting to what the other had done. There is no statute or good reason why both must necessarily join in the same deed, which at times may be inconvenient, as is recognized by chapter 136 of the acts of 1895, and, in the absence of any statute requiring joinder in the same deed, even if it were desirable, the courts cannot make one. *Green v. Bennett*, 120 N. C. 394, was decided on a transaction occurring before the above cited acts of 1893 and 1895, and therefore it was governed by the technical ruling in *Ferguson v. Kingsland*, 93 N. C. 337, and such cases, a distinction which was pointed

out in *Barrett v. Barrett*, 120 N. C. 127. In the present case, rights of third persons have not intervened, and the curative statutes apply.

CLARK, J., DISSENTED. "The husband," he said, "executed his deed with full covenants of warranty. In a subsequent deed, the wife executed a release of her contingent right of dower. Her privy examination was duly and regularly taken. The only defect that can be urged is, that 'the written consent' of her husband was not taken, but the conveyance is not of her own land, and, even if it were, the previous deed of the husband with warranty was a written consent given with all solemnity. There is no statute anywhere which requires that the husband's assent shall be in the same deed with the wife's release of her dower. When it is the husband's land, and he has conveyed it by deed with full warranty, and subsequently the wife releases her dower right by deed with privy examination, the warranty in the husband's deed is not only an assent to the wife's subsequent release of dower, but a solemn contract that she shall make the release, and is a liability of his estate should he die before his wife and without procuring her to execute such release. If it was a conveyance of her property, held by her independent of any control of her husband, the case is that of two joint owners of an interest in property, which can be conveyed by them in separate deeds, and, construing the two papers together, the court should hold that there was a conveyance of the entire title, each assenting to what the other had done. There is no statute or good reason why both must necessarily join in the same deed, which, at times, may be inconvenient, as is recognized by chapter 136, acts of 1895, and, in the absence of any statute requiring joinder in the same deed, even if it were desirable, the courts cannot make one."

DOWER.—NO ALIENATION BY THE HUSBAND alone can destroy his wife's right of dower: See note to *Den v. Frew*, 22 Am. Dec. 710, 711. The foreclosure of a mortgage in which the wife did not join, and sale thereunder, do not bar her right of dower in the mortgaged premises: Note to *Miller v. Farmers' Bank*, 61 Am. St. Rep. 830.

SOMERS v. BOARD OF COMMISSIONERS.

[123 NORTH CAROLINA, 562.]

INSANE PERSONS—SHERIFF'S INSANITY—EFFECT OF. A sheriff's right to exercise the duties of his office ceases when he becomes insane.

INSANE PERSONS—EVIDENCE OF SHERIFF'S INSANITY.—An official ascertainment of a sheriff's insanity is *prima facie* evidence of the fact that he is insane.

INSANE PERSONS—INSANITY OF SHERIFF—RIGHTS OF SURETIES.—Upon the official declaration of a sheriff's insanity, his sureties have no more rights than they would have in case of his death.

SHERIFFS AS TAX COLLECTORS—FAILURE TO FILE BOND—EFFECT OF.—If a sheriff has not renewed his bond, his

sureties have no right to collect taxes for the year in which such bond is required, whether the nonexistence of the bond is caused by the sheriff's failure to exhibit tax receipts at the time required, or by his insanity.

SHERIFFS—DEPUTIES OF, ARE AGENTS—TERMINATION OF AGENCY BY SHERIFF'S INSANITY.—A sheriff's deputy is merely his agent, and such agency is terminated by the official ascertainment of the sheriff's insanity.

INSANE PERSONS—ELECTION OF TAX COLLECTOR UPON SHERIFF'S INSANITY.—Upon the official declaration of a sheriff's insanity, during his term of office, the county commissioners have power to elect a tax collector for the ensuing year unless, and until, the sheriff is restored to reason.

INSANE PERSONS—RIGHT TO COLLECT TAXES AFTER SHERIFF BECOMES INSANE.—Neither a sheriff's deputy nor his bondsmen have a right of action to compel the county commissioners to give them the tax list for the year following that in which the sheriff has been officially ascertained to be insane. The sheriff's bondsmen, in case of his insanity, have a right to collect the current list, but after that it becomes the duty of the tax collector chosen by the county commissioners to collect the taxes.

INSANE PERSONS—EFFECT OF FAILURE TO DECLARE OFFICE OF SHERIFF VACANT, AFTER HE BECOMES INSANE.—While county commissioners have a right to declare the office of sheriff vacant upon his insanity, their failure to do so merely authorizes the coroner to perform the duties of sheriff proper, and does not cast upon him the right to collect taxes.

Civil action for the tax-books of 1898, and to enjoin their delivery to the tax collector. The action was brought by A. F. Somers, deputy sheriff and agent of the bondsmen of T. M. Webb, sheriff, T. M. Webb, by H. I. Webb and A. F. Somers, guardian, and Joseph A. Dale, coroner, against the board of commissioners of Burke county and J. W. Garrison. T. M. Webb was elected sheriff of Burke county from December, 1896, to December, 1898. In the spring of 1898, he became physically and mentally incapacitated to perform the duties of his office, and turned over all his books and papers to his deputy, A. F. Somers, and shortly thereafter became imbecile. He was then taken to an asylum for treatment, was authoritatively ascertained to be a lunatic, and a guardian was appointed for him. The deputy continued to collect the taxes until the first Monday in September, 1898, when the board of commissioners, by resolution, in which it was recited that the sheriff had not made a settlement of taxes for the years 1895, 1896, and 1897, and was behind thereon some five thousand dollars, and had refused payment after demand being made, elected Garrison as tax collector for the year 1898, and gave him the tax books for that year. This action was thereupon instituted in September, 1898. Upon motion of the defendants, a judgment of nonsuit was entered, and the action was dismissed. The plaintiffs appealed.

J. T. Perkins and E. J. Justice, for the appellants.

A. C. Avery, W. S. Pearson, and J. M. Mull, for the appellees.

⁵⁸⁴ **CLARK, J.** Upon the insanity of the sheriff his right to exercise the office ceased, and his committal to the asylum for the insane and the appointment of a guardian for him, upon the certificate of the superintendent of the asylum as provided by the code, section 1673, was certainly at least *prima facie* evidence of such insanity. There was no evidence offered to contradict such insanity. Upon the declaration of insanity the sureties of the sheriff had no more rights than would have gone to them upon his death, i. e., to collect the tax list then in his hands: Code, sec. 3687; Laws of 1897, c. 169, sec. 117; *Perry v. Campbell*, 63 N. C. 257; *McNeill v. Somers*, 96 N. C. 467. The commissioners on the first Monday in September were vested with the power of electing a tax collector for the ensuing year, unless and until the sheriff should be restored to reason. The failure to exhibit the tax receipts on said first Monday in September would have been an additional ground justifying the county commissioners in refusing to give him the new tax-books, even if he had been sane, and the sureties would have no right to collect taxes on such new list after his failure to renew his bond, whether such failure was caused by failure to exhibit the required receipts or by his insanity: *Colvard v. Commissioners* 95 N. C. 515; Code, sec. 2070; the time (December) being changed to September: Laws 1897, c. 169, sec. 35.

In North Carolina, a sheriff's deputy is merely his agent (*Jamesville etc. R. R. Co. v. Fisher*, 109 N. C. 1), and such agency terminated upon the official ascertainment of the insanity. Neither *Somers*, therefore, nor the sureties ⁵⁸⁵ on the sheriff's bond have a right of action to compel the commissioners to give them the tax list. The agency could not have been one coupled with an interest, as that is prohibited: Code, sec. 2084; *Basket v. Moss*, 115 N. C. 448; 44 Am. St. Rep. 463. Upon the *prima facie* ascertainment of the insanity of the sheriff under section 1673 or by inquisition of lunacy, the commissioners might have declared the office vacant under section 2071 of the code, but their failure to do so merely authorized the coroner to perform the duties of sheriff proper, until such declaration (*Greer v. Asheville*, 114 N. C. 678) and did not cast upon him the right to collect the taxes, which went to the sheriff's bondsmen for the current list, and after that the duty devolved upon a tax collector chosen by the county commissioners. Indeed,

the election of a tax collector at the meeting of the county commissioners, supervening upon the appointment of a guardian for the sheriff, under section 1673 of the code, was pro tanto a declaration of a vacancy in the sheriff's office under section 2071 to the extent of his duties as tax collector, and their failure to elect a sheriff to serve process merely left that matter open for future action: *Greer v. Asheville*, 114 N. C. 678.

No error.

EVIDENCE—INSANITY.—PROCEEDINGS IN LUNACY are presumptive, but not conclusive, evidence of want of capacity: *Hughes v. Jones*, 116 N. Y. 67; 15 Am. St. Rep. 286; note to *Lancaster County Bank v. Moore*, 21 Am. Rep. 30.

PELLETIER v. GREENVILLE LUMBER COMPANY.

[123 NORTH CAROLINA, 596.]

RECEIVERS—PROPERTY IN CUSTODIA LEGIS—INTERFERENCE—LEAVE OF COURT.—Property in the actual or constructive possession of a receiver is in custodia legis, and cannot be interfered with without leave of court.

RECEIVERS—EXCLUSIVE POSSESSION—NATURE AND OBJECT OF.—A receiver's exclusive possession of property does not interfere with, or disturb, any pre-existing liens, preferences, or priorities. It simply holds the property intact until the relative rights of all parties can be determined, and prevents the sacrifice of assets by a multiplicity of suits and executions.

EXECUTION — INSOLVENT CORPORATION — PARAMOUNT LIEN—SALE OF LAND IN RECEIVER'S HANDS—LEAVE OF COURT.—Land belonging to an insolvent corporation cannot be sold upon execution, after the appointment and possession of a receiver, upon a valid judgment obtained before such appointment, without leave of the court, but this will always be granted in proper cases, for a court of equity is not required to retain possession of property when it would be inequitable to do so.

RECEIVERS—REMEDY OF JUDGMENT CREDITOR HOLDING PARAMOUNT LIEN.—When a judgment creditor of an insolvent corporation, whose lien is superior not only to the claims of all its other creditors, but even to the original title of the corporation itself, is prejudiced by having a receiver put in his way, his remedy is by a petition and motion in the cause.

Motion to continue a restraining order until the hearing. The plaintiff was a stockholder in the defendant lumber company, which had become insolvent. The other defendants were creditors. The action was instituted for the appointment of a receiver and for such restraining orders and further relief as would conduce to the furtherance of the rights and interests of the creditors and stockholders. A receiver was appointed. Subsequently Callie Joyner sought to levy an execution upon the property of the corporation in the receiver's hands, but she was

restrained, and directed to show cause why an injunction should not be issued restraining a sale under the execution. She answered the rule, and set up that she held a judgment against the defendant company for services rendered, which was paramount to the original title of the defendant corporation, and, of course, paramount to all claims of its creditors. The injunction was refused, the restraining order was vacated, and the plaintiff and receiver appealed.

Clark & Guion, for the appellants.

Jones & Boykin, for the appellee, Callie Joyner.

500 DOUGLAS, J. This case comes before us on an appeal from the refusal of the court below to continue an injunction against the sale of real estate of the defendant corporation under a judgment in favor of Mrs. Callie Langston, now Callie Joyner. There is no question that this land is subject to execution under this judgment as held in *Langston v. Greenville etc. Imp. Co.*, 120 N. C. 132. That judgment is superior not only to the claims of all the other judgment creditors in this case, but even to the original title of the insolvent corporation itself. The only question is, whether the land can be levied upon and sold under that judgment while in the hands of a receiver.

In other words, can land belonging to an insolvent corporation be sold after the appointment and possession of a receiver upon a valid judgment obtained before such appointment? We think that as a matter of right the land cannot be sold without leave of the court. Property in the actual or constructive possession of the receiver is in *custodia legis*, as the possession of the receiver is that of the court, he being merely the hand of the court. This exclusive possession of the receiver does not interfere with or disturb any pre-existing liens, preferences, or priorities, but simply prevents their execution by holding the property intact until the relative rights of all parties can be determined. Another essential object sought to be obtained by the appointment of a receiver for an insolvent corporation is to prevent the sacrifice of its assets by a multiplicity of suits and petty executions. Both these objects would be destroyed by permitting anyone, no matter what may be his title or claim, to interfere with property in *custodia legis* without leave of the court by which said custody is held: 1 *Freeman on Executions*, sec. 129; *Beach on Receivers*, sec. **600** 207, 213, 738; *High on Receivers*, sec. 163; 20 *Am. & Eng. Ency. of Law*, 138.

Under the old equity practice, when a person holding a prior or paramount claim or title was prejudiced by having a receiver put in his way, the course was either to give him leave to bring an ejectment, or to permit him to be examined *pro interesse suo*. The same result can now be accomplished by a petition and motion in the cause. In the case of *Wiswell v. Sampson*, 14 How. 52, 66, where this question is fully and ably treated, the court says: "A party, therefore, holding a judgment which is a prior lien upon the property, the same as a mortgagee, if desirous of enforcing it against the estate after it has been taken into the care and custody of the court, to abide the final determination of the litigation, and pending that litigation, must first obtain leave of the court for this purpose."

We cannot assent to the doctrine laid down by Chancellor Walworth in *Albany City Bank v. Schermerhorn*, 9 Paige, 372, 378; 38 Am. Dec. 551, that real estate in the custody of a receiver can be levied upon and sold under execution, provided only that the actual possession of the receiver is not interfered with. Its practical effect would be either to permit outside parties to stop all further proceedings of a court of equity by disposing of the subject matter in controversy, or else to put that court in the position of holding simply the naked possession of property, and gravely proceeding to determine who would have been entitled to the property if it had not been sold. This doctrine is distinctly denied in *Wiswall v. Sampson*, 14 How. 52, where it is said that the court must administer the property "independently of any rights acquired by third persons pending the litigation. Otherwise the whole fund may have passed out of its ⁶⁰¹ hands before the final decree, and the litigation become fruitless."

The case of *Skinner v. Maxwell*, 68 N. C. 400, although dealing with personal property, lays down the same general rule.

As it is well settled that the property cannot be sold under execution without leave of the court, it is equally clear that in proper cases such leave can be given. A court of equity is not required to retain possession of property when it would be inequitable to do so.

It simply remains to be seen whether the judgment creditor has leave of the court, express or implied, to proceed with his execution. Upon the hearing of the matter the court decreed: "That the said injunction to the hearing is hereby refused; that the restraining order heretofore granted is vacated . . . and the said Callie Joyner recover her costs incurred herein." We

think that this unqualified refusal of the court to continue the injunction is implied leave to proceed. As his honor does not base his action upon want of power, we must assume that he acted in his equitable discretion, and we think that this discretion was properly exercised under all the circumstances of the case. The judgment of Mrs. Joyner is paramount to the original title of the defendant corporation, and is, of course, paramount to all claims of its creditors. They are asking to have the land divided up into building lots, and sold by the lot, at the cost of the fund and consequently at the risk of Mrs. Joyner. If they wish the land so sold, they have the privilege of paying off Mrs. Joyner, and then speculating in the land at their own risk and in their own way.

The judgment is affirmed.

RECEIVERS.—THE CUSTODY of a receiver is the custody of the court; in other words, the custody is that of the law, and is exclusive alike of both parties to the suit. He simply holds the property for those ultimately entitled to it: *Note to Farmers' Loan Co. v. Oregon Pac. R. R. Co.*, 65 Am. St. Rep. 826; *Green v. Coast Line R. R. Co.*, 97 Ga. 15; 54 Am. St. Rep. 379; note to *Relsner v. Gulf etc. Ry. Co.*, 59 Am. St. Rep. 91. The object of appointing a receiver is to preserve the property for the benefit of all parties interested: *Knickerbocker v. McKindley Coal etc. Co.*, 172 Ill. 535; 64 Am. St. Rep. 54; *Franklin Nat. Bank v. Whitehead*, 149 Ind. 530; 63 Am. St. Rep. 302.

RECEIVERS—INTERFERENCE WITH POSSESSION OF—EXECUTION.—The possession of a receiver must not be disturbed, except by permission of the court, by persons having adverse, though paramount, liens. A sale under execution of property in the custody of a receiver, though under a levy made prior to his appointment, is void, unless authorized by the court: *Walling v. Miller*, 108 N. Y. 173; 2 Am. St. Rep. 400, and extended note thereto on execution against property in the hands of a receiver. That property in the hands of a receiver cannot be attached, see *Texas Trunk Ry. Co. v. Lewis*, 81 Tex. 1; 26 Am. St. Rep. 776; *Gilman v. Ketcham*, 84 Wis. 60; 36 Am. St. Rep. 899.

STATE v. ROBBINS.

[122 NORTH CAROLINA, 730.]

FORCIBLE ENTRY AND DETAINER.—AN INDICTMENT for forcible entry and detainer may consist of two papers pinned together, and returned into court as one bill, where the two charges are numbered first and second count.

FORCIBLE ENTRY AND DETAINER.—INDICTMENT.—Separate indictments for forcible entry and detainer, and at different terms, may be treated as different counts of one bill, if germane.

FORCIBLE ENTRY AND DETAINER.—INDICTMENT.—COUNTS, WHEN NOT REPUGNANT.—If an indictment for forcible entry and detainer has two counts concerning the same transaction, the possession in one being stated as that of the landlord, and in the other as that of the tenant, the two counts are not repugnant, but a mere statement of the same transaction to meet the different phases of proof. The court may, therefore, properly refuse to quash, to compel an election, or to arrest judgment.

LANDLORD AND TENANT.—NATURE OF POSSESSION.—The possession of leased premises is sub modo in the tenant, but it certainly remains in the landlord to the extent that he can warn off intruders and trespassers.

FORCIBLE ENTRY AND DETAINER.—ENTRY UPON LEASED PREMISES BECOMES FORCIBLE, WHEN.—Although a tenant in possession, through intimidation or indifference, does not forbid parties from going upon the leased premises and plowing up the land under a claim of ownership against the landlord, yet if they refuse to go after the landlord orders them off, but continue to plow up the land, the entry becomes forcible after being forbidden, if not so at the beginning.

INDICTMENT.—TWO COUNTS.—WHEN VERDICT UPON ONE WILL SUPPORT JUDGMENT.—If there are two counts in an indictment, a general verdict of guilty on both is a verdict of guilty on each, where the defendant does not exercise his right to require a separate verdict on each count. Hence, if one of the counts is good, it will support the judgment, although an erroneous instruction was given on the other.

Indictment for forcible entry and detainer, against George Robbins, Allen Robbins, and William Hunt. There was a verdict of guilty and the defendants appealed.

Wiley Rush, for the appellants.

Zeb V. Walser, attorney general, for the state.

⁷³⁵ **CLARK.** The indictment consisted of two papers pinned together and returned into court as one bill, the two charges being numbered first count and second count. We see nothing objectionable in this. Even if they had been returned as separate indictments and at different terms, they could be treated as different counts in the same bill, if germane: *State v. Perry*, 122 N. C. 1018.

The charge in the first count was forcible entry and detainer upon the premises in the peaceable possession of Caroline Haroldson, and the second count was for the same offense upon the premises in possession of Betsy Black. The transaction alleged was one and the same, Mrs. Haroldson being the landlord, and Betsy Black her tenant. The court properly refused to quash, or to compel the solicitor to elect, or to arrest judgment, for the two counts were not repugnant, but "a mere statement of the same transaction to meet the different phases of proof": *State v. Harris*, 106 N. C. 682, and numerous precedents cited at page 686. In *State v. Eason*, 70 N. C. 88, the indictment for forcible entry and detainer was sustained, though there were four counts laying the possession in different persons.

The state showed by the testimony of the prosecutrix that she was the owner and in possession of the premises, ⁷³⁷ and had been such for seventeen years. It was not necessary to prove this much, as proof of peaceable possession (by one not a mere intruder or trespasser himself) would have been sufficient, but we do not see how the defendant was hurt by proving more than was necessary.

The court charged the jury, "If the defendant went upon the premises, then in possession of Betsy Black and Tom Black, peaceably and by their permission, and their possession was as tenants of Mrs. Haroldson, and afterward Mrs. Haroldson, the landlord, came, and, in the presence of the tenants, ordered the defendants from the premises, and they refused to go, and their numbers or conduct was such as was calculated to put her in fear, they would be guilty. The possession of the tenant was the possession of the landlord." In this there was no error. The possession is sub modo in the tenant, but it remains in the landlord certainly to the extent that he can warn off intruders and trespassers. The defendants were not mere visitors on premises by consent of the tenant, but took possession, plowing the land up under claim of ownership against the landlord in possession. They could not avoid an action of ejectment of this forcible way of taking possession. The tenant could not give such intruders the right of possession by actual attornment, still less could he do so, as here, by silence that was caused by intimidation, as the tenant stated on the direct examination, or by indifference, as intimated on the cross-examination.

The prosecutrix was not at the precise point of entry at the identical moment; she could not be everywhere, but went the

same day, on learning of the entry, and ⁷³⁸ ordered the defendants off, and they refused to go and plowed up the land. The entry became forcible after being forbidden, if not so in its beginning: *State v. Webster*, 121 N. C. 586; *State v. Lawson*, 123 N. C. 740; ante, p. 844, and cases there cited. The entry of three persons, their remaining and plowing up the land after being forbidden by the landlord, a woman, was sufficient force: *State v. McAdden*, 71 N. C. 207; *State v. Armfield*, 27 N. C. 207; *State v. Pollock*, 26 N. C. 305; 42 Am. Dec. 140, and other cases cited in *State v. Lawson*, 123 N. C. 740, ante, p. 844.

There were two counts and a general verdict on both, which is a verdict of guilty on each (*State v. Cross*, 106 N. C. 650) as the defendants did not exercise their right to acquire a separate verdict on each count. There being no exception as to the other count, the verdict thereon would have sustained the judgment, even had there been error in the instruction on this count, it being surplusage: *State v. Toole*, 106 N. C. 736, which has been cited and approved in *State v. Brady*, 107 N. C. 822; *State v. Hall*, 108 N. C. 776; *State v. Edwards*, 113 N. C. 653; *State v. Perry*, 122 N. C. 1018, and in other cases.

No error.

INDICTMENT—JOINDER OF COUNTS—ELECTION—VERDICT—JUDGMENT.—Counts charging the same offense may be joined in the same indictment to meet the various aspects in which the evidence may present itself: *Dill v. State*, 35 Tex. Crim. Rep. 240; 60 Am. St. Rep. 37; and if two counts in an indictment relate to one and the same transaction, a general verdict is sufficient, which the court may apply to either count and order judgment accordingly: *State v. Van Wye*, 136 Mo. 227; 58 Am. St. Rep. 627, and note. The prosecutor is not compelled to elect, unless it appears that more than one offense is charged in the indictment: Note to *State v. Fitzsimon*, 49 Am. St. Rep. 771. Two counts manifestly relating to the same offense and transaction are properly joined in the same information, where the one is varied from the other only to meet the evidence as it may be adduced: *People v. Aikin*, 66 Mich. 460; 11 Am. St. Rep. 512; *State v. Glidden*, 55 Conn. 46; 3 Am. St. Rep. 23. In such a case, the court will neither quash the indictment nor compel the prosecution to elect upon which count it will try the defendant: Note to *McGuff v. State*, 16 Am. St. Rep. 30.

LANDLORD AND TENANT—TRESPASS UPON LEASED PREMISES—RIGHT OF ACTION.—POSSESSION by a tenant is the possession of the landlord: *Alexander v. Gibbon*, 118 N. C. 796; 54 Am. St. Rep. 757. In the case of landlord and tenant for injuries to the possession, the right of action is in the tenant, and he alone can maintain trespass, though if there is an injury to the reversion the lessor may have an action on the case: Note to *Anderson v. Hapler*, 85 Am. Dec. 323. One who remains upon another's premises after being ordered to leave is a trespasser: *Breitenbach v. Trowbridge*, 64 Mich. 893; 8 Am. St. Rep. 829, and note.

STATE v. LAWSON.

[128 NORTH CAROLINA, 740.]

FORCIBLE ENTRY AND DETAINER—FORCIBLE TRESPASS.—THE ONLY DISTINCTION between forcible trespass and forcible entry and detainer is that the former is as to personal property and the latter as to realty, and this distinction is not always observed.

FORCIBLE ENTRY AND DETAINER.—TO CONSTITUTE A FORCIBLE ENTRY, it is not necessary that the party in possession shall be actually put in fear. It is sufficient if there is such demonstration of force as to create a reasonable apprehension that he must yield to avoid a breach of the peace, and such demonstration may be by an intimidating number of persons, or by weapons.

FORMER ACQUITTAL—WHAT PROOF WILL SUSTAIN.—The plea of former acquittal, upon the trial of an indictment for forcible entry and detainer, is sustained by proof of an acquittal of forcible trespass involving the same transaction as to the same land.

Indictment for forcible entry and detainer. There was a verdict of not guilty as to Collins, and of guilty as to Lawson and Cheatham, who appealed from the judgment.

A. M. Stack, for the appellants.

Zeb. V. Walzer, attorney general, for the state.

⁷⁴¹ CLARK, J. Cheatham, Lawson, and Collins are indicted for forcible entry and detainer. Lawson and Collins pleaded former acquittal, as well as not guilty. The solicitor admitted that they had been tried for forcible ⁷⁴² trespass at last term for this same transaction and acquitted. The court erred in refusing the prayer of defendants, Lawson and Collins, to instruct the jury to sustain the plea of former acquittal as to them though the jury cured this as to Collins by acquitting him. It is true the same act, with an additional circumstance, may be an offense against two statutes (State v. Stevens, 114 N. C. 873; State v. Robinson, 116 N. C. 1047) but the only distinction between forcible trespass and forcible entry and detainer is that the former is as to personal property and the latter as to realty, which distinction is not always observed: State v. Davis, 109 N. C. 809. There being in evidence nothing of personal property, on the admission of the solicitor that it was "the same transaction," we must take it that it was the same offense: State v. Nash, 86 N. C. 650; 41 Am. Rep. 472.

The defendant Cheatham further contends it was error to refuse the prayer for instruction that there was no evidence to warrant a conviction as to him. There was evidence by the state

that the prosecuting witness was in possession of the land, had sowed rye thereon, and in March the three defendants came on the land and began plowing up the rye, that he was not present when they entered, but when he learned of it he went where the defendants were and ordered them to desist, but they refused and went on and plowed up the rye, and he was "afraid to say much to them," and did not stay long; that they worked there that day, and Cheatham held and worked the land that year. In the defendant's evidence it appeared that the three went on the land with plow, hoe, ax, and mattock, and acted as prosecutor stated. It is true defendants denied possession of the land by prosecutor, and asserted that there was no demonstration of force. Upon this conflict of evidence ⁷⁴³ the court properly submitted the case to the jury, and we presume under proper instruction, as the charge is not sent up, not being excepted to. The appearance of defendants in such force, with ax, mattock, hoe, and plow, with the avowed and executed purpose to plow up the rye the prosecutor had sown, and in spite of his personal protest, was reasonably calculated to put him in fear, and he says he was in fact put in fear, was "afraid to say much," and left the invading host in possession then and for the balance of the year, which was some evidence of the truth of his statement.

Indeed, in *State v. Davis*, 109 N. C. 809, it is said: "It is not necessary that the party shall be actually put in fear: *State v. Pearman*, 61 N. C. 371. It is sufficient if there is such demonstration of force as to create a reasonable apprehension that the party in possession must yield to avoid a breach of the peace: *State v. Pollock*, 26 N. C. 305; *State v. Armfield*, 27 N. C. 207. Such demonstration of force may be a 'multitude' or by weapons: *State v. Ray*, 32 N. C. 29; citing *State v. Flowers*, 6 N. C. 225; *State v. Mills*, 13 N. C. 555." It was not necessary that the prosecutor should be present at the very moment of entry; he could not be present at every point in his premises. The defendants did not enter with his permission, and when he found they were there he ordered them off, but, relying on their numbers, they intimidated him and remained in forcible possession: *State v. Webster*, 121 N. C. 586; *State v. Woodward*, 119 N. C. 836; *State v. Davis*, 109 N. C. 809; *State v. Lawson*, 98 N. C. 759.

The defendant Cheatham further relies on *State v. Simpson*, 12 N. C. 504, that the entry of three though without violence (if against the prohibition of the party in possession who is present) is a sufficient demonstration ⁷⁴⁴ of force, and that Lawson and Collins having been acquitted on a former trial he alone could

have been present on this occasion, and, there being no physical violence, threats, or weapons, he could not be guilty. But this case must be tried by the evidence in this case, and by the evidence of the state, and, indeed, according to defendant's own evidence, all three defendants were present. If, in the former trial, Lawson and Collins had been convicted, that verdict could not have been produced on this trial against Cheatham to prove that two others were present. E converso, the verdict of acquittal cannot be produced in Cheatham's favor as evidence that they were not present. The former verdict of acquittal as to them may have been procured by absence of witnesses or for other reasons. It can have no bearing in this case, which depends upon the evidence of the transaction itself as laid before this jury. It is available to Lawson and Collins, but not to Cheatham, who was not a party to it. A similar case and ruling is that in indictments for fornication and adultery, though that is necessarily an offense committed by two; if the parties are tried at different times or even at the same time, the acquittal of one is not a bar to the conviction of the other, as there may be more evidence against one, as his or her confession for instance, which would not be evidence against the other (if not made in that other's presence): *State v. Cutshall*, 109 N. C. 764, 771; 26 Am. St. Rep. 599.

Besides, there may be a demonstration of force by less than three: *State v. McAdden*, 71 N. C. 207.

For failure to give the instruction asked upon the plea of former acquittal there must be a new trial as to Lawson.

There is no error as to Cheatham.

FORCIBLE ENTRY AND DETAINER—FORCIBLE ENTRY—WHAT IS.—An entry upon premises in defiance of the occupant, with such a display of force as to reasonably deter him from maintaining his possession, is a forcible entry: *Lewis v. State*, 99 Ga. 692; 59 Am. St. Rep. 255. Personal violence is not necessary to constitute a forcible entry. Just cause to fear bodily harm is sufficient to make the entry forcible: *State v. Pollok*, 4 Ired. 305; 42 Am. Dec. 140; *Foster v. Kelsey*, 38 Vt. 199; 84 Am. Dec. 676. An entry made against the will of one in possession is forcible in legal contemplation: *Croff v. Ballinger*, 18 Ill. 200; 65 Am. Dec. 735. Compare monographic note to *Evill v. Conwell*, 18 Am. Dec. 139, on what is a forcible detainer.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

PARRY'S ESTATE.

[188 PENNSYLVANIA STATE, 22.]

HUSBAND AND WIFE—ESTATE BY ENTIRETIES—CHATELS—CHOSES IN ACTION.—An estate by entireties may be created in a chattel as well as realty, in a chose in action and one in possession, and is not abolished, as to choses in action, by legislation affecting joint tenancy.

HUSBAND AND WIFE—ESTATE BY ENTIRETIES—LETTER OF CREDIT—SURVIVORSHIP.—An estate by entireties is created by a letter of credit, purchased by a husband with his own money, payable to himself and his wife, and intended for use in foreign countries. Hence, the wife is entitled, by survivorship, to any balance that may be due upon such letter of credit if the husband dies before it is exhausted.

LEGACY—BEQUEST OF ARTICLES FOR "PERSONAL USE AND ORNAMENT" DO NOT INCLUDE A SAILING YACHT. A bequest from a husband to his wife of "all his clothing, household and kitchen furniture, linen, china, plate, plated ware, jewelry, pictures, engravings, books, bric-a-brac, and articles of personal use and ornament" does not include a sailing yacht owned by the testator at the time of his death, for the words "articles of personal use and ornament" evidently embrace only articles of that kind previously enumerated, and which are kept in the house or on the premises.

George S. Graham and Charles A. Chase, for the appellant.

John G. Johnson and R. Loper Baird, for the appellee.

25 DEAN, J. On October 14, 1895, with a view to foreign travel, accompanied by his wife, William A. Parry purchased from Drexel & Co. and the Tradesmen's National Bank of Philadelphia, two letters of credit, each in the sum of \$10,000. The letters are in the same words, of which this is a copy:

"We hereby authorize the bearers, W. A. Parry and Minnie H. Parry, his wife, to value at sight upon Credit Lyonnaise, London, to an amount not exceeding two thousand pounds, or at their option, upon Credit Lyonnaise, Paris, to the extent of fifty thousand francs." The credits were to extend to December 31, 1896. The husband and wife had been on their travels about four months when he died at Darjeeling, India, on February 8, 1896. At his death, there remained a balance unexpended on the letters of credit of twelve thousand, eight hundred and twenty-five dollars and thirty-four cents. This was drawn by the widow before she returned to her home in Philadelphia. Before he left home, on March 29, 1895, the husband executed a will, whereby he bequeathed to his wife, absolutely, twenty thousand dollars, and the income of nearly all the remainder of his estate, which was large, for life, and appointed her and Joseph Hopkinson executors of his will. By their first account filed there was a balance of over ^{or} one hundred and twenty thousand dollars for distribution. At the audit, the widow's coexecutor claimed she should be charged with the balance, twelve thousand eight hundred and twenty-five dollars and thirty-four cents, unexpended on the letters of credit at the death of her husband. The auditing judge sustained the claim; she filed exceptions. On hearing before the court in bank, but two judges, Ashman and Penrose, sat; one was for affirming the decree of the auditing judge, the other for reversing; so, the court being equally divided, the decree was affirmed: See 6 Dist. 717. From that decree we have this appeal by the widow.

The credit was purchased by the husband's money; the wife paid none. The learned auditing judge was of opinion that the letters were issued to them jointly, merely as a matter of convenience; that, as they represented the husband's money, and there was no evidence of a gift or assignment by him to her, the unexpended balance should be charged against her.

We are clear the writings created an estate, as between husband and wife, by entireties, and such an estate at common law goes to the survivor. This estate may be created in a chattel as well as realty, in a chose in action and one in possession: Freeman on Cotenancy and Partition, secs. 63, 68. And, as to choses in action, it is not abolished by the legislation affecting joint tenancy; for an estate that as to unmarried persons would be a joint tenancy, as to husband and wife is a tenancy by entireties. Therefore, neither the act of March 31, 1812, that of April 11, 1848, nor that of June 3, 1887, applies. This question is fully

discussed by our brother McCollum in *Bramberry's Estate*, 156 Pa. St. 628; 36 Am. St. Rep. 64. These letters of credit on their face have nothing to distinguish them, in their legal consequences, from a draft drawn in favor of the husband and wife as payees, by the American bankers on the foreign ones, or from a certificate of deposit or promissory note to them jointly, all of which have been held to constitute an estate by entireties. It was not an absolute gift to the wife of the whole amount, nor intended so to be; it was an estate in personalty, the value of which to her depended on two contingencies: 1. On her survivorship during the life of the letters; 2. On how much was still payable at his death. Both contingencies happened, and she survived as to so much of the estate as had not been spent.

The fact that they were going abroad, and that this was a convenient method of providing money for their expenses, ³⁷ does not rebut, or even cast doubt on, the intention expressed in the writings. The husband procured to be framed and delivered an instrument which effects certain legal consequences on the happening of certain contingencies. He knew that by means of it either could readily obtain money in foreign countries; that if both survived to return home he could receive from the bankers who issued the letters, the estate being personalty, any balance not expended; that if he died abroad the surviving wife took all that was left. There is not a spark of evidence indicating any other intention than that which legally arises on the face of the paper. In fact, he may have, very reasonably, intended that if he died abroad among strangers his widow should immediately be possessed of funds sufficient for her necessities and comfort, independent of any provision made for her in his will. Appellees argue that by such construction, if a letter of credit were issued for an indefinite amount, it would enable the widow to sweep the entire estate. We think it highly improbable that any banker would issue a letter of credit for an indefinite amount, which would enable the wife to sweep her husband's entire estate and, perhaps, the banker's too; but, if such a letter were issued at the request of the husband, the presumption would be quite strong that he intended his wife should have his entire personal estate in case of his death. However, any improbability as to intention which might possibly be raised by such an extreme case is without weight here, for the husband took the letters for a limited amount, probably not one-twentieth of his large estate.

We think the court below erred in charging appellant with

the sum of twelve thousand, eight hundred and twenty-five dollars and thirty-four cents, balance unpaid on the letters of credit at her husband's death.

The testator, in addition to other large bequests to his widow, directs that she shall have "all his clothing, household and kitchen furniture, linen, china, plate, plated ware, jewelry, pictures, engravings, books, bric-a-brac, and articles of personal use and ornament." Under this clause the widow claimed a sailing yacht owned by testator at his death. The court below did not allow her claim, because, in its opinion, a fair interpretation of this bequest pointed only to an intent to give her such goods and chattels as would be kept in his dwelling-house or on his premises, and that the words, "articles of personal use ³⁸ and ornament" did not include the yacht. We think this view correct; the words evidently meant to embrace articles of personal use and ornament in the house, like unto those enumerated.

As to the first assignment of error the decree is reversed, and it is directed the surcharge of twelve thousand eight hundred and twenty-five dollars and thirty-four cents be stricken off. As to the remaining exceptions it is affirmed, costs of appeal to be paid out of the fund.

A TENANCY BY ENTIRETIES MAY EXIST IN PERSONAL as well as real property, in a chose in action as well as a chose in possession: *Bramberry's Appeal*, 156 Pa. St. 628; 36 Am. St. Rep. 64, and note; *Phelps v. Simons*, 159 Mass. 415; 38 Am. St. Rep. 430, and extended note; and is not abolished by a statute abolishing survivorship among joint tenants, nor by legislation which secures to a wife the enjoyment of her separate estate: *Bramberry's Appeal*, 156 Pa. St. 628; 36 Am. St. Rep. 64.

SURVIVORSHIP.—Under a conveyance to husband and wife, if she survives, she takes the whole estate: *Brownson v. Hull*, 16 Vt. 809; 42 Am. Dec. 517.

WILLS.—GENERAL WORDS in a will, following after and coupled with words of limited signification, are restricted to the same class of things as the former, except where such general words are in a residuary clause: *Note to Succession of Allen*, 55 Am. St. Rep. 810.

PARRY'S ESTATE.

(186 PENNSYLVANIA STATE, 23.)

EXECUTORS AND ADMINISTRATORS—TRANSPORTATION OF DECEDENT'S BODY FROM ABROAD—CLAIM FOR, BY ATTORNEY.—If, while a man and his wife are traveling abroad, the husband dies, and the wife telegraphs the fact of death to her attorney in this country, and requests him to meet her in a foreign city, which he does, and makes all arrangements, under vexatious

circumstances, for the transportation of the decedent's body to America, the sum of eighteen hundred dollars is not an unreasonable allowance for such services, and should be paid out of the decedent's estate, though the services were not strictly professional, where such call took the attorney away from his professional duties for fifty-five days, and he expended considerable money out of his own pocket. He might well have inferred from the telegram that the widow needed his legal advice in matters connected with the decease of her husband.

EXECUTORS AND ADMINISTRATORS—LIABILITY OF ESTATE FOR TRANSPORTATION OF DECEDENT'S BODY FROM ABROAD.—If a person having an estate in this country dies while traveling in a foreign country, there is a legal liability on the part of his estate for services in connection with embalming and transporting his body from the place of death to the place of burial here, rendered at the request of his widow, and, where the estate is ample, it should be subjected to such charges.

John G. Johnson and R. Loper Baird, for the appellant.

George S. Graham and Ernest L. Tustin, for the appellee.

³⁰ **DEAN, J.** This is an appeal from a decree of the court below, awarding to Charles A. Chase eighteen hundred dollars for certain services rendered at the request of the widow of William A. Parry in connection with the transportation of the body of her deceased husband from India to Philadelphia, and its burial at the latter place. It appears that Mr. Parry, his wife being with him on foreign travel, died on February 8, 1896, in India. The next day, she telegraphed to Mr. Chase the fact of death, and for him to meet her at Marseilles, France, for which port she had started, as he understood, with the body of her husband on the steamer "Nubia." Having arrived at Paris, he made all necessary arrangements to have the body transported from Marseilles through France, and reshipped to Southampton, and from there to America. As it turned out, the body had not been shipped on the "Nubia," but on another vessel, in which it reached England, from which point he had it shipped to America. From his own statement, which is not contradicted, the work he did involved the loss of fifty-five days of time from his professional duties as a lawyer in Philadelphia, caused him to pay considerable money out of his own pocket, and subjected him to no end of vexation. The character of the services performed was not strictly professional; they could have been performed, perhaps, as well by another than a lawyer, yet, before that time, he had been the legal adviser of Mrs. Parry, and he might very well suppose when he received the telegram that she needed legal advice in matters connected with the decease of her husband. For these services and money expended he presented a bill against the

estate of two thousand five hundred dollars. This was objected to by Mr. Hopkinson, one of the executors: 1. Because it was excessive; and 2. Because the services were not rendered for benefit of the estate, but at the request of and for the benefit of the widow. The auditing judge cut the amount of the claim down to eighteen hundred dollars, which sum was awarded, and the court, on exceptions, confirmed the adjudication. From this decree the coexecutor, Hopkinson, appeals. As the auditing judge, with all the parties before him, thought the amount allowed was reasonable, there is nothing in the facts which constrains us to pronounce it excessive.

As to the argument that there is no legal liability on part of ⁴⁰ the estate, we do not think it well founded. Where the estate is ample, as here, there is as much reason for subjecting it to reasonable charges for the embalming and transportation of a body from India to the cemetery at Philadelphia as from a dwelling on Walnut street to the same place. Taking into view the liberal provision testator made for his widow, other interested parties, not unreasonably perhaps, think she should have borne this expense of her husband's burial; but she does not think so, and that is the end of the matter. Sentiment is voluntary; we are not here to enforce on widows the enjoyment of it.

The decree of the court below in this particular is affirmed and appeal dismissed, costs to be paid out of the fund.

THE REASONABLE AND NECESSARY FUNERAL EXPENSES of a deceased person are a charge upon his estate: Note to Gregory v. Hooker, 9 Am. Dec. 652; Patterson v. Patterson, 50 N. Y. 574; 17 Am. Rep. 384.

KEARNS v. HOWLEY.

[188 PENNSYLVANIA STATE, 116.]

EQUITY—JURISDICTION—UNINCORPORATED ASSOCIATIONS.—Courts of equity have no authority to interfere with the action of voluntary and unincorporated associations where no right of property is involved.

EQUITY—JURISDICTION—UNINCORPORATED ASSOCIATION—COMMITTEE OF POLITICAL PARTY.—A court of equity has no jurisdiction, by injunction, to restrain the chairman of a county committee of a political party from filling vacancies in violation of the rules of the party, where it appears that no property rights are involved.

ASSOCIATIONS—PROOF THAT NO PROPERTY RIGHT IS INVOLVED.—While a political committee may, from time to time, disburse large sums of money for campaign purposes, this

fact does not prove that any property right is involved, where a dissatisfied member is seeking a remedy against the association, because no member has any personal ownership in the funds.

Bill in equity, brought by E. L. Kearns and A. G. Smith, for an injunction against Joseph Howley, the chairman, and Thomas Kane, the secretary, of the Democratic county committee of Allegheny county.

John McCleave, W. J. Brennen, and D. T. Watson, for the appellants.

W. H. S. Thomson, J. M. Stoner, Frank Thomson, and C. A. Fagan, for the appellees.

118 DEAN, J. The members of the Democratic county committee of Allegheny county, by the rules of the party, are elected at the primary elections on the last Saturday of August in each year. By rule 7 the election officers must certify the vote for each candidate to the executive committee of each ward, borough, and township, and also to the chairman of the county committee. The election of the delegates who are to compose the county convention to nominate candidates for county offices are elected at the same time, and the convention meets the following Monday or Tuesday. Rule 7 having provided for certification of the vote to the county chairman, rule 8 provides that "a list of the county committee so elected shall be prepared by the chairman, and announced at the county convention." **119** By rule 10 the county committee so chosen must meet the first Monday of April following, and elect a chairman to serve for the ensuing year. The defendant, Joseph Howley, had been elected chairman on the first Monday of April, 1897, and therefore was chairman in August of that year at the county convention. He announced the members elect to the county committee, so far as returns had been received. Quite a number of districts had not certified the election of members of the committee; these were announced as vacancies, to the number of two hundred and fifty-eight, out of a roll of five hundred and twenty-one. The chairman, Howley, at the proper time, called a meeting of the county committee, as provided in rule 10, for the first Monday of April, 1898; he was a candidate for re-election as chairman. The bill filed the Thursday before the meeting averred that in a large number, two hundred and fifty-eight, of the districts announced as vacant, no duly elected committeeman had been certified; that Howley, in violation of the rules, had already filled vacancies with names of persons not elected, and was about to

complete the roll with names of others appointed by himself; further, that he had erased from the roll the names of duly elected members, and was about to wrongfully appoint others. The prayer of the bill was, that Howley be restrained by injunction from erasing names, and that he be enjoined from filling vacancies, or in any way tampering with or interfering with the roll. The defendants made no answer, but contented themselves with denying the jurisdiction of the court. After hearing testimony, the learned judge of the court below found the material facts averred by plaintiff to be true, and, as a conclusion of law, that the court had jurisdiction to entertain the bill and grant relief; therefore, he entered a decree restraining the defendants, or either of them, from adding names to the roll upon any pretense, or striking therefrom names, and annexed to the decree a roll of those whose names should properly appear thereon. Thereupon defendants bring this appeal, and assign for error want of jurisdiction in the court.

We see in the evidence no reason to question the correctness of the court's finding of fact. Howley probably filled the vacancies with the names of Democrats personally agreeable to himself, and it is by no means incredible they accorded with him in his ambition to continue himself in office. His opinion ¹²⁰ was, that by virtue of his office he had power to fill the vacancies, and it is not clear that he was wrong in this opinion. However this may be, if he usurped the power or wrongfully exercised it, he was amenable to his party, which could dethrone him and visit him with political penalties. But the question here is, Has a court of equity jurisdiction at the instance of dissatisfied members of the party or committee to correct and make up the roll, and force warring Democrats to associate with each other, when they are averse to such associations.

It is clear to us that no property right in plaintiffs or in others as members of the county committee existed. As a purely political committee, it neither owned nor pretended to own or to derive any benefit from anything of value held by them in common. That money for legitimate election expenses was contributed by Democrats to the committee, and by the members paid out, gave the one who handled the share put in his possession no personal ownership in it. He could derive honestly no personal benefit from the fund, and consequently had no property right. Such a duty would be a very "dry trust," if honestly executed. But the learned judge of the court below was of opinion that, even if membership of the committee conferred no property

right, nevertheless, under the act of June 16, 1836, which confers on the common pleas the jurisdiction and powers of a court of chancery in "the supervision and control of all corporations, other than those of a municipal character, and unincorporated societies or associations and partnerships," he had jurisdiction to entertain the bill and found thereon his decree. We have more than once decided that this act gives to the courts only the powers of the English court of chancery: See *Kneedler v. Lane*, 3 Grant, 523, where Justice Strong fully and clearly construes the act, and so pronounces. The English chancellor has always disclaimed authority to interfere with the action of voluntary and unincorporated associations where no right of property was involved: *Rigby v. Connol*, L. R. 14 Ch. Div. 482. We will not cumber this opinion with further citations from the English reports to sustain this view, for it is scarcely questioned by counsel for appellee. The court below, we think, was misled into claiming for the courts of Pennsylvania enlarged chancery powers, because of the tendency of our late legislation to regulate primary ¹²¹ elections and prevent fraud and corruption by the election officers. It may be, if this bill had aimed to prevent a threatened violation of law by any of these officers, it could have been maintained. But there is no statutory injunction or prohibition directed to chairmen and secretaries of county committees; they are amendable alone to their party, which is purely political. The authority of the courts in such a case is thoroughly discussed by the New York court of appeals, in *McKane v. Adams*, 123 N. Y. 609; 20 Am. St. Rep. 785. In that case, *McKane* filed a bill to enjoin the Democratic committee of Kings county from denying his membership. The court dismissed it, saying in the course of an elaborate opinion: "His status therefore is that, though his town association elected him as a delegate to the general committee of the county organization, the members of that body have refused to admit him to association with them in their office. And if they would and will not associate with him, upon what reasoning or principle should they be compelled to, and the aid of a court of justice invoked? The right to be a member is not conferred by any statute; nor is it derivable as in the case of an incorporate body. It is by reason of the action and of the assent of members of the voluntary association that one becomes associated with them in the common undertaking, and not by any outside agency or by the individual's action. Membership is a privilege which may be accorded or withheld, and not a right which can be gained independently and

then enforced. So when, as by the plaintiff's own showing, the committee refused to admit him as a member or to confirm his election, he was remediless against that refusal. No rights of property or of person were affected, and no rights of citizenship were infringed upon."

We adopt this language as expressing our opinion in this case, without referring to and citing the many cases to which counsel on both sides have called attention, for none of them is of such authority as to move us from our previous decisions. The constitution and statutes of the commonwealth guarantee to all citizens the right of self-government by protecting them in the exercise of the elective franchise for all officers voted for at state and local elections; and, lately, the law has gone further, and has so far recognized political parties as to pass an act prescribing the duties of officers at primary elections, ¹²² and imposing severe penalties for misconduct. But beyond this, political parties and party government are unknown to the law; they must govern themselves by party law. The courts cannot step in to compose party wrangles, or to settle factional strife. If they attempt it, it may well be doubted whether they would have much time for anything else.

We reverse the decree, and direct that the bill be dismissed at costs of appellee.

Jurisdiction of Equity over Voluntary Unincorporated Associations.*

Courts, either of law or of equity, will interfere for the purpose of protecting the property rights of members of voluntary unincorporated associations in all proper cases, and, when they take jurisdiction, will follow and enforce, so far as applicable, the rules applying to incorporated bodies of the same character: *Otto v. Journeymen Tailors* etc. Union, 75 Cal. 308; 7 Am. St. Rep. 156; *Von Arx v. San Francisco Gruetli Verein*, 113 Cal. 377. Courts of chancery have supervision and control of all voluntary unincorporated societies or associations; and with respect to them they have the power to prevent acts contrary to law and prejudicial to the interest of the community, or to the rights of individuals, and can afford specific relief where a recovery in damages would be an inadequate remedy for the wrong: *Ebbingshaus v. Killian*, 1 Mackey, 247, 255; *Kisor's Appeal*, 62 Pa. St. 423, 435. The foundation of the jurisdiction of a court of equity over voluntary unincorporated associations, so far as the same exists, seems to be based upon the protection of the right of property, or of some civil

***REFERENCE TO MONOGRAPHIC NOTES.**

Voluntary associations: 7 Am. St. Rep. 160-170.
 Redress in courts of law against proceedings in lodges, churches, and other voluntary associations: 18 Am. St. Rep. 301-307.
 Remedies of members of fraternal and other associations: 59 Am. St. Rep. 1:8-701.
 Validity of constitution, by-laws, and proceedings of voluntary charitable associations: 69 Am. Dec. 670-674.

right of the members: See monographic note to *Otto v. Journeyman Tailors' etc. Union*, 7 Am. St. Rep. 161, on voluntary associations. The members of such an association have the right to the use of its property, according to, and for the purposes of, the association as shown by its articles, as long as any of the members remain: *Sommers v. Reynolds*, 103 Mich. 307; *Textile Workers v. Barrett*, 19 R. I. 663. The title to property may be vested in an association before it is incorporated: *American Silk Works v. Salomon*, 6 Thomp. & C. 352; 4 Hun, 185; *Whipple v. Parker*, 29 Mich. 369; and a person who, of his own free will and accord, becomes a member of a voluntary unincorporated association voluntarily agrees to be bound by its rules, by-laws, and regulations. He must, therefore, abide by them, unless they are contrary to the fundamental law of the association, or in violation of the law of the land. The courts, either of law or of equity, can interfere no further than to hold the association to a fair and honest administration of such rules and regulations. It follows that one who becomes a member in a voluntary unincorporated association whose rules provide for suspension or expulsion upon certain grounds, and direct a mode of proceeding before a committee or tribunal of the association to ascertain whether, in a given case, such grounds exist, submits himself to these rules, and cannot, when they are invoked against himself, resort to a court of equity to prevent them from being put in force, where nothing unconscientious, unlawful, or contrary to public policy is shown. In such cases, an injunction against the tribunal of the association, or against an officer of the association, charged with executing the decision of such tribunal, will not lie to restrain the association from interfering with the privileges of the complaining member, particularly where he has not exhausted all the remedies provided for by the association: *White v. Brownell*, 3 Abb. Pr., N. S., 318; 4 Abb. Pr., N. S., 162; *Greene v. Board of Trade*, 68 Ill. App. 446.

On the other hand, a court of equity will interfere by injunction or otherwise to prevent the unlawful suspension or expulsion of a member of a voluntary, unincorporated association, where it would necessarily affect his civil rights and property, such as his financial standing, and depriving him of the use of property that is common to all, however insignificant its value: *Huston v. Reutlinger*, 91 Ky. 838; 34 Am. St. Rep. 225; *Albers v. Merchants' Exchange*, 39 Mo. App. 583, 596; *Hutchinson v. Lawrence*, 67 How. Pr. 88; *Gray v. Christian Soc.*, 137 Mass. 329; 50 Am. Rep. 810, and extended note thereto; *Knights of Pythias' case*, 3 Brewst. 452, 454.

A court of equity, however, has no power to compel admission to membership in an association, whether incorporated or not: *American Live Stock Commission Co. v. Chicago Live Stock Exchange*, 143 Ill. 210; 36 Am. St. Rep. 335; *Mayer v. Journeymen Stonecutters' Assn.*, 47 N. J. Eq. 519. The members of a voluntary unincorporated association may lawfully agree that no associate shall remain a member and enjoy its privileges if he refuses to comply with its rules. Hence, if a member is suspended for violating the rules of an association, he cannot afterward invoke the equitable

power of a court to compel his reinstatement, any further than to see that the investigation was conducted in good faith, on notice to him and opportunity to be heard, and that the decision was within the scope of the jurisdiction conferred on the committee. A member of an association cannot insist upon remaining a member of it and at the same time repudiate its conditions of membership and refuse to comply with its rules: *Lewis v. Wilson*, 121 N. Y. 234; *Greer v. Stoller*, 77 Fed. Rep. 1. If he puts himself outside of the association, he cannot appeal to a court of equity to reinstate him after expulsion. A member is entitled to the privileges and rights inhering in a membership so long only as he keeps his part of the contract, expressed in his subscribing to the articles and by-laws of the association. It is a general rule of law, applicable to voluntary unincorporated associations, that a member must either submit to its rules or surrender his membership. He has his option to retain his membership by complying with the by-laws, or cease to be a member by refusing a compliance: *Greer v. Stoller*, 77 Fed. Rep. 1, 8.

Members of a voluntary association or benefit society, such as the Modern Woodmen of America, may, although the association is incorporated, enjoin the unauthorized and illegal removal of the society's principal office: *Bastian v. Modern Woodmen*, 166 Ill. 595, reversing 68 Ill. App. 378; and an officer of a voluntary, unincorporated association may enjoin members thereof from proceeding to incorporate it without authority of the association: *Rudolph v. Southern Benefical League*, 23 Abb. N. C. 199; *McGlynn v. Post*, 21 Abb. N. C. 97. So a shareholder of voluntary unincorporated association may enjoin the removal of a building from land belonging to the association, and the converting of the same from a school-house into a dwelling-house: *Marston v. Durgin*, 54 N. H. 347. Dissatisfied members of a voluntary association cannot, by incorporating themselves, deprive the association of the right to use its own name, and if they attempt to do so, by injunction, but suppress material facts, the injunction will be denied: *Black Rabbit Assn. v. Munday*, 21 Abb. N. C. 99. Individuals who leave an incorporated society, and form a voluntary one, cannot maintain a suit in equity to recover the corporate funds, where the corporation remains entire and in full possession of all its rights: *Goodman v. Jedidjah Lodge*, 67 Md. 117. The majority of a charitable voluntary association cannot annul or change its constitution, or bring it over to a new rival organization, differing from it in material respects. Hence, a vote to that effect, or having that object, is void, and a bill in equity may be maintained to recover the possession of personal property which belonged to the association, and which was taken by the majority and claimed to belong to their new association: *McFadden v. Murphy*, 149 Mass. 341.

Equity has jurisdiction of a suit upon a note executed in behalf of the Society of Shakers by its trustees, even without the aid of a statute giving the right to sue in equity in such a case: *Society of Shakers*, 68 Fed. Rep. 730; and a committee of an unincorporated society may maintain a suit in equity on behalf of the society

to enforce a trust in lands and to remove the trustee who has repudiated it, where the committee has been appointed for that purpose, and where the trustee took the lands in trust for the benefit of the widows and orphans of deceased members of the society, under such regulations as the society should provide, with power to the association to sell the property for the uses specified: *Gull-foill v. Arthur*, 158 Ill. 600.

Accounting.—A member of a voluntary unincorporated association, formed for the purpose of buying and selling lands, may maintain a bill in chancery to compel his associates to account for, and pay over to the association, certain profits made and retained by them in purchasing a tract of land for the association: *McDowell v. Joice*, 149 Ill. 124; affirming 48 Ill. App. 627. So a bill may be maintained to have an accounting of a church fund which has been diverted to different purposes than what it was originally intended for: *Presbyterian Church v. Donnom*, 1 Dessau, 154.

It seems, however, that, if the articles of an association, formed for the purpose of speculating in real estate requires the ownership of two thousand dollars of the capital stock as a condition to membership, a party who has failed to pay in such amount on calls is not entitled to maintain a bill in chancery for an account of profits and for partition of lands unsold, especially when he owes the company more than the amount of calls paid in by him: *Stevenson v. Mathers*, 67 Ill. 123. So, if the members of a church corporation bring suit for its benefit, though not in its name, against its trustees who have become members of an unincorporated church body, the corporation cannot, after it has accepted and enjoyed the benefit of a decree in its favor, say that the proceeding was not prosecuted in its behalf, and bring a suit in its own name to compel the trustees to account, and allege that it was not bound by such portions of the decree as were unfavorable to it: *Appeal of the Third Reformed Dutch Church*, 88 Pa. St. 503.

Benefit and Benevolent Societies, Generally.—Persons who voluntarily become members of a fraternal benefit or benevolent society, whether incorporated or not, are bound by all rules and regulations of the society which are not immoral, against public policy, contrary to the law of the land, or in contravention of natural justice. Courts, neither of law nor of equity, will undertake to direct or control the internal policy of such societies, or attempt to decide questions relating to the discipline of its members, but will leave the society free to carry out any lawful purposes in its own way, and in accordance with its own rules and regulations: *Reno Lodge v. Grand Lodge*, 54 Kan. 73, 80; *Josich v. Austrian Ben. Soc.*, 119 Cal. 74; note to *Otto v. Journeyman Tailors' etc. Union*, 7 Am. St. Rep. 163, 164; but courts of equity, as well as courts of law, will not hesitate to take hold of, and exercise jurisdiction over, cases in which such a society is a party, and where some civil or property right is involved: *Reno Lodge v. Grand Lodge*, 54 Kan. 73, 80; *Wachtel v. Noah Widows etc. Soc.*, 84 N. Y. 28; 38 Am. Rep. 478; *Otto v. Journeyman Tailors' etc. Union*, 75 Cal. 308; 7 Am. St. Rep. 156, and note; notes to *Connelly v. Masonic Mut. Ben. Assn.*, 18 Am.

St. Rep. 301; *Robinson v. Templar Lodge*, 59 Am. St. Rep. 199; *Fisher v. Patton*, 134 Mo. 32, 53. Thus, where the funds of an association are deposited in a savings bank, and the name of the association is afterward changed, but one of the trustees refuses to join in making a transfer of the fund to the successor of the old association, equity has jurisdiction of a bill to compel him to make such assignment: *Birmingham v. Gallagher*, 112 Mass. 190. So, where a majority of the members of a benevolent society go over to another society, the seceding members take no right of property with them, and equity will declare the rights of the minority and enforce them by a proper decree; *Ladies Ben. Soc. v. Benevolent Soc.*, 3 Tenn. Ch. 100. But equity will refuse relief against a beneficial society, where the remedy should be sought in a court of law: *Beatty's Appeal*, 122 Pa. St. 428. And where a mutual benefit association, with a reserve fund held by the subordinate lodges in different states, but owned and controlled by the supreme lodge, becomes insolvent, and a receiver is appointed, with power to collect the assets wherever found, and to wind up the association, ancillary receivers of the several branches of the association should be ordered to transmit such reserve fund to the general receiver: *Smith v. Taggart*, 87 Fed. Rep. 94, 98; *Baldwin v. Hosmer*, 101 Mich. 119, 432; *Durward v. Jewett*, 46 La. Ann. 559, 708.

Board of Brokers.—An injunction will lie to restrain a board of brokers from irregularly expelling a member: *Leech v. Harris*, 2 Brewst. 571; but it will be dissolved unless the complaint shows some equity and that the member will be deprived of some substantial right in a manner not authorized by the association or by law. The New York "Open Board" of Brokers is a voluntary association: *White v. Brownell*, 3 Abb. Pr., N. S., 818; 4 Abb. Pr., N. S., 162.

Boards of Trade.—Courts of equity, as well as courts of law, will refuse to interfere with the disciplinary powers of a board of trade: *Board of Trade v. Nelson*, 162 Ill. 431; 53 Am. St. Rep. 312; and this is probably the rule whether the board is incorporated or not. The Board of Trade of the City of Chicago, although incorporated, is merely a voluntary association: *Board of Trade v. Nelson*, 162 Ill. 431; 53 Am. St. Rep. 312; and the Merchants' Exchange of St. Louis, Missouri, is also a corporation, incorporating a voluntary association previously in existence: *Goddard v. Merchants' Exchange*, 9 Mo. App. 290. But as a corporate body is plainly different from an unincorporated association, and, as the rules of the law concerning the one may not necessarily apply to the other, we shall simply cite the following cases as showing the rules applicable to an incorporated board of trade: *Board of Trade v. Nelson*, 162 Ill. 431; 53 Am. St. Rep. 312; *Ryan v. Cudahy*, 157 Ill. 108; 48 Am. St. Rep. 305; *Green v. Board of Trade*, 174 Ill. 585; 63 Ill. App. 446; *Pitcher v. Board of Trade*, 121 Ill. 412; *Metropolitan etc. Exchange v. Chicago Board of Trade*, 15 Fed. Rep. 847.

Building and Loan Associations.—In a suit to cancel a bond containing a contract between the plaintiffs and a building and loan association, a court of equity has jurisdiction to grant relief against

unconscionable stipulations in such contract, and will not permit parties to fix a sum specified therein as liquidated damages by naming it as such, and thus prevent the court from considering it as a penalty: *Tilley v. American Bldg. etc. Assn.*, 52 Fed. Rep. 618. A court of equity will not enforce a penalty for a breach of contract between such an association and a borrower: *Roberts v. American Bldg. etc. Assn.*, 62 Ark. 572; 54 Am. St. Rep. 309. A court of equity has jurisdiction to adjust the accounts of a building and loan association and to wind it up: *Goodrich v. City Loan etc. Assn.*, 54 Ga. 98; *Towle v. American Bldg. etc. Inv. Soc.*, 61 Fed. Rep. 446; note to *Knutson v. Northwestern Loan etc. Assn.*, 64 Am. St. Rep. 415; *In re West London etc. Bldg. Soc.*, [1894] 2 Ch. 352; and may make all proper orders for the direction of receivers: *Towle v. American Bldg. etc. Soc.*, 61 Fed. Rep. 446; particularly in cases of insolvency, and will instruct them how to distribute funds: *Thompson v. North Carolina Bldg. etc. Assn.*, 120 N. C. 420; *Strauss v. Carolina Interstate Bldg. etc. Assn.*, 117 N. C. 308; 53 Am. St. Rep. 585. A stockholder in a building and loan association may maintain a suit in equity to restrain directors of the association from closing out a series of its shares before their maturity, in violation of its by-laws, and from releasing securities of borrowing members, some of whom are insolvent, and to restrain them from discontinuing the collection of fines, penalties, et cetera, where such action on the part of the officers will have the effect of preventing the plaintiff's shares from attaining their full value: *Fisher v. Patton*, 134 Mo. 32, 51. So, where such an association, after the lapse of the period in which shares are to run, or to become matured, refuses to pay, the obligation of the company to pay, and the jurisdiction of a court of equity in the premises are clear, and such a court, upon the facts being stated, will entertain a bill which prays for a discovery, an accounting and an injunction, and the appointment of a receiver: *Amer v. Union Bldg. etc. Assn.*, 50 N. J. Eq. 170.

Clubs and Committees.—The jurisdiction of equity over club matters is based upon property rights. If the rights of a member of an ordinary club association, involving some pecuniary interest, have been disturbed by the committee of the club, he is entitled to ask a court of chancery whether the rules of the club have been observed, whether anything has been done which is contrary to natural justice, and whether the decision complained of was rendered after notice and according to the law of the association, and in good faith: *Baird v. Wells*, 44 Ch. Div. 661; *Loubat v. Le Roy*, 15 Abb. N. C. 1; but a court of equity should not entertain proceedings to review the action of a club in expelling a member until he has exhausted the remedies of the club: *Loubat v. Le Roy*, 15 Abb. N. C. 1, and note thereto on judicial interposition in affairs of a voluntary association. An incorporated club may be restrained, at the suit of a member thereof, from committing a misdemeanor to the injury of his property rights, as by furnishing liquor to its members: *Klein v. Livingston Club*, 177 Pa. St. 224; 55 Am. St. Rep. 717; but a court of equity will not restrain the trial of charges pre-

ferred against a member of a club: *Gebhard v. New York Club*, 21 Abb. N. C. 248. Equity has jurisdiction over the fund of a voluntary unincorporated association, such as a club which is impressed with a trust to pay it according to the terms of its subscription; as where funds were provided by clubs to pay for substitutes during the Civil War: *Foley v. Tovey*, 54 Pa. St. 190.

The aid of the courts cannot be invoked to compel a voluntary political association of individuals to admit the plaintiff to membership and to office with them, as no rights of property or of person are affected, and no rights of citizenship are infringed: *McKane v. Adams*, 123 N. Y. 609; 20 Am. St. Rep. 785. In the case of a proprietary club in which the members have no right of property, a member who has been expelled by a committee, though the proceedings were irregular, cannot obtain relief by way of injunction: *Baird v. Wells*, 44 Ch. Div. 661.

Exchanges.—A voluntary association, such as a livestock exchange, whether incorporated or not, has, within certain well-defined limits, power to make and enforce by-laws for the government of its members, and such by-laws are ordinarily matters between the association and its members alone, with which strangers have no concern. If it passes by-laws which are unreasonable or contrary to law or public policy, and attempts to enforce them against a dissenting or unwilling minority, the latter may, in proper cases, appeal to a court of chancery for relief against their enforcement, but strangers have no right to interfere, as they do not apply to nor bind them: *American Live Stock etc. Co. v. Chicago Live Stock Exchange*, 143 Ill. 210; 36 Am. St. Rep. 385. In cases of expulsion from a voluntary association, such as an exchange, courts of equity will limit themselves to inquiring whether the body acted within its powers, after giving notice to the accused and affording him an opportunity to be heard, and whether they have exercised their powers fairly and in good faith. If this has been done, the inquiry is ended, and a court of equity cannot interfere by injunction or otherwise: *Lewis v. Wilson*, 121 N. Y. 284, 287. But, on the contrary, if this has not been done, and a method not authorized by the charter, or the rules and regulations of the association, and prohibited by the principles of the common law, has been pursued, equitable relief by injunction, or otherwise, may be had: *Albers v. Merchants' Exchange*, 39 Mo. App. 583, 598; *Hutchinson v. Lawrence*, 67 How. Pr. 38; *Gray v. Christian Soc.*, 137 Mass. 329; 50 Am. Rep. 310, and extended note thereto. An injunction to restrain an exchange from interfering with a member's seat and privileges will not be granted where such member has been suspended for cause: *Baum v. New York Cotton Exchange*, 21 Abb. N. C. 253; and a court of equity cannot proceed to judgment, if there is a want of jurisdiction over all the necessary parties, essential to a full and final determination, as where a bill in equity seeks to enjoin a board of directors of a livestock exchange, a voluntary business association, from doing certain specified acts, and one of the defendants is a nonresident of the state: *Greer v. Stoller*, 77 Fed. Rep. 1.

Fire Company.—A fire association, formed for general and public usefulness, where there is no individual emolument or advantage, is a charity over which a court of equity can exercise its jurisdiction, and it will not suffer the funds of the association to be diverted to other uses than what the donors intended. If a member of such an association is unjustly, and without reasonable cause, deprived of his membership therein, his only relief is in a court of equity, for he has none in a court of law. His remedy is in equity, where he should apply specifically for restoration: *Thomas v. Ellmaker*, 1 Para. Cas. 98.

Fishermen's Union.—If money of a purely voluntary association, having no legal status whatever, such as a fishermen's union, formed for the purpose of maintaining the price of fish, which are to be sold through a committee, is held in trust by one member of the union, and paid out to another party, its trust character is, in the absence of fraud, thereby lost, and cannot be enforced as against such third party: *Fournie v. Shepard*, 15 Wash. 94.

Joint Stock Companies. If unincorporated, are governed by the general principles of law applicable to partnerships: Note to *Carter v. McClure*, 60 Am. St. Rep. 848. If the articles of agreement of such a company do not provide an express mode for the forfeiture of stock, a valid foreclosure cannot be made without a decree in equity: *Walker v. Ogden*, 1 Biss. 287. Chancery has jurisdiction to wind up such an association: *Willis v. Chapman*, 68 Vt. 59; and where the entire assets of an unincorporated joint stock association have been finally disposed of, a controversy among its members over the distribution of the common fund is one for equitable cognizance: *Butterfield v. Beardsley*, 28 Mich. 411.

Lodges.—If the trust fund of a lodge is about to be diverted to an improper and unwarranted purpose, a court of equity has jurisdiction to enforce the trust and to prevent such diversion, but will dismiss a bill where the facts proved do not show such a diversion: *Koener Lodge v. Grand Lodge*, 146 Ind. 639, 655; *Grand Lodge v. Germania Lodge*, 56 N. J. Eq. 63; *Schubert Lodge v. Schubert*, 56 N. J. Eq. 78; *Lady Lincoln Lodge v. Faist*, 52 N. J. Eq. 510, 515. If the majority of the members of a subordinate lodge withdraw from the jurisdiction of the grand lodge, the minority, who remain steadfast in their allegiance, and to whom the charter is again delivered, are, as between them and the secessionists, entitled to the lodge property: *Ahlendorf v. Barkous*, 20 Ind. App. 657. Where the legal existence of a Masonic chapter is gone, a court of equity will not entertain a bill to restore it to life: *Strickland v. Prichard*, 37 Vt. 324; neither will a court of equity enjoin the authority of a grand master over the worshipful master of a local lodge of Masons, particularly where the remedies within the order have not been exhausted, and no property rights are involved: *Mead v. Stirling*, 62 Conn. 586. But equity has jurisdiction of a controversy over the diversion of property belonging to an Odd Fellows' Hall Association, and will see that it remains subject to the uses to which it was originally dedicated: *Robbins v. Waldo Lodge*, 78 Me. 565.

As to matters of expulsion, where a bill in equity is filed for

restoration, all that can be done is for the court to inquire into the regularity and good faith of the proceedings, under the constitution and laws of the order. It cannot inquire into the merits of what has passed into judgment in a regular course of procedure. The interference, by courts, with the disciplinary powers of lodges, whether incorporated or not, is only justified where the exercise of the power has been without jurisdiction, or has been marked by gross injustice and unfairness: *Sperry's Appeal*, 116 Pa. St. 391; *Mead v. Stirling*, 62 Conn. 586; *People v. Order of Foresters*, 162 Ill. 78; *Croak v. Order of Foresters*, 162 Ill. 298. But an injunction will issue, where a member has been improperly suspended, to right the wrong according to the circumstances of the case: *Knights of Pythias' case*, 3 Brewst. 452, 454. An action will not lie to restrain a voluntary unincorporated society of Royal Arch Masons from proceeding, in accordance with their rules, to try a member upon charges of having violated the disciplinary laws of the order: *Lawson v. Hewell*, 118 Cal. 613.

Oneida Community.—A member of the Oneida Community, who has been expelled therefrom, is not entitled to relief in equity and to have his property rights in such unincorporated association adjusted, unless he shows some ground for the equitable interference of the court: *Burt v. Oneida Community*, 137 N. Y. 346; 138 N. Y. 649.

Religious Societies.—The law of voluntary unincorporated associations applies to unincorporated religious societies: *Watson v. Jones*, 13 Wall. 679, 714; *First Presbyterian Church v. Wilson*, 14 Bush, 252; and, strange as it may seem, such societies figure very conspicuously in the strife and tumult over worldly matters. The Quakers, or Society of Friends, who neither take oaths nor go to war, seem to have quite successfully eliminated litigation from their midst, but other religious societies have occupied much of the time and attention of the courts. A court of equity has no jurisdiction of any purely ecclesiastical question, except as an incident to the determination of some property or civil right. Its power to adjudicate disputes between warring church parties is limited to an examination of the rules of the church organization to ascertain the church law, and, if that is not in conflict with the law of the land, to protect the rights of the parties under the law they have made for themselves. It will never take up matters of religious doctrine for the purpose of determining the abstract truth or falsity thereof. It will not consider such matters at all, except where civil rights, rights of property, or contract respecting the holding, control, use, or enjoyment of property is dependent on them: *Nance v. Busby*, 91 Tenn. 303; *Long v. Harvey*, 177 Pa. St. 473; 55 Am. St. Rep. 733; *Hale v. Everett*, 58 N. H. 9; 16 Am. Rep. 82; *Mason v. Muncaster*, 9 Wheat. 445; *Watson v. Jones*, 13 Wall. 679; *Richardson v. Union etc. Soc.*, 58 N. H. 187; *Trustees v. Halvorson*, 42 Minn. 503; *Moseman v. Heitshusen*, 50 Neb. 420; *First Baptist Church v. Witherell*, 3 Paige, 296; 24 Am. Dec. 223; *Bowden v. McLeod*, 1 Edw. Ch. 588; *Ferraria v. Vasconcellos*, 31 Ill. 25; note to *Long v. Harvey*, 55 Am. St. Rep. 738.

A court having no ecclesiastical jurisdiction has no power to review or revise the proceedings or judgments of church tribunals which pertain only to questions of church discipline. A church organization, as a voluntary religious association, alone has the power to adjust all matters with respect to its internal policy which do not affect the rights of the citizen or the jurisdiction of the state. A court of equity has no power to supply remedies lacking for the regulation of the organization within itself, and the final decision of the ecclesiastical tribunal, properly convened, must, therefore, as to all ecclesiastical matters, such as membership, expulsions, and the like, be accepted as final and conclusive: *Powers v. Budy*, 45 Neb. 208; *Pounder v. Ashe*, 44 Neb. 672, 682; reversing the same case, 86 Neb. 564; *Schweiker v. Husser*, 146 Ill. 399; *Philomath College v. Wyatt*, 27 Or. 390; *Harmon v. Dreher*, *Spear Eq.* 87; *Lamb v. Cain*, 129 Ind. 486; *Dieffendorf v. Trustees*, 20 Johns. 12; *Kuns v. Robertson*, 154 Ill. 394; *Baxter v. McDonnell*, 155 N. Y. 83. The regularity and legality of legislative acts of church bodies is always open to investigation by the civil courts, but a court of equity is not justified in interfering with the action of church authorities because of a deviation from the standards of faith, unless such deviation is so palpable as to enable the court, from an examination of the historical and doctrinal practices of the church, to say that there has been an essential change in fundamental doctrine: *Kuns v. Robertson*, 154 Ill. 394, 415; *Philomath College v. Wyatt*, 27 Or. 390; *Bear v. Heasley*, 98 Mich. 279. A change in the confession of faith of a religious association does not amount to a misuse or perversion of the trust upon which its property is held, if the substantial theological doctrine and general polity are retained, though there is a change in the church policy or an alteration in the expressed form of faith: *Russie v. Brazzell*, 128 Mo. 93; 49 Am. St. Rep. 542. In cases where a civil right or property right depends upon some matter pertaining to ecclesiastical affairs, a court of equity will try such right, and nothing more, taking the ecclesiastical decisions as it finds them, and accepting them as matter adjudicated by another legally constituted tribunal: *Harmon v. Dreher*, *Spear Eq.* 87; *Lamb v. Cain*, 129 Ind. 486.

While courts of equity will decide nothing affecting the ecclesiastical rights of a church, they will take hold of, and exercise jurisdiction over, cases which involve civil rights or rights of property, either of a member of the association or of the association itself, and determine such rights in conformity with the laws of the land, and the principles of equity, notwithstanding the final decision of the ecclesiastical tribunal: *Ferraria v. Vasconcellos*, 31 Ill. 25; *Watson v. Jones*, 13 Wall. 679; *Pounder v. Ashe*, 86 Neb. 564; *Baxter v. McDonnell*, 155 N. Y. 83; *Harmon v. Dreher*, *Spear Eq.* 87; *Bowden v. McLeod*, 1 Edw. Ch. 588; *Burr v. First Parish*, 9 Mass. 277; *Stearns v. First Parish*, 21 Pick. 114. Compare the note to *Robinson v. Templar Lodge*, 59 Am. St. Rep. 206, showing that a member of an unincorporated voluntary association cannot be deprived by contract, or by the constitution and by-laws of the

association, of all right to resort to the courts. When a church becomes divided, a majority of the members cannot abandon the tenets and doctrine of the denomination and retain the right to use of the property; on the contrary, the seceders forfeit all right thereto, although but a single member adheres to the original faith and doctrine of the church. The holders of church property are regarded in equity as holding it in trust for the maintenance of the faith and worship of the founders of the religious society, and when property, real or personal, is vested in a religious society, whether incorporated or not, as a church or congregation "for the worship of Almighty God and the promotion of piety and godly living," it is a charitable use. The corporation or society is a trustee, and can no more divert the property from the use to which it was originally dedicated than any other trustee can. Property given or set apart to a church or unincorporated religious association for its use in the enjoyment and promulgation of its adopted faith and teachings is held in trust for that purpose by the church or association, and any member of the church or association less than the whole has no power to divert it from the purpose intended. Equity has jurisdiction to enforce such a trust, and will do so according to the principles of justice in all cases where the association is divided, and there is controversy over the use of or disposition of its property; but a court of equity must, of course, dismiss a bill to adjust such property rights, if the facts shown do not warrant its interference. In the exercise of chancery jurisdiction, in such cases, to maintain the trust and to enjoin invasions or perversions thereof, the remedy by injunction seems to be peculiarly adapted to the relief sought; and a court of equity has jurisdiction to determine, in such controversies, where the title or right to the property is: *Bouldin v. Alexander*, 15 Wall. 181; *Smith v. Swormstedt*, 16 How. 288; *White v. Rice*, 112 Mich. 408; *Willson v. Livingstone*, 99 Mich. 594; *Bear v. Heasley*, 98 Mich. 279, 816; *Gable v. Miller*, 10 Paige, 627; *Trustees v. Rechlin*, 49 Mich. 515; *Fadness v. Braunborg*, 73 Wis. 257; *Avery v. Baker*, 27 Neb. 888; 20 Am. St. Rep. 672; *Wicks v. Nedrow*, 28 Neb. 886; *Burke v. Wall*, 29 La. Ann. 38; 29 Am. Rep. 316; *Brundage v. Deardorf*, 55 Fed. Rep. 839; *Ferraria v. Vasconcellos*, 81 Ill. 25; *Watson v. Jones*, 13 Wall. 679; *Finley v. Brent*, 87 Va. 103; *Mannix v. Purcell*, 46 Ohio St. 102; 15 Am. St. Rep. 562; *Rottman v. Bartling*, 22 Neb. 375; *Gass v. Wilhite*, 2 Dana, 170; 26 Am. Dec. 446; *Curd v. Wallace*, 7 Dana, 190; 32 Am. Dec. 85; *McKinney v. Griggs*, 5 Bush, 401; 96 Am. Dec. 360; *Schnorr's Appeal*, 67 Pa. St. 138; 5 Am. Rep. 415; *Roshi's Appeal*, 69 Pa. St. 462; 8 Am. Rep. 275, and note; *Fuchs v. Meisel*, 102 Mich. 357; *Landis' Appeal*, 102 Pa. St. 467; *Kuns v. Robertson*, 154 Ill. 394; *Brown v. Moore*, 80 Ky. 443; *Mt. Zion Church v. Whitmore*, 83 Iowa, 138; *Trustees v. Trustees*, 4 N. J. Eq. 77; *Hale v. Everett*, 53 N. H. 9; 16 Am. Rep. 82; *Ebbinghaus v. Killian*, 1 Mackey, 247, 255; *Trustees v. Hoessli*, 13 Wis. 348; *Phillomath College v. Wyatt*, 27 Or. 390; *Schlichter v. Keiter*, 156 Pa. St. 119; *McGinnis v. Watson*, 41 Pa. St. 9; *Kisor's Appeal*, 62 Pa. St. 428; *Krecker v. Shirey*,

163 Pa. St. 534; *Bllem v. Schultz*, 170 Pa. St. 563; *Gibson v. Armstrong*, 7 B. Mon. 481; *Scott v. Curle*, 9 B. Mon. 17; *Berryman v. Reese*, 11 B. Mon. 287; *Newman v. Proctor*, 10 Bush, 318; *First Presbyterian Church v. Wilson*, 14 Bush, 252; *Brunnenmeyer v. Buhre*, 32 Ill. 183; *Nelson v. Benson*, 69 Ill. 27; *Field v. Field*, 9 Wend. 394; *Determann v. Luehrmann*, 74 Iowa, 275; *Park v. Chaplin*, 96 Iowa, 55, 69; 59 Am. St. Rep. 353; *Reorganized Church v. Church of Ohrist*, 60 Fed. Rep. 937; *Prickett v. Wells*, 117 Mo. 502; *Fulbright v. Higginbotham*, 133 Mo. 608; *Smith v. Pedigo*, 145 Ind. 361; note to *Connelly v. Masonic Mut. Ben. Assn* 18 Am. St. Rep. 302.

While, in the case of contending factions of an unincorporated church society, where the association is divided and there is a wrangle over property rights, an injunction will lie, at the instance of the faction entitled to the property, to restrain trespasses thereon by the other faction, to prevent acts by pretended trustees, and to enforce a trust, these are not the only available remedies in equity in cases involving unincorporated religious associations. The members of these bodies have the same right as those of other voluntary associations of persons formed for charitable or benevolent purposes to seek the aid of a court of equity, not only to prevent a diversion of the property of such a body from the uses and trusts to which it was originally devoted, but to secure to themselves the enjoyment of the rights of membership in respect to the use of the property. An injunction is, therefore, the proper remedy to secure to the officers of a church the peaceable possession of its property as against members of the parish who have assumed to exclude them therefrom without right: *Lutheran etc. Church v. Gristgan*, 34 Wis. 328; *Richter v. Kabat*, 114 Mich. 575. The exclusion of a pastor may be restrained: *Krecker v. Shirey*, 163 Pa. St. 534. A court of equity has jurisdiction to restore those excluded from their rights: *Kisor's Appeal*, 62 Pa. St. 428; and to enjoin any interference with the property of the association by outside parties: *Beatty v. Kurtz*, 2 Pet. 566, 580; *East Haddam etc. Church v. East Haddam etc. Soc.*, 44 Conn. 259. If a pastor has no fixed compensation by contract, but the discipline of the church provides for his payment by voluntary contributions, this will secure to him such a reasonable compensation as will create in him a property right in the office of pastor, which a court of equity will recognize and protect: *Schweiker v. Husser*, 146 Ill. 399. A dismissed pastor may be enjoined from preaching in the church which dismissed him: *Hatchett v. Mt. Pleasant etc. Church*, 46 Ark. 291; and a bill may be maintained to restrain a clergyman not regularly chosen from attempting to force himself upon a congregation: *Trustees v. Stewart*, 43 Ill. 81; but if he has been chosen according to the usages of the church and adheres to its principles, it has been held that equity will compel the trustees to permit him to preach: *Skilton v. Webster*, Bright N. P. 203. In *Whitcar v. Michenor*, 37 N. J. Eq. 6, a mandatory injunction was issued requiring the trustees of a church to open the building to the preacher and the church. Appended to this case is an extended note showing when a preacher must be accepted and when he may be rejected, as well as the use of an injunction as a remedy.

While the trustees of a religious society may not be under the control of a court of equity, as trustees, in the proper sense of the term (*Robertson v. Bullions*, 11 N. Y. 242), yet an individual member of such a society has an equitable interest in its property, and may maintain an action for the removal of faithless trustees, who have deprived the society of property held by them in trust for the purposes of the association: *Nash v. Sutton*, 117 N. C. 231. The trustees may be enjoined from leasing a church for a school-house: *Perry v. McEwen*, 22 Ind. 440; or from closing the church doors, in case of a divided congregation, against those who choose to remain in the church, and who represent the regular church organization: *Fuchs v. Meisel*, 102 Mich. 357. Where two congregations enter into articles of association to build a church in which "divine service" only shall be held, one congregation is entitled to an injunction restraining the other from holding a Sunday-school in the church: *Gass' Appeal*, 73 Pa. St. 39; 13 Am. Rep. 726. A member, wrongfully expelled from the Harmony Society, sometimes called Rapp's Settlement, was, in equity, held entitled to recover his proportional part of the whole property of the society, with interest: *Nachtrieb v. Harmony Settlement*, 3 Wall. Jr. 66, 81, 87. Chancery has jurisdiction of a suit for the quiet enjoyment of church property: *Cahill v. Bigger*, 8 B. Mon. 211; and may entertain a bill to cancel a deed and to quiet title to such property; and, where it is impossible to partition the property, a judgment directing its sale, and a division of the proceeds will be sustained: *Wicks v. Nedrow*, 28 Neb. 386.

But relief in equity will not be granted where the complainant shows no sufficient equitable interest to claim the interposition of a court of equity: *Dolan v. Mayor*, 4 Gill. 394. A court of equity will not ordinarily interfere, by injunction, to eject a clergyman from the possession of his church and to forbid his preaching in it: *Youngs v. Ransom*, 31 Barb. 49; *Ehrenfeldt's Appeal*, 101 Pa. St. 186; and he cannot be enjoined from receiving voluntary contributions merely because he has been deposed from the ministry by some ecclesiastical judicatory, whether he rightfully or wrongfully officiates in his character as religious teacher or minister: *Calkins v. Cheney*, 92 Ill. 463. A court of equity will not enjoin a religious society against using a by-law to prevent certain persons from becoming members: *Richardson v. Union etc. Soc.*, 58 N. H. 187; nor will it enjoin a church from selling its property in payment of a debt: *Eggleston v. Doolittle*, 33 Conn. 396. It cannot install wrongly elected officers in a church: *Long v. Harvey*, 177 Pa. St. 473; 55 Am. St. Rep. 733; nor will it enjoin one faction of a church from forcibly entering a common burying ground for the purposes of burial: *Miller v. English*, 6 N. J. Eq. 304. The session of a Presbyterian church, or the individual members thereof, as such, have no standing in a court of equity to call the incorporated trustees of the church to account for a breach of trust: *Everett v. First Presbyterian Church*, 53 N. J. Eq. 500. A court of equity will not issue an injunction to restrain the sale of a pew for a delinquent assessment: *Abernethy v. Society*, 3 Daly, 1; or its proper removal

or change: *Solomon v. Congregation B'nai Jeshurun*, 49 How. Pr. 263. Neither will it, at the instance of a pewholder, enjoin the trustees of a dilapidated church from tearing the edifice down, when the increase of the congregation makes it proper to do so: *Heeney v. Trustees*, 2 Edw. Ch. 608.

Trade Unions—Unlawful Associations.—Trade unions are voluntary societies, not incorporated, and, like individuals, are subject to the jurisdiction of a court of equity. They sometimes interfere with a man's business, and there are doubtless cases in which a man's property, his trade, his livelihood, and the goodwill of his business would be absolutely ruined by them, if what is complained of is not peremptorily stopped. Where such injury is threatened, a court of chancery has undoubted jurisdiction to afford relief by injunction: *Lyons v. Wilkins*, [1896] 1 Ch. 811. It may enjoin a "boycott" by such association, and by this term we mean a combination to inaugurate and maintain a general proscription of articles manufactured by the party against whom it is directed. A "boycott" is unlawful: *Oxley Stave Co. v. Coopers' International Union*, 72 Fed. Rep. 695. Equity also has jurisdiction to protect an unincorporated trade union in the use of its property, as of labels for trade union purposes: *Tracy v. Banker*, 170 Mass. 266. But in a suit by a Missouri corporation to enjoin certain trade unions or assemblies, and their members, from instituting a boycott, a federal circuit court for the district of Kansas has no jurisdiction of individual defendants who are citizens of Missouri, nor can the association be sued as a body, or members thereof, who are not parties to the record, be enjoined: *Oxley Stave Co. v. Coopers' International Union*, 72 Fed. Rep. 695, 697.

Any voluntary unincorporated association of persons formed for the purpose of imposing an unreasonable restraint upon the exercise of a trade or business is unlawful, and equity will not aid a member of it to retain his membership therein, and to restrain the association from suspending or expelling him therefrom for a violation of its illegal rules and by-laws: *Huston v. Reutlinger*, 91 Ky. 333; 34 Am. St. Rep. 225; *Greer v. Payne*, Kan. App., Sept., 1896. But a court of equity does not exercise visitatorial powers over voluntary associations or their proceedings, except to prevent the violation of some law of the state, or to protect or enforce some right already acquired: *Mayer v. Journeymen Stonecutters' Assn.*, 47 N. J. Eq. 519; and there is no ground for an injunction against such a body where nothing unlawful or actionable can be found in the case: *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223.

Courts, Interference by.—The civil courts, whether of equity or of law, do not take cognizance of matters arising out of the affairs of voluntary unincorporated associations unless some civil or property right is involved. They will not interfere with questions of policy, discipline, and internal government, except where no jurisdiction or gross injustice and unfairness appear, in which case a court of equity has jurisdiction to act; and it may be stated as a general rule that neither courts of equity nor courts of law will interfere to control the administration of the laws of such associa-

tions, or to enforce rights springing therefrom; but that such organizations must be left to enforce their rules and regulations by such means as they may adopt for their government: *People v. Order of Foresters*, 162 Ill. 78, 86; *Levy v. United States Grand Lodge*, 9 Misc. Rep. 633, New York, Sup. Ct., Sept. 1894; *Robertson v. Walker*, 8 Baxt. 316; *People v. Board of Trade*, 80 Ill. 134; *Kehlenbeck v. Logeman*, 10 Daly, 447; *Board of Trade v. Nelson*, 162 Ill. 431; 53 Am. St. Rep. 312; *Itter v. Howe*, 23 Ont. App. 256; *White v. Brownell*, 3 Abb. Pr., N. S., 318; 4 Abb. Pr., N. S., 162; *Chase v. Cheney*, 58 Ill. 509; 11 Am. Rep. 95; *Green v. Board of Trade*, 174 Ill. 585; *Powers v. Budy*, 45 Neb. 208; *Rector v. Huntington*, 82 Hun, 125; *Kuns v. Robertson*, 154 Ill. 394; *Fadness v. Braunborg*, 73 Wis. 257; *Skilton v. Webster*, Bright N. P. 203; notes to *Hiss v. Bartlett*, 63 Am. Dec. 776; *Connelly v. Masonic Mut. Ben. Assn.*, 18 Am. St. Rep. 301, 302; *Philomath College v. Wyatt*, 27 Or. 390; *Grimes v. Harmon*, 35 Ind. 198; 9 Am. Rep. 690; *Deaderick v. Lampson*, 11 Helsk. 523; *Trustees v. Halvorson*, 42 Minn. 503, 507; *Pounder v. Ashe*, 36 Neb. 564; *Nance v. Busby*, 91 Tenn. 303; *Ryan v. Lamson*, 44 Ill. App. 204; *Jennings v. Scarborough*, 56 N. J. L. 401; and a member of an unincorporated voluntary association will not, as a rule, be granted relief, either in a court of equity or a court of law, until he has exhausted the remedies of the association, even where property rights are involved: *Oliver v. Hopkins*, 144 Mass. 175; *Olery v. Brown*, 51 How. Pr. 92; *People v. Grand Lodge*, 166 Ill. 71; *Buettner v. Frazer*, 100 Mich. 179; *Jeane v. Grand Lodge*, 86 Me. 434; *Levy v. Magnolia Lodge*, 110 Cal. 297; *Mulroy v. Knights of Honor*, 28 Mo. App. 463; though it is held in New Jersey that, to secure property rights or enforce money demands against social or beneficial organizations, a member thereof may, in the first place, prosecute his claim in the civil courts, unless the constitution or by-laws of the organization expressly provide otherwise, in which case he is bound by them: *Roxbury Lodge v. Hocking*, 60 N. J. L. 439; 64 Am. St. Rep. 596; *Smith v. Ocean Castle*, 59 N. J. L. 198; *Ocean Castle v. Smith*, 58 N. J. L. 545.

And, as we understand the authorities, the decision of an association upon matters pertaining to the body, and not involving any property right, is conclusive upon the courts; and that, even in cases where the right of property in the civil court is dependent upon some question over which the association has jurisdiction, the decision of the highest tribunal of the organization with reference to it will, where it has proceeded regularly and in conformity with its laws, be accepted both by courts of equity and courts of law as conclusive upon the question of property involved: *Watson v. Jones*, 13 Wall. 679; *Connitt v. Reformed etc. Church*, 54 N. Y. 551; *Sperry's Appeal*, 116 Pa. St. 391; *Nance v. Busby*, 91 Tenn. 303; *People v. McDonough*, 8 N. Y. App. Div. 591. In fact, as a voluntary unincorporated association is the sole and exclusive judge of questions of doctrine and policy, it is only in respect to civil or property rights in, or growing out of, such association that an appeal to the courts can be had: *Grand Lodge v. People*, 60 Ill. App.

550. Compare note to *Robinson v. Templar Lodge*, 59 Am. St. Rep. 198-209.

Contribution—Specific Performance.—Equity has jurisdiction of a bill to hold persons liable to contribution as members of a voluntary unincorporated association for debts and expenses authorized at meetings of the association: *Cheney v. Goodwin*, 88 Me. 563, but it has no jurisdiction to order the specific performance of a canon of a church, or to supervise the action of the proper officer thereunder: *Rector v. Huntington*, 82 Hun, 125.

Adequate Remedy at Law.—A court of equity has jurisdiction over the affairs of voluntary unincorporated associations, where some civil or property right is involved, and there is no adequate remedy at law: *Andriessen's Appeal*, 123 Pa. St. 303; *Amer v. Union Bldg. etc. Assn.*, 50 N. J. Eq. 170; *Allender v. Vestry Trinity Church*, 3 Gill, 166, 169; *Callsen v. Hope*, 75 Fed. Rep. 758; *Society of Shakers v. Watson*, 68 Fed. Rep. 730; *Davis v. United Engineers*, 28 N. Y. App. Div. 396.

Dissolution.—A court of equity has jurisdiction to dissolve a voluntary unincorporated association, but it should not be dissolved for slight causes. It is only when it is entirely apparent that the organization has ceased to answer the ends of its existence, and no other mode of relief is attainable: *Lafond v. Deems*, 81 N. Y. 508; *Fischer v. Raab*, 57 How. Pr. 87; *Roper v. Burke*, 83 Ala. 193; *Chicago etc. Assn. v. Hunt*, 127 Ill. 257. See, also, *Burdon v. Massachusetts etc. Assn.*, 147 Mass. 360; *McFadden v. Murphy*, 149 Mass. 341.

Parties.—It is a well-established rule in equity that where the parties are numerous and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others; and this rule applies to voluntary unincorporated societies: *Smith v. Swormstedt*, 16 How. 288, 302; *Liggett v. Ladd*, 17 Or. 89; *Foster v. Bryant*, 16 Gray, 190; *Bloete v. Simon*, 19 Abb. N. C. 88; *Arts v. Guthrie*, 75 Iowa, 674; *Durburow v. Niehoff*, 87 Ill. App. 403; *McDowell v. Joice*, 149 Ill. 124; affirming same case, 46 Ill. App. 627; *Berryman v. Joice*, 11 B. Mon. 287; *Avery v. Baker*, 27 Neb. 388; 20 Am. St. Rep. 672; *Nance v. Busby*, 91 Tenn. 303, 315.

It is also a well-established rule in equity that a bill may be maintained against a portion of a numerous body of defendants, representing a common interest; and this likewise applies to voluntary unincorporated associations: *Smith v. Swormstedt*, 16 How. 288, 302; *Fitzpatrick v. Rutter*, 160 Ill. 282; *Van Houten v. Pine*, 86 N. J. Eq. 183; *United States v. Coal Dealers' Assn.*, 85 Fed. Rep. 252; *Dubs v. Egli*, 167 Ill. 514; *Society of Shakers v. Watson*, 68 Fed. Rep. 730.

CORN EXCHANGE NATIONAL BANK v. SOLICITORS' LOAN AND TRUST COMPANY.

[188 PENNSYLVANIA STATE, 330.]

BANKS—INSOLVENCY—REPLEVIN TO RECOVER DEPOSIT FRAUDULENTLY ACCEPTED.—An insolvent bank which accepts a deposit commits a fraud upon the depositor, and he may maintain replevin for the money if it has not been used, or mixed with the common funds, and can be identified.

EQUITY—JURISDICTION—MONEY RECEIVED BY TRUST COMPANY UNDER IMPLIED MISREPRESENTATION AS TO SOLVENCY—TRUST FUNDS.—If a bank, upon the request of a trust company, which is at the time insolvent, accommodates it, without charge, with a large number of small bills, receiving a worthless check for its favor, and, on the next morning, the company, without opening its doors, makes an assignment for the benefit of creditors, the package of bills, unbroken, passing into the hands of the assignee, a court of equity has jurisdiction of a suit brought for the restoration of the package, for it, having been obtained by a clearly implied misrepresentation as to solvency, is impressed with a trust, and the bank is entitled to its return.

Bill in equity brought against the defendant trust company and its assignees, to have a trust declared.

Dimmer Beeber, Hampton L. Carson, A. I. Phillips, and J. Levering Jones, for the appellant.

Richard S. Hunter, for the appellees.

³³³ **DEAN, J.** The plaintiff and the defendant, one as a bank, the other as a trust company, did business in Philadelphia. The bank frequently accommodated the trust company with currency of the various denominations on request and without charge. On January 2, 1896, the trust company, by telephone, asked the bank for two thousand dollars in two dollar bills, and on a favorable response sent its check for that amount on Fourth Street National Bank, where it had funds to meet it, by messenger, who returned with the bills put up in packages. On the next day, the trust company, without opening its doors, failed and made an assignment for the benefit of creditors, of which the Fourth Street National had immediate notice. The Corn Exchange Bank, the plaintiff, in the regular course of business, sent the check to the clearing-house before 8:30 on the morning of the 3d, but the Fourth Street National, because of the assignment, refused to honor it, and the Corn Exchange the same day was ³³⁴ compelled to take it up. The two thousand dollars received by the trust company remained in the package in its possession unbroken, and was turned over to its assignee. The plaintiff then filed this bill, setting out the foregoing facts, and

prayed for an order on the assignee to restore to it the unopened package. The assignees filed a demurrer, averring that no special trust relation calling for the interposition of equity was established by the foregoing facts, and, further, that plaintiff had an adequate remedy at law. The court below sustained the demurrer and dismissed the bill, from which decree we have this appeal.

From the averments of the bill, which are admitted by the demurrer, and the statements in the deed of assignment, the trust company was insolvent on January 2d, when the transaction took place and it received the plaintiff's money, and the officers of the company were aware of its condition. Keeping its doors open on that day was, whether intentional or not, a representation to the public of solvency. Whether they still hoped on that day by some means to recuperate and avoid closing is not material; the fact of insolvency on that day remains. There is no difference in principle between this transaction and that of a depositor who leaves his money with the bank a few hours before it suspends. The acceptance of the money under such circumstances is a fraud upon the depositor, and if it has not been used or mixed with the common funds, and can be identified, he can maintain replevin for it: *Furber v. Stephens*, 35 Fed. Rep. 17. In *Cragie v. Hadley*, 99 N. Y. 131, 52 Am. Rep. 9, it was held that where drafts were deposited for collection with a bank which failed the next day, the title did not pass out of the depositor, and he could recover. It will be noticed that no question of confusion of assets arises in this case; the very package delivered by plaintiff remains in possession of the assignees. It would be highly inequitable to pass over to the creditors of the insolvent trust company plaintiff's money, because defendants acquired possession of it by a misrepresentation of solvency. Besides, plaintiff was not a customer of the trust company, and did not adopt it as a convenient place of deposit, but as a pure accommodation accepted a worthless check for the two thousand dollars. We say worthless, because in the course of business it could not be presented until the insolvency of the drawer became known, and the fund on which it had been ~~225~~ drawn had constructively passed to the assignee for the benefit of creditors.

The jurisdiction of equity is sustainable, because, under the facts, the package of money is impressed with a trust; the title never passed from plaintiff, because the possession was obtained by a plainly implied misrepresentation.

The decree is reversed, and it is ordered that the assignees deliver to plaintiff the package or packages of two dollar bills, amounting to two thousand dollars, as in plaintiff's bill averred. Costs to be paid by appellees.

FRAUDULENT BANKING—REMEDY OF DEPOSITOR.—To permit a deposit in a bank in reliance upon its supposed solvency is a gross fraud, if its officers know at the time of its insolvency, and the depositor is entitled to reclaim the deposit or the proceeds. If it has been kept separate and not fully received before formal insolvency, the depositor may claim it: *Note to State v. Shove*, 65 Am. St. Rep. 21; *Cragle v. Hadley*, 99 N. Y. 121; 52 Am. Rep. 9.

GASTON'S ESTATE.

[188 PENNSYLVANIA STATE, 374.]

WILLS—IMMATERIALITY OF FORM.—The form of a will is not material if a testamentary intention is apparent from the face of the paper.

WILLS—EVINCING TESTAMENTARY DISPOSITION.—A testamentary disposition of property may be evinced by the word "wish," as well as the word "will," at the commencement of a will.

WILLS—CONSTRUCTION OF—GENERAL RULE.—Whether a writing was intended to be a disposition of property after death must be determined from the language of the paper itself, and the circumstances surrounding its execution and preservation.

WILLS—CERTAINTY—DEFINITENESS.—A writing will be interpreted and enforced as a will if it is definite enough to be capable of such interpretation and enforcement.

WILLS—EXTRINSIC EVIDENCE TO IDENTIFY PROPERTY AND LEGATEES.—Parol evidence may be heard to identify the property and legatees named by a testatrix in a will.

WILLS—FORM—DEFINITENESS—PAROL EVIDENCE.—A paper as follows:

"Dec. 13 1893
It my wish

two
that Mrs. Weller the 1 houses and
lots the ten acers for the four
boys Ern Frank Lue and Paul
Mrs Weller pay Eliz Mell 1500
Mr Shipply pay to Poty
Johnston 500 his debt and
Callie Abell 500 dollars
Mrs Shipply the other 500
Lucid 500 Chatty Uncel 500
My sisters 4000 apeace
Mary Abell Agness Snodgrass
Mary E. Anderson 1000
Ed Weller keeps what he got
Lone to pay Evert Abell 500
And keep the blance

"E. J. GASTON,"

written by an illiterate person, in lead pencil, on the back of a gas receipt, found after the decedent's death in a bureau drawer, and dated two years before her death, at a time when she had excellent business capacity, is a will, and sufficiently definite to be interpreted and enforced as such where it appears that the property and persons mentioned therein are capable of being identified by parol evidence.

D. F. Patterson and R. W. Irwin, for the appellants.

T. F. Birch, J. W. Donnan, A. G. Braden, and C. W. Campbell, for the appellee.

³⁷⁵ DEAN, J. A certain writing, a copy of which is herein given, was admitted to probate by the register of wills of Washington county as the last will and testament of Eliza J. Gaston; thereupon the heirs at law of the alleged testatrix petitioned the orphan's court for leave to appeal from the decision of the register for the following reasons: Because the said writing is not the last will and testament of Eliza J. Gaston, in that: 1. The provisions ³⁷⁶ thereof are vague, indefinite, uncertain, and in some instances void; 2. It is written in lead pencil on the back of a printed notice to consumers from a gas company, contains erasures, alterations, and interlineations in material parts, and was not among the valuable papers of deceased found after her death; 3. The writing does not contain any of the formal requisites of a will, and is not declared therein to be the will of Eliza J. Gaston; 4. The writing is not testamentary in character.

The court, by proper process, brought all the parties interested before it, and after full hearing, upon due consideration, being of opinion that the writing was not the last will and testament of Eliza J. Gaston vacated and set aside the probate. From that decree, we have this appeal. The following is a copy of the alleged will, as nearly as the same can be made to appear in print:

"Dec 13 1893

ft my wish

two .

that Mrs. Weller the ^ houses and
lots the ten acers for the four
boys Ern Frank Lue and Paul
Mrs Weller pay Eliz Mell 1500
Mr Shipply pay to Poty
Johnston 500 his debt and
Callie Abell 500 dollars
Mrs Shipply the other 500
Lucid 500 Chatty Uncel 500
My sisters 4000 apeace

Mary Abell Agness Snodgrass
Mary E. Anderson 1000
Ed Weller keeps what he got
Lone to pay Evert Abell 500
And keep the blance

"E. J. GASTON."

Two questions are raised by this paper which must be answered before decree: 1. Is this a will? That is, was it intended to be a disposition of property to take effect after death? 2. Is it so certain and definite as to be capable of intelligent interpretation ³⁷⁷ and enforcement? Both questions must be answered in the affirmative, else the writing ought not to have been admitted to probate as a will. The form of the writing is of but little moment if a testamentary intention be apparent from the face of the paper. This paper, it is undisputed, is wholly in the handwriting of the deceased. She was seventy years of age, a widow, and childless; although somewhat illiterate, the testimony is, that she had excellent business capacity; had settled up, as administratrix, the estate of her husband who had died some years before, her account showing a balance of about sixteen thousand dollars; this, notwithstanding profuse gifts in her lifetime, had by accumulations reached the sum of about twenty thousand dollars at her death. Up to the date of her death her faculties were unimpaired; she was undoubtedly capable of determining on, and framing in her own mind, a testamentary disposition without the aid of counsel or advisers; whether from lack of education she was capable of so clearly expressing that intention in writing without assistance, as to leave no ground for litigation may be doubted. We are now only considering whether this writing on its face is testamentary. If, instead of saying "it my wish" at the commencement of the writing, she had said, "it my will," there could have been no doubt of the intention that the disposition of her property following these words was to take effect after her death; the use of the word "will" preceding the gifts would have been conclusive as to the character of the instrument. But what distinction is there in fact between the signification of the words "will" and "wish," when used as preliminary to a schedule of property to be distributed among a number of beneficiaries. The "wish" of a testator as to a disposition expressed in writing and formally signed in his lifetime is just as effective as his "I will," or "I desire," or "I direct." His death makes the one just as imperative as the other. Then follows an allotment of all or nearly all of her es-

tate among a large number of collateral relatives, and to an intimate personal friend and her children. She lived two years after making this writing; evidently she did not intend to denude herself of her property during her lifetime by making immediate gifts of which the paper was a memorandum, for she does nothing of the kind. The paper is found in her bureau drawer after her death, in which drawer were kept gas ³⁷⁸ receipts, on the back of one of which was the writing. The place where it was found may have been considered by her a safe depository for the writing; in what particular or inappropriate place an elderly lady or, for that matter, a younger one, will put articles or writings of value is hard to even guess; as to Mrs. Gaston, concealment of the writing from interested parties may have been her principal object; if it was, she selected a kind of paper and a place which in all probability would effect her purpose, and yet, after her death, the paper would necessarily be discovered. Another significant fact to indicate that this was more than a memorandum of property to be thereafter formally devised and bequeathed is that it is signed. There was another schedule not signed. Being in her own handwriting, the writing in dispute would have been just as effective as a memorandum for a future will without signature, but it would not have been effective as a will, and we may fairly presume that to make it effective was the purpose of the signature.

In cases such as this precedents rarely afford much aid. We start with the settled principle controlling the adjudication in all of them, namely, from the language of the paper itself, and the circumstances surrounding its execution and preservation, did the author of it intend the writing to be a disposition of his or her property to take effect after death? The absence of sameness of expression and the wide variations in facts in nearly all cases compel a conclusion from the language and circumstances of the particular case. It seems to us *Knox's Estate*, 131 Pa. St. 220, 17 Am. St. Rep. 798, approaches nearer this paper in character than any of the others cited. The writing in that case did not in words express that it was a will; it was in pencil on an ordinary sheet of letter paper, found in the deceased's portfolio, which last was in a cupboard in the room where she died; although there were many bequests, not a word announced the paper to be a last will. In the beginning the testatrix says: "A few little things I would love to have done." She does not sign it with her full name, but merely, "Harriett." One of the directions is testamentary by inevitable inference: "Please have

just my baptismal names on stones." In the opinion of this court, delivered by Justice Mitchell, it is said: "The writing in question is clearly testamentary. Although it does ³⁷⁰ not on its face purport to be a will, and in form is not a command but a request, addressed to no special person by name, . . . it has the essential element of being a disposition of property to take effect after death." The same remarks apply with fully as much force to the paper before us.

Is the writing so definite as to be capable of interpretation and enforcement? It may be conceded that without additional knowledge to that disclosed in the writing distribution could not be made with certainty; but that is because the court, without evidence dehors the will, cannot identify the subject of the devise or bequest and the beneficiary. Everything was clear to the testatrix and, doubtless, the will is clear to the relatives and friends interested, notwithstanding the meagerness of description, for their familiarity with the property and the persons needs but a suggestion to identify both. Take the first devise, "Mrs. Weller the two houses and lots." It appears from the evidence that a Mrs. Weller had been reared in her house, married, and had a family; a close intimacy like that of parent and child continued between them until the death of testatrix. Who doubts that this woman is the devisee? The testatrix owned two houses and lots only a few feet apart, in one of which testatrix lived, and in the other Mrs. Weller; they visited each other daily; thus pointing with reasonable certainty to the subject of the devise, and the evidence upon that question for final determination may be made absolutely certain. "The ten acres for the four boys, Ern, Frank, Lue, and Paul." Mrs. Weller has four sons known by these names. Does anyone doubt who are the devisees of the ten-acre lot? And so of all the devises and legacies; parol evidence cannot be adduced to change or supply an intent not expressed, but may be heard to identify the property and legatee named by the testatrix. We think, on proper inquiry by the learned court below, the true interpretation of this will will be demonstrable, and the effect given it that the testatrix intended by the words she used.

For the reasons given, the decree of the court below vacating and setting aside the probate is reversed, leaving to stand as originally entered the order of the register; costs to be paid out of the estate.

WILLS—FORM—CONSTRUCTION.—An instrument is a will, whatever its form, if the intention of the maker to dispose of his estate after death is sufficiently manifested, and this intention is lawful in itself, and the writing has the statutory formalities: *Babb v. Harrison*, 9 Rich. Eq. 111; 70 Am. Dec. 203. The intent of the testator must control in construing the will: *Westcott v. Binford*, 104 Iowa, 645; 65 Am. St. Rep. 530; note to *Succession of Allen*, 55 Am. St. Rep. 309; and in determining such intention the courts will look, not only at the instrument itself, but to the circumstances under which the will was made as well as to the state of the testator's property and his family: *Elliott v. Elliott*, 117 Ind. 380; 10 Am. St. Rep. 54; *Noe v. Kern*, 93 Mo. 367; 3 Am. St. Rep. 544; *Murphy v. Carlin*, 113 Mo. 112; 35 Am. St. Rep. 699. Courts, in reading wills, always supply obviously omitted words whenever the word omitted is apparent, and no other word will supply the defect: *Mitchell v. Donohue*, 100 Cal. 202; 38 Am. St. Rep. 279.

WILLS.—EXTRINSIC EVIDENCE IS ADMISSIBLE TO EXPLAIN what a testator has written in a will, but not to show what he intended to write: *Note to Clarke v. Clarke*, 57 Am. St. Rep. 683. The person or property to which a will applies may be identified by extrinsic evidence; and the circumstances, situation, and surroundings of a testator, at the time of executing his will, may be shown by extrinsic evidence: See monographic note to *Chappell v. Missionary Soc.*, 50 Am. St. Rep. 285, 287, on extrinsic evidence to explain wills; *Schlottman v. Hoffman*, 73 Miss. 188; 55 Am. St. Rep. 527.

HUMMEL v. LILLY.

[188 PENNSYLVANIA STATE, 463.]

EVIDENCE—PRESUMPTION OF PAYMENT.—After twenty years the law presumes that every debt is paid, no matter how solemn the instrument may be by which such debt is evidenced; and such presumption stands until rebutted.

EVIDENCE.—THE LEGAL PRESUMPTION of payment of a debt, arising from lapse of time, is alone sufficient to defeat a recovery, if no promise to pay, or no payment on account, has been made within twenty years.

JUDGMENT—REVIVAL—WHAT PLEADING OF PLAINTIFF DOES NOT REBUT PRESUMPTION OF PAYMENT.—In a proceeding to revive a judgment more than twenty years old, a statement by the plaintiff, in his pleadings, that no part of the principal or interest of the debt has ever been paid does not rebut the presumption of payment arising from the lapse of time.

JUDGMENT—REVIVAL—WHAT PLEADING OF DEFENDANT DOES NOT REBUT PRESUMPTION OF PAYMENT. If the affidavit of defense, in a proceeding to revive a judgment more than twenty years old, affirmatively sets up the defense of presumption of payment from lapse of time, an additional averment therein that the defendant has not made any "new promise nor paid any money on account of said judgment" does not rebut the presumption of payment. It should be regarded as the negation of any obligation arising from a payment on account, and not as a declaration that the whole debt is due because none of it has been paid.

Scire facias to revive a judgment. The proceeding was instituted by James R. Hummel, administrator of the estate of Joseph Hummel, deceased, against William E. Lilly. The court made absolute a rule for judgment for want of a sufficient affidavit of defense, and the error assigned was the order of the court.

W. C. Loos, for the appellant.

George W. Geiser, for the appellee.

⁴⁸⁵ GREEN, J. The plaintiff, on June 24, 1897, issued a scire facias to revive and continue the lien of a judgment entered June 1, 1876. More than twenty years having elapsed from the entry of the judgment, the debt was paid by presumption of law at the time the scire facias was issued. In the plaintiff's statement no fact or circumstance was averred as explanatory of the long delay in demanding payment, and no new undertaking, and no other act or declaration of the defendant was alleged of such a character that it would amount to a recognition of the debt, such as a payment of either interest or principal on account of the debt. It is true that the statement averred that no part of the interest or principal of the debt had ever been paid, but that averment would not suffice to create an obligation on the part of the defendant to pay the debt after twenty years had elapsed. Otherwise, there would be no use of a presumption of payment resulting from lapse of time. Yet we have held many times over that after twenty years a legal presumption of payment arises which it is the duty of the plaintiff to rebut by affirmative proof. In *Peters' Appeal*, 106 Pa. St. 340, we said, "After a lapse of twenty years mortgages, judgments, and all evidences of debt are presumed to be paid: *Foulk v. Brown*, 2 Watts, 209; and a recognizance in the orphans' court: *Beale v. Kirk*, 84 Pa. St. 415; and in less than twenty years, with circumstances, payment may be presumed: *Hughes v. Hughes*, 54 Pa. St. 240; *Briggs' Appeal*, 93 Pa. St. 485. After twenty years, the law presumes that every ⁴⁰⁰ debt is paid, no matter how solemn the instrument may be by which such debt is evidenced. And such presumption stands until rebutted." In *Hess v. Frankenfield*, 106 Pa. St. 440, the proceeding was, as in this case, a scire facias on a judgment to revive and continue the lien. The judgment had remained unpaid for nineteen years when the scire facias was issued. We held that a period of nineteen years, accompanied with proof of circumstances tending to show payment, was sufficient to raise the presumption of payment, and that the question of payment was for the jury. We said, "The question of payment is a question of fact and, there-

fore, its proper determination is within the province of the jury. In a given case, if there are no circumstances tending to aid the presumption of payment, and the presumption does not arise for want of the necessary time, it would be the duty of the court to so instruct the jury and withdraw it from their consideration. But in this case, it seems to us, there were circumstances, some of them of a highly persuasive character, which tended to support the presumption, and therefore it became the duty of the court to submit the whole of them, including the lapse of time, to the determination of the jury." In *Diamond v. Tobias*, 12 Pa. St. 312, we said: "The rule is well established that where the period is short of twenty years, the presumption of payment must be aided by other circumstances besides the mere lapse of time. But exactly what these circumstances may be never has been, and never will be, defined by the law. There must be some circumstances, and where there are any it is safe to leave them to the jury."

In the case at bar, the learned court below held that because the defendant had said in his answer that, "he has not made a new promise nor paid anything on account of said judgment," the presumption of payment was rebutted, and the plaintiff was entitled to judgment for the whole amount of his claim. It is manifest that the statement of the defendant was made to meet the claim that was set up against him. It was, on the face of the statement, a claim more than twenty years old, and the defense of presumption of payment from lapse of time was alleged in the immediately preceding sentence, and then, to rebut any inference of a recognition of the debt and a liability resulting therefrom, the defendant added an averment that, "He has not made a new promise nor paid any money on account of ⁴⁸⁷ said judgment." This was plainly for the purpose of setting up a defense adapted to the peculiar character of the claim. The legal presumption of payment was averred and then the allegation that he had neither made a new promise nor paid anything on account of the debt. If he had made no new promise and had made no payment on account of the debt, those were facts which relieved him from any imputation of having recognized or acknowledged the debt, and if that state of facts appeared on the trial there could be no recovery. But there are very many methods of payment other than by the direct one of paying money to the creditor. Independent transactions, release, any of the numerous methods of accord and satisfaction, setoff, voluntary surrender of the liability, gift,

fraud, duress, and many other matters may constitute a discharge of the obligation, and, of course, all or any of these would be available by way of defense, and would not be precluded even if no money had been paid on account. But the legal presumption arising from lapse of time is alone sufficient to defeat a recovery if no promise to pay or no payment on account had been made within twenty years. And where this much is developed in the affidavit of defense it is enough to carry the case to the jury. It does not by any means follow that if there has been no payment on account made within that time, that the plaintiff is for that reason alone entitled to a final judgment in his favor for the whole amount of his claim. The extraordinary laches exhibited by a delay of twenty years, during which no demand has been made for either any of the principal or any of the interest of a money obligation, can only be accounted for, where there is no explanation of the delay, on the theory that the obligee has received satisfaction for his debt in some way, or that there is some good legal or equitable reason why he should not recover. It would not be right to exclude the defendant from all opportunity to set up any of the numerous defenses which may be made against the plaintiff's claim when they are not rebutted by anything contained in his affidavit of defense. We are therefore of opinion that it was error to enter an absolute judgment for the whole amount of this very stale and questionable claim, simply because the defendant says he never paid anything on account of it. Such an assertion in an affidavit of defense, instead of being consistent ⁴⁶⁸ with the idea that he owes the whole of the debt, is only consistent with the idea that he does not owe any of it. In *Reed v. Reed*, 46 Pa. St. 239, Strong, J., delivering the opinion said, "Within twenty years the law presumes the debt has remained unpaid, and throws the burden of proving payment upon the debtor. After twenty years the creditor is bound to show by something more than his bond that the debt has not been paid, and this he may do because the presumption raises only a *prima facie* case against him."

We are of opinion that the statement made in the affidavit of defense is to be regarded as the negation of any obligation arising from a payment on account, and not as a declaration that the whole amount of the bond was due because it had not been paid, and therefore the case should go to a jury, where all the facts can be heard and the cause intelligently decided on its merits.

Judgment reversed and procedendo awarded.

PAYMENT—JUDGMENT—PRESUMPTION FROM LAPSE OF TIME.—All debts excepted out of the statute of limitations, unclaimed and unrecognized for twenty years, are, in the absence of sufficient explanatory evidence, presumed to have been paid: Note to Courtney v. Standenmeyer, 56 Kan. 392; 54 Am. St. Rep. 594. This presumption is an artificial and arbitrary rule of law, and, unlike the statute of limitations, is not a bar to an action on the original contract. The presumption, however, is a disputable one, and may be overcome by other facts and circumstances; but the burden of proof is on the creditor to show that payment of the debt has not been made: Note to Jameson v. Rixey, 64 Am. St. Rep. 732. As a general rule, the unexplained lapse of twenty years from the time that a judgment is rendered raises a legal presumption that it has been paid: See monographic note to Alston v. Hawkins, 18 Am. St. Rep. 683, on presumption of payment from the lapse of time.

BEARDSLEE v. COLUMBIA TOWNSHIP.

[188 PENNSYLVANIA STATE, 496.]

TRIAL—USE OF PHOTOGRAPHS—ORDER OF PROOF—CURING OF ERROR.—The order of testimony rests largely in the discretion of the trial judge, and initial errors may be cured by subsequent proof. Hence, although witnesses are erroneously permitted to indicate to a jury, upon a photograph, the exact place of an accident, without any preliminary proof that the photograph represents the place, the error is cured by the production of such proof before the photograph is formally admitted in evidence.

EVIDENCE — PHOTOGRAPHS — RULE — PRELIMINARY PROOF.—Photographs are competent evidence, and, when properly taken, are judicially recognized as of a high order of accuracy; but in careless, or inexperienced, or interested, hands they are capable of very serious misrepresentation of the original. Their use on a trial should not, therefore, be permitted until there has been preliminary proof of care and accuracy in the taking of them, and of their relevancy to the issue before the jury.

EVIDENCE—PHOTOGRAPHS—CHANGE IN LOCALITY.—In an action to recover damages of a township for personal injuries alleged to have been caused by a dangerous and unguarded place in a road, a photograph of such place is admissible in evidence, although not taken until after changes were made in the condition of the road between the time of the accident and the time of photographing, if proof is made of the nature of such changes.

WITNESSES—ACCIDENT—OPINIONS OF NONEXPERTS AS EVIDENCE OF CONTRIBUTORY NEGLIGENCE.—It is error, in an action to recover damages of a township for personal injuries alleged to have been caused by a dangerous and unguarded place in a road, to admit the opinion of a nonexpert witness as evidence of contributory negligence, such opinion being founded upon a hypothetical question containing facts concerning the horses, harness, wagon, and the load.

APPEAL—EXCEPTIONS TO ACTS OF JUDGE IN PRESENCE OF THE JURY—CONSTRUCTION OF STATUTE.—A statute authorizing exceptions to rulings, orders, and remarks of the judge made in the hearing of the jury at any stage of the proceedings, is a provision of very doubtful wisdom, and, under it, the ordi-

nary rule that the error assigned must appear to have been injurious to the appellant will be most rigidly applied.

APPEAL—EXCEPTIONS—REMARKS OF JUDGE—WHAT DOES NOT JUSTIFY A REVERSAL.—If the defendant, in an accident case, obtains a verdict, a judgment thereon will not be reversed because of remarks made by the trial judge in sustaining the plaintiff's objection to an offer made by the defendant, where his meaning is not entirely clear, and his remarks are susceptible of another interpretation than that put upon them by the plaintiff, especially where he sustained the plaintiff's objection, as the jury, in that event, could hardly have drawn any inference from the occurrence adverse to the plaintiff.

Trespass brought by Charles Beardslee and his wife, Martha Beardslee, to recover damages for personal injuries occurring to Martha Beardslee while riding in a wagon with her son, and caused by the wagon going over an alleged dangerous and unguarded place in a road. There was a verdict and judgment for the defendant, and the plaintiffs appealed.

D. A. Overton and E. B. Parsons, for the appellants.

William Maxwell and A. C. Fanning, for the appellee.

⁵⁰¹ MITCHELL, J. The first three assignments of error are to the use of a photograph and permitting witnesses to indicate upon it to the jury the exact place of the accident, without any preliminary proof that it represented the place at all, and especially in view of the admission that it was not taken until after changes had been made in the road. This was error at the time. But it appears ⁵⁰² that before the photograph was formally admitted in evidence, proof had been supplied of the identity of the locality, the general faithfulness of the representation, and the nature of the changes in the condition of the road between the time of the accident and the time of photographing. It becomes, therefore, a mere question of the order of testimony, which is largely within the discretion of the trial judge, and the initial error was cured so that it did appellants no harm.

Photographs are competent evidence, and, when properly taken, are judicially recognized as of a high order of accuracy: See *Udderzook v. Commonwealth*, 76 Pa. St. 340. But in careless, or inexperienced, or interested hands they are capable of very serious misrepresentation of the original. Before they are permitted to be used in the trial, therefore, there should always be preliminary proof of care and accuracy in the taking of them, and of their relevancy to the issue before the jury.

The further objection in the present case, that the photograph was not taken until after the township defendant had made

changes in the road at the place of the accident, is not without difficulty. In photographs, as in plans, maps, or other drawings used as evidence, there ought to be substantial identity in the person, place, or thing photographed and that which the jury are to consider in the case. But photographs of the scene of an accident taken at or near to the time are not always obtainable, and, bearing in mind the object sought, the assisting of the jury by knowledge of the locality to judge the conduct of the parties with reference to the issue raised, the only practicable rule would seem to be that the changes must not be such as to destroy the substantial identity, and that the changes, whatever they are, must be carefully pointed out and brought to the jury's attention. This would have to be the course pursued if a view were allowed to the jury at the trial, and no other appears practicable in regard to plans, photographs, or other substitutes for a view. With these safeguards the subject must be left largely to the discretion of the trial judge. In the present case, we cannot say that there was any error in regard to the photograph of which the appellants are now entitled to complain.

The fourth to ninth assignments inclusive we are obliged to sustain. A hypothetical case as to the horses, the harness, the wagon, and the load, as defendant viewed the evidence in regard ~~508~~ to the accident, was asked of a number of witnesses, and their opinions were admitted as evidence of contributory negligence on part of the plaintiff. They were not experts, several of them expressly disclaiming such character, and, so far as appears, none of them knew any more about the subject than the average jurymen. There is no view on which the admissibility of such opinions can be sustained. The subject was carefully considered and the rule intended to be finally settled in *Graham v. Pennsylvania Co.*, 139 Pa. St. 149; *See Dooner v. Delaware etc. Canal Co.*, 164 Pa. St. 17; *Cookson v. Pittsburg etc. Ry. Co.*, 179 Pa. St. 184; *Auberle v. McKeesport*, 179 Pa. St. 321. For this error in a generally well tried case we are obliged to reverse the judgment.

The assignments relative to the duty of the plaintiffs to have avoided the road where the accident occurred by taking another one need not be considered in detail. The jury were told in answer to one of defendant's points, "that if the point of the accident was so dangerous that an ordinarily prudent person would not have attempted to pass it, but would have taken another road under the circumstances, then the plaintiffs cannot recover in this case, and your verdict should be for the defendant." Ap-

pellants complain that there was no sufficient evidence that the other road was any safer, but, as the case must go back for another trial, it would be of no use to discuss this point any further.

The last assignment is to some remarks made by the judge in sustaining appellants' objection to an offer by the defendant. As the ruling of the court was in their favor, appellants would, of course, have no exception at common law, and their standing to object here must rest entirely on the act of May 24, 1887, paragraph 3 (Pub. Laws, 199), which authorizes exceptions to rulings, orders, and remarks of the judge made in the hearing of the jury at any stage of the proceedings. This is a provision of very doubtful wisdom, and under it the ordinary rule that the error assigned must appear to have been injurious to the appellant will be most rigidly applied. The remarks of the judge here complained of are susceptible of an interpretation that would indicate that he had in mind the earlier rather than the later cases on the subject of the negligence of a driver as imputable to a voluntary passenger. But it is not entirely clear that such was ⁵⁰⁴ his meaning, and, as he sustained appellants' objection, the jury could hardly have drawn any inference adverse to the appellants from the occurrence.

Judgment reversed, and venire de novo awarded.

TRIAL.—THE ORDER OF ADMITTING EVIDENCE is discretionary with the court: *Ponca v. Crawford*, 23 Neb. 662; 8 Am. St. Rep. 144; *Kaufman v. Farley Mfg. Co.*, 78 Iowa, 679; 16 Am. St. Rep. 462; *Kansas City v. Bradbury*, 45 Kan. 381; 23 Am. St. Rep. 731; and its rulings will not be interfered with, unless they clearly establish an abuse of its discretion: *Peterson v. Wood Mowing etc. Co.*, 97 Iowa, 148; 59 Am. St. Rep. 399. A court has discretionary power to admit testimony out of its order: *Stephens v. Union Assur. Soc.*, 67 Am. St. Rep. 595.

PHOTOGRAPHS AS EVIDENCE—CHANGE.—Photographic sketches of the scene of an accident are admissible in evidence as a correct representation of the locality and its surroundings, and any change in the appearance of the locality, arising from the views having been taken at a different season of the year, is open to explanation: *Dyson v. New York etc. R. R. Co.*, 57 Conn. 9; 14 Am. St. Rep. 82. They should be verified by the photographer as being a correct representation of the locality and scene: *Kansas City etc. R. R. Co. v. Smith*, 90 Ala. 25; 24 Am. St. Rep. 753; but if there is no evidence of their correctness, they are admissible for what they are "worth": *Louisville etc. R. R. Co. v. Hall*, 91 Ala. 112; 24 Am. St. Rep. 863. It is not error to admit evidence of their correct representation of the locality where an accident occurred: *Miller v. Louisville etc. Ry. Co.*, 128 Ind. 97; 25 Am. St. Rep. 416.

WITNESSES—NEGLIGENCE.—OPINIONS ARE NOT ADMISSIBLE IN EVIDENCE where the facts upon which they are founded may be ascertained, and made intelligible to the court and jury: *Kelley v. Detroit etc. R. R. Co.*, 20 Am. St. Rep. 518; *Reid v. Ladue*, 66 Mich. 22; 11 Am. St. Rep. 462. and note. Compare note to *Enos v. St. Paul etc. Ins. Co.*, 46 Am. St. Rep. 814. Questions of

negligence should be determined from facts, and not from opinions: *Inaley v. Shire*, 54 Kan. 793; 45 Am. St. Rep. 308; *Kelley v. Detroit etc. R. R. Co.*, 80 Mich. 237; 20 Am. St. Rep. 514. A hypothetical state of facts is not an allowable basis for the opinion of a non-expert witness: *Note to Alabama etc. R. R. Co. v. Frazier*, 80 Am. St. Rep. 32.

APPEAL—REVERSAL.—REMARKS OF THE COURT, during the trial of a cause, are no ground for reversal, if the appellant was not prejudiced or injured thereby: *People v. Baker*, 100 Cal. 188; 33 Am. St. Rep. 276.

SMITH v. BLACHLEY.

[188 PENNSYLVANIA STATE, 550.]

AGENCY—ILLEGAL TRANSACTION—ACCOUNTABILITY OF AGENT FOR MONEYS RECEIVED FROM PRINCIPAL.—While the courts will not enforce an illegal contract, yet if the agent of another has, in the prosecution of an illegal enterprise for his principal, received money or other property belonging to the principal, he is bound to turn it over to him, and cannot shield himself from liability therefor upon the ground of the illegality of the original transaction.

AGENCY—FRAUD—ILLEGAL TRANSACTION—AGENT'S ACCOUNTABILITY FOR EXTORTION FROM PRINCIPAL.—An agent cannot set up a pretended illegal transaction to retain money extorted from his principal by the grossest falsehood to further a mythical illegal transaction. The money still belongs to the principal, and he can rightfully demand it as soon as he discovers the fraudulent conduct of his agent.

TO MAKE A TRANSACTION ILLEGAL, there must be an illegal intention, accompanied by an act which is criminal or prohibited by law, for the law takes no cognizance of an intent existing only in the mind, nor does it impose as a penalty for such intent immunity to him who has plundered one guilty of it.

IN CASES OF FRAUD, THE STATUTE OF LIMITATIONS does not begin to run until the fraud is discovered, particularly where falsehood, producing fear, has been resorted to for the purpose of preventing inquiry.

AGENCY—PHYSICIAN AS AGENT AND BLACKMAILER—LIABILITY TO PRINCIPAL—STATUTE OF LIMITATIONS.—If two families, one having a son, and the other a daughter, are attended by a physician, who falsely represents that an illness of the girl was the result of a criminal abortion; that the father of each family is about to be prosecuted for the crime by a humane society; and that the matter can be hushed up with money; the physician cannot, after thus putting himself in the position of a mere blackmailer, and after constantly urging the parents to keep quiet about the matter, retain money which he has received from them for that purpose, in consequence of his representations, but is bound to turn it over to those who paid it to him, and the statute of limitations does not begin to run until the fraud is discovered.

Assumpsit, by Beabout's executors, Smith and Burroughs, to recover money had and received. The court below, upon the conclusion of the plaintiff's evidence, entered a compulsory nonsuit which it refused to take off.

Franklin P. Iams, C. C. Brock, J. W. Ray, and H. B. Artell, for the appellants.

E. G. Ferguson and J. S. Ferguson, for the appellee.

⁵⁵² DEAN, J. Blachley, the defendant, a physician, practiced his profession in the years 1888 and 1889 in Morris township, Washington county. In the adjoining township lived Joseph Beabout, farmer, his wife and daughter Alice, the latter a single woman; also, John McCullough, farmer, his wife and son. Blachley was at times called in as a physician to both families where they lived in the country, about three miles apart, while the physician's office was about five miles from both. In February, 1887, Blachley was called in to attend Alice, the daughter of Beabout, in an illness which he said was the result of a criminal abortion. About February or March, 1888, after she was restored to health, he called upon McCullough, and soon after upon Beabout, and represented to them that the Humane Society of Pittsburg was about to institute a criminal prosecution against the members of both families for procuring the abortion, and suggested to them that he was in conference with the agent of the society, and that the matter might through him be hushed up by their paying over to him the sum of \$3,000, which he would give to the agent to stop further inquiries. Several interviews were subsequently had, in which the representations were repeated. He dwelt largely on the disgrace which such a prosecution would bring on both families; further offered to assist them in obtaining the money through a bank in the town of Washington. On May 15th, following, Beabout and McCullough went to Washington, met Blachley, got the money from the bank and paid it over to him. He told them the agent of the society had not yet arrived, but when he came, he, Blachley, would pay the money to him and take his receipts. Afterward, he advised them frequently to keep quiet concerning the matter; to tell no one; not to employ counsel or advise with others, or trouble might result. Deterred by ⁵⁵³ this advice and caution, they made no inquiries until a short time before this suit was brought, November 16, 1895. Then McCullough (Beabout having died in the mean time) discovered that no prosecution had been contemplated by the Humane Society, and, so far as could be discovered, it had neither knowledge of nor authority to institute such prosecution; further, that Blachley had pocketed the money and still retained it; that the whole story narrated by him from beginning to end was a tissue of false-

hoods concocted to extort money from them. The plaintiff offered ample evidence tending to establish these facts. As the court below entered a compulsory nonsuit, we must consider them, for the purpose of review, as fully proved.

The defendant, in addition to non assumpsit, pleaded the statute of limitations. The court below sustained the latter plea, saying, "Under the circumstances their (the plaintiffs') right of action against Blachley accrued and the statute of limitations began to run as soon as the money was paid to him. They cannot be heard to say that he committed a fraud upon them by failing to consummate an arrangement which was in itself a fraud upon the administration of justice. The plaintiffs are the parties who, to maintain their action, are compelled to uncover and invoke the aid of the corrupt agreement. This being the case, they cannot profit by it, either directly, as the foundation of an action, or by using it to toll the statute."

Is this conclusion warranted by the facts? It is the policy of the law to leave parties to an illegal transaction where it finds them, by refusing relief to either party. Assuming, what is not proved, that the crime of abortion was committed, and that those who participated in procuring it were the six members of the two families, and that the parties on the one side to the composition of the crime were the heads of the two families, Beabout and McCullough, where is the other party? Blachley was not the prosecutor, and did not pretend to be. According to his own statement he was their physician, friend, and adviser; he urged them to stifle the prosecution by paying money to the Humane Society, the pretended prosecutor, the other party to the composition. He was the mere agent of the Beabouts and the McCulloughs. Assume then, as plaintiffs allege and defendant admits, that he was their agent to carry ⁵⁵⁴ the money to the society, and assume further, that he was lying all the time to them—that in fact there was no such prosecution—then the offense was impossible of commission for want of parties. This leaves Blachley in the position of a mere blackmailer who has extorted money from his patients, from those who confided in him, and whose friend he pretended to be, by falsehoods which operated on their fears; and leaves them in the position of having given money to their agent and supposed friend to be used by him in compounding a crime that they and their families might be saved from scandal. What is the policy of the law as to the relation thus assumed by Blachley, the agent, toward these plaintiffs, his principals? It is to exact from such agent the

most unflinching fidelity to his principals; it abhors any unfair dealing, treachery or overreaching. The same rule governs as between master and servant, client and counsel, physician and patient; the relation is one of trust and confidence; they do not deal at arm's length; the principal is in the power of the agent; he is helpless against wrong. May this confidant by falsehood entrap his principal into an illegal intent, get possession of his property or money, and then claim exemption from restitution by pleading that his principals intended an illegal act? We can conceive of nothing more destructive of morals in these relations than to hold such a rule applicable to the facts of the case before us. Such an application would be a license to agents and those occupying confidential relations to plunder their principals.

We have no authority in this state directly to the point one way or the other. Quite a number in other states and in England sustain the view we have taken. In *Evans v. Trenton*, 24 N. J. L. 764, Evans had been treasurer of the city; he sought to retain \$500 of the city's money in addition to his salary out of a fund realized from the issue of currency to raise funds for the city; the extra services were performed in this transaction, which was in violation of the banking laws of the state. When suit was brought against him, he set up the illegality of the transaction as a defense. The court held: "The mere agent to an illegal transaction cannot set up the illegality of the transaction in a suit by his principal to recover money that has been paid to such agent for his principal on account of ⁵⁵⁵ the illegal transaction. This defense can only be set up by a party to the illegal transaction." In *Baldwin v. Potter*, 46 Vt. 402, Baldwin employed Potter to make sales of candy by a scheme which was violative of the law prohibiting lotteries. In suit by the principal against the agent for the money so received, the agent pleaded the illegality of the transaction by which he obtained the money. It was held that if the suit had been between the plaintiff and the purchaser of the candies, the parties to the illegal contract, it could not have been maintained, and then the court says: "But the defendant (the agent) insists that inasmuch as the plaintiff could not have enforced the contract of sale as between himself and the purchaser, therefore, as the purchaser has performed the contract by paying the money to the plaintiff through me as their agent, I can now set up the illegality of the contract of sale to defeat the action brought to enforce a contract on my part to pay the money that I, as agent, received, over to my principal. In other words, because my principal did

not receive the money on a legal contract, I am at liberty to steal the money, appropriate it to my own use and set my principal at defiance. We think the law is well settled otherwise." In Wood on Master and Servant, section 202, this is the text: "While the courts will not enforce an illegal contract, yet if a servant or agent of another has, in the prosecution of an illegal enterprise for his master, received money or other property belonging to the master, he is bound to turn it over to him, and cannot shield himself from liability therefor upon the ground of the illegality of the original transaction."

There are numerous authorities to the same effect. If, then, the agent cannot successfully set up the unlawful contract to enable him to hold money received from another for his principal, much less can he set up a pretended illegal transaction to retain money extorted from his principals by the grossest falsehood to further the mythical illegal transaction. The money still belongs to the principal, and he can rightfully demand it as soon as he discovers the fraudulent conduct of his agent.

It is argued that even if no crime was actually committed by plaintiffs, yet there was an intent to commit one when they paid the money to Blachley, and hence even if their agent defrauded them they cannot recover it back. As we have noticed, the intended crime was an impossible one. When conduct susceptible ⁵⁹⁶ of two constructions is proved, the intent often determines its criminality; but an intent not carried out by an act, or which is impossible of execution by an act, is not punishable; the law takes no cognizance of an intent existing only in the mind; nor does it impose as a penalty for such intent immunity to him who has plundered one guilty of it. "The illegal intention must be accompanied by an act which is criminal or prohibited by law in order to make the transaction illegal": 1 Bishop's Criminal Law, sec. 204, et seq.

As to the plea of the statute of limitations, it will not screen defendant from liability if the suits were brought within six years of the discovery of the fraud. There was ample evidence, if believed by the jury, that defendant had by systematic falsehood and artifice, not only concealed the fraud, but for a long time had deterred his employers from inquiry. Under such circumstances the plea will not avail him.

The judgment is reversed and a procedendo awarded.

AGENCY—AGENT'S LIABILITY TO PRINCIPAL FOR MONEY RECEIVED ON ILLEGAL CONTRACT.—An agent who has received money growing out of an illegal contract may be compelled

to pay it over at the suit of his principal. The law implies a promise on the part of the agent to pay over to his principal money received for him as such agent, and the illegality of the contract by virtue of which the money was collected affords no defense: *Floyd v. Patterson*, 72 Tex. 202; 13 Am. St. Rep. 787; note to *Lemon v. Grosskopf*, 99 Am. Dec. 63, 64.

FRAUD—LIMITATIONS OF ACTIONS.—In cases of fraud, the bar of the statute of limitations begins to run only from the date of the discovery of the fraud: Note to *Castro v. Gell*, 52 Am. St. Rep. 87. Compare note to *McBride v. Burlington etc. Ry. Co.*, 59 Am. St. Rep. 338.

CASES
IN THE
SUPREME COURT
OF
SOUTH CAROLINA.

LATIMER v. TROWBRIDGE.

[52 SOUTH CAROLINA, 193.]

EVIDENCE, OTHERWISE INCOMPETENT, becomes competent when received without objection.

EVIDENCE.—PRESUMPTION OF PAYMENT arising from lapse of time can be rebutted only by such evidence as would be required to take a case out of the operation of the statute of limitations.

JUDGMENTS.—PRESUMPTION OF PAYMENT—LIMITATIONS.—The period of time during which a person is absent from the state must be deducted from the time required by the statute of limitations to bar an action on a judgment against him, and the same rule applies to the presumption of payment arising from lapse of time. Such absence may be proved by ordinary oral evidence.

J. A. McCullough, for the appellant.

Cothran, Wells & Ansel, for the appellee.

194 McIVER, C. J. This action was commenced on the 2d of June, 1896, for the purpose of recovering the amount due on a judgment which the plaintiff had obtained, in the court of common pleas for Greenville county, against defendant's intestate, on the 28th of September, 1871. The defense relied on was the statute of limitations and the presumption of payment arising from lapse of time. The plaintiff, after offering the record of the judgment in evidence, testified, without objection, that no part of the amount due on the judgment had ever been paid, unless it was paid to the sheriff, and then offered the deputy sheriff (the sheriff being sick at the time), who testified that, so far as he knew, and so far as the records of the sheriff's office showed, no part of the amount due on the judgment had ever been paid.

The plaintiff then offered the testimony of sundry persons residing in Kalamazoo, in the state of Michigan, to the effect that defendant's intestate moved to that state in 1870 or 1871; that he married there "in the seventies"; that his wife died in 1892, and that soon thereafter he moved back to this state. One of those witnesses, Flora Anderson Weaver, when asked where Mr. and Mrs. Trowbridge lived after they were married, and until the death of Mrs. Trowbridge, replied: "Part of the time in Michigan and part of the time in South Carolina. Their home was here [Kalamazoo, Michigan], but they spent some of their winters in the South." That witness also testified that while W. C. Trowbridge was a citizen of the state of Michigan, he was a registered voter therein for both state and municipal elections, having registered first on 5th of November, 1870, and again on the 22d of October, 1882—it being admitted on the trial that all qualified voters in Michigan were required to register every ten years. Charles H. Gleason, the city clerk of Kalamazoo ¹⁸⁹⁵ testified that W. C. Trowbridge was registered as a voter in that city on the 19th of February, 1884—the act of incorporation of said city having gone into effect in 1884; that he was again registered on the 2d of April, 1891; and that "he was marked as removed on the 1st of April, 1893."

At the close of plaintiff's testimony, counsel for defendant moved for a nonsuit, which was granted, because the court was "of opinion that plaintiff has not introduced evidence of the character required by section 311 of the code, and the decided cases, sufficient to rebut the presumption of payment of the judgment sued on arising from lapse of time." From this judgment plaintiff appeals, on the several grounds set out in the record, which need not be set out here, as the only real question in the case is, whether the plaintiff had introduced any evidence tending to rebut the presumption of payment arising from lapse of time.

The foregoing statement shows that the action in this case was not commenced until after the expiration of twenty years from the date of the original entry of the judgment upon which the plaintiff bases his action; and the circuit judge seems to have based his conclusion upon the fact that the plaintiff had introduced no evidence of the character of that which he thought was required by section 311 of the Code of Procedure to rebut the presumption of payment arising from the lapse of twenty years from the date of the original entry of the judgment. That sec-

tion reads as follows: "Nothing in the two preceding sections contained shall be construed to prevent an action upon a judgment after the lapse of twenty years from the date of the original entry thereof, and a recovery thereon, in case it shall be established, by competent and sufficient evidence, that the said judgment, or some part thereof, remains unsatisfied and due." The two preceding sections are 309, providing that final judgment shall be liens upon real estate for the period of ten years from the date of the entry thereof, and also how such judgments shall be revived; but also providing that a judgment shall not in any case constitute ¹⁹⁶ a lien on any property of the judgment debtor after the lapse of twenty years from the date of its original entry; further providing that a judgment shall not be a lien upon the homestead; and finally providing that this section shall not be so construed as to affect the lien of judgments entered prior to the 1st of March, 1870. The other section referred to (310) provides that executions may issue upon final judgments at any time within ten years from the date of the original entry thereof, or within ten years from the date of any revival of the same, and shall have active energy during said periods without renewal; provided, that the execution shall not issue or be renewed in any case after the lapse of twenty years from the date of the original entry of the judgment; besides other provisions as to executions, which do not seem pertinent to the present inquiry. It would seem, therefore, that the object of section 311 of the code was to repel any inference that might possibly be drawn from the provisions of 309 and 310 that, after the lapse of twenty years from the date of the entry of a judgment, no proceeding of any kind could be instituted to enforce the payment of any amount that might still remain "unsatisfied and due," by expressly authorizing an action on such judgment and a recovery thereon, if "it shall be established, by competent and sufficient evidence, that said judgment, or some part thereof, remains unsatisfied and due." But the section does not prescribe what shall be either "competent" or "sufficient" evidence, and, therefore, that must be determined by the general principles of law, under which the competency of evidence is determined by the court and its sufficiency by the jury. The question which we are called upon to determine, arising under a motion for nonsuit, since neither the circuit court nor this court can consider the sufficiency of the evidence, must be determined by us alone upon the question of competency. The general rule undoubtedly is, that testimony, which would otherwise be incompetent, becomes

competent when it is received without objection: *Burris v. 197 Whitner*, 3 S. C. 510, which has been followed in a number of subsequent cases. The rule applies even in a criminal case: *State v. Hicks*, 20 S. C. 341. In this case, it appears that the plaintiff and the deputy sheriff were both permitted, without objection, to testify that no part of the amount due on the judgment had ever been paid; and, under the rule above referred to, this testimony, even if otherwise incompetent, became competent, and its sufficiency should have been left to the jury.

But it is contended by counsel for respondent that the well-settled rule is, that the presumption of payment arising from the lapse of time can only be rebutted by such evidence as would be required to take a case out of the operation of the statute of limitations; and the cases of *Boyce v. Lake*, 17 S. C. 481, 43 Am. Rep. 618, and *Sartor v. Beaty*, 25 S. C. 293, are cited to sustain, and do sustain, this view. This doctrine, as will be seen by reading those cases, and others of like tenor, is drawn from the analogy furnished by the provisions of the statute of limitations; and, accordingly, counsel for respondent, following that analogy, relies upon section 131 of the Code of Procedure, which reads as follows: "No acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of this title, unless the same be contained in some writing signed by the party to be charged thereby; but payment of any part of principal or interest is equivalent to a promise in writing." Now the title in which this section is found relates entirely to the statute of limitations, and cannot, therefore, be applied, except by analogy, to the doctrine of presumption of payment from lapse of time. But if we follow the analogy furnished by the provisions of the statute of limitations, we must follow such analogy throughout; for, certainly, it will not be contended that the court should follow this analogy so far as it may operate to the benefit of the defendant, and ignore it when it operates against his interest. There is another provision found in this same title, embodied in section ¹⁹⁸ 121, which materially affects the question we are considering, which reads as follows: "If, when the cause of action shall accrue against any person, he shall be out of the state, such action may be commenced within the terms herein respectively limited, after the return of such person into this state; and if, after such cause of action shall have accrued, such person shall depart from and reside out of this state, or remain continuously absent therefrom for the space of one year or more, the time of his absence shall not be

deemed or taken as any part of the time limited for the commencement of such action." In the comparatively recent case of *Burrows v. French*, 34 S. C. 165, 27 Am. St. Rep. 811, this court had occasion to construe the section just quoted, and in that case, at page 196, after considering the authorities upon the point there involved, used the following language: "This, too, seems to be in conformity with the evident intention of the legislature, for it is manifest that the purpose was to declare the limitations of time within which the doors of our court should be open for the enforcement of the several causes of action mentioned in the statute; and as the doors of the court are, practically, not open for that purpose until the person to be charged comes within the jurisdiction, provision has been made that the time of such limitation shall not commence to run until the courts are practically open for the enforcement of a given cause of action against the particular person sought to be charged thereby; and the statute even goes further, and provides, by the second clause of section 121 of the code, that: 'If, after such cause of action shall have accrued, such person shall depart from and reside out of this state, or remain continuously absent therefrom for the space of one year or more, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action.' This shows that the legislature intended that a creditor should have the full period of six years in a case like this [twenty years in a case like the one now under consideration], while his debtor was within the reach of the process of the court, ¹⁹⁰ to bring his action, except where his temporary absence was for a period of less than one year." Now, as there certainly was some testimony tending to show that defendant's intestate, the judgment debtor, was "out of the state" when the judgment was recovered against him, inasmuch as such judgment was entered on the 28th of September, 1871, and as the testimony not only tends to show that he became a resident of Kalamazoo, in the state of Michigan, in 1870 or 1871, but also that he was first registered there as a voter on the 5th of November, 1870, and was again registered as a voter on the 22d of October, 1882, again on the 19th of February, 1884, and again on the 2d of April, 1891, and was finally marked as removed on the 1st of April, 1893, it is very clear that there was some evidence that defendant's intestate was absent from the state from the time the judgment was recovered until some time in 1892, when his wife died, soon after which he returned to this state, as one of the witnesses testified. So that

without entering upon the somewhat mooted question as to when a cause of action on a judgment accrues, as may be seen by reference to the cases of *Lee v. Giles*, 1 Bail. 449; 21 Am. Dec. 476; *Pinckney v. Singleton*, 2 Hill (S. C.) 346; *Norwood v. Manning*, 2 Nott. & McC. 395; *Vandiver v. Hammett*, 4 Rich. 509; *Shooter v. McDuffie*, 5 Rich. 61; *Clark v. Conner*, 2 Strob. 346; *Parnell v. James*, 6 Rich. 370; *Ligon v. McNeil*, 6 Rich. 377; *Copeland v. Todd*, 30 S. C. 419; and assuming for the purposes of this case only that the cause of action accrues so soon as the judgment is entered, it is quite clear that there was some evidence tending to show that defendant's intestate was absent from the state when the cause of action accrued, and that question should, therefore, have been left to the jury; for if that had been found to be the fact, then the plaintiff would have been protected from defendant's plea of the statute of limitations, under the provisions of section 121 of the code, and would also have been protected from the plea of payment by lapse of time. If the analogy of the statute of limitations is to be followed so as to bring the ²⁰⁰ case within the operation of section 131, it must also be followed so as to bring the case within the operation of section 121.

In the oral argument before this court, counsel for respondent referred to the case of *Garrett v. Weinberg*, 48 S. C. 28, but we are unable to see what application that case has to this. There it was held, and very properly held, that, under the well-settled rule of property, the minority of one of several tenants in common would protect the rights of the adult tenants against the plea of the statute of limitations resting upon adverse possession, but would not protect the rights of the adult tenants in common against the presumption of a deed from lapse of time; and Mr. Justice Gary, in delivering the opinion of the court, refers to the case of *Hill v. Sanders*, 4 Rich. 521, 55 Am. Dec. 696, as showing why the rule does not apply to the presumption of a deed. The reason of the rule is based upon and grows out of one of the peculiar incidents of an estate of tenancy in common by which tenant is seised per my et pour tout; and, therefore, if adverse possession cannot be pleaded against any one of the tenants in common by reason of his minority, it cannot be pleaded against any of the others; for, if there can be no adverse possession against one, there can be none against any of the tenants in common: See *Thompson v. Gaillard*, 3 Rich. 422, 423; 45 Am. Dec. 778. But this manifestly does not apply to the presumption of a deed; and hence the distinction so properly recognized by Mr.

Justice Gary, in *Garrett v. Weinberg*, 48 S. C. 28. We are unable, therefore, to see what application that case has to this.

Counsel for respondent also relies upon the provision of the act of 1879, now incorporated in the Revised Statutes as section 1961, as construed in *Henry v. Henry*, 31 S. C. 1; but that provision has no application to this case, for two reasons: 1. Because it related solely to the lien of judgment and mortgages, and there is no question here as to the lien of the judgment—in fact, so far as appears, it never had any lien; for, under the law as it stood at the time this judgment was obtained—in 1871—judgments were not liens, ²⁰¹ and there is nothing to show that any steps were taken to make it a lien under the subsequent act of 1873; 2. But the more conclusive reason is, that it was distinctly held, in *Henry v. Henry*, 31 S. C. 1, that the act of 1879 had no application to judgments recovered after the adoption of the code; and this judgment was recovered since that time. It seems to us, therefore, that, in any view of the case, the circuit judge erred in granting the motion for a nonsuit, as there was some evidence to rebut the plea of the statute of limitations, as well as the plea of payment, based upon the presumption of payment arising from lapse of time, upon which the case should have been left to the jury.

The judgment of this court is, that the judgment of the circuit court be, and the same is hereby, reversed, and that the case be remanded to that court for a new trial.

EVIDENCE—INCOMPETENCY OF—HOW WAIVED.—An objection to evidence as incompetent is waived unless made when the evidence is offered: *Walt v. Maxwell*, 5 Pick. 217; 16 Am. Dec. 391; note to *Winters v. Winters*, 63 Am. St. Rep. 433.

PAYMENT—PRESUMPTION OF—WHEN ARISES AND CHARACTER OF.—All debts excepted out of the statute of limitations, unclaimed and unrecognized for twenty years, are, in the absence of sufficient explanatory evidence, presumed to have been paid: *Gregory v. Commonwealth*, 121 Pa. St. 611; 6 Am. St. Rep. 804. The presumption, however, is a disputable one: Note to *Jameson v. Rixey*, 64 Am. St. Rep. 732; and may be rebutted by circumstances explaining the delay as by showing that the plaintiff, being an alien, was prevented from suing by the existence of war: *Balley v. Jackson*, 16 Johns. 210; 8 Am. Dec. 309. See monographic note to *Alston v. Hawkins*, 18 Am. St. Rep. 879, on the presumption of payment from the lapse of time.

LOAN AND EXCHANGE BANK v. PETERKIN.

[82 SOUTH CAROLINA, 236.]

MORTGAGES—FORECLOSURE—PARAMOUNT TITLE.—If a defendant in a foreclosure suit raises the question of paramount title in himself, the complaint should not be dismissed as to him, and he is entitled to have the issue of title tried by a jury.

MORTGAGES—FORECLOSURE PARAMOUNT—TITLE—BURDEN OF PROOF.—If a defendant in a foreclosure suit raises the issue of paramount title in himself by denying the title of the mortgagor, the plaintiff must be the actor and has the burden to prove title in the mortgagor.

F. H. Weston and Abney & Thomas, for the appellant.

A. J. Green, for the appellee.

²³⁶ **JONES, J.** The complaint in this case is for foreclosure of a mortgage, recorded August 16, 1892, executed July 30, 1892, by defendant, Peterkin, to plaintiff on a tract of five thousand acres in the Congaree river swamp, in Richland county. Ross S. McKenzie was made a party defendant, under allegation that he "had, or claimed to have, some interest in or lien upon the mortgaged premises . . . that arose subsequent to the lien of the plaintiff's mortgage." McKenzie, in his original answer, set up: 1. A general denial; 2. Title in himself to six hundred and twenty-seven acres of said tract, under ²³⁷ deed of Sheriff Cathcart, dated November 4, 1895; 3. That neither plaintiff, as mortgagee, nor Peterkin, as mortgagor, has any right, title, or interest in the said six hundred and twenty-seven acres; and by amended answer, pursuant to order of the court, he alleged further: 4. That he is in possession of the six hundred and twenty-seven acres, and claims title in fee thereto; "that his title and possession to said six hundred and twenty-seven acres is derived from different and independent sources than the defendant, J. A. Peterkin; that long prior to the date of said mortgage, this defendant, his ancestors, predecessors, and grantors, were seized and possessed of said tract of land, claiming and holding the same adversely to the whole world," et cetera; 5. That the court is without jurisdiction to order an issue to be tried upon the title between the parties; and, for a second defense, pleads the statute of limitations. On the call of the case, on motion to refer issues of fact to a jury, Judge Benet passed the following order (omitting recitals: "Ordered, that the following issue be submitted to a jury: Has the defendant, R. S. McKenzie, title to the six hundred and twenty-seven acres of land described in paragraph 2 of

his answer? That in the trial of this issue, the said R. S. McKenzie shall be the actor.

We are asked by appellant, McKenzie, to reverse this order, on exceptions raising the following questions: 1. Should the complaint have been dismissed as to McKenzie? 2. Was it error to order an issue? 3. Was it error to require McKenzie to be actor in such issue? 4. Was the issue ordered in proper form?

As to the first question, the case of *Sale v. Meggett*, 25 S. C. 72, settles that when a defendant in a cause of equity raises the question of paramount title in himself, which would defeat the plaintiff's recovery as to him, the complaint should not be dismissed as to him, but that he is entitled to have the issue of title tried by a jury.

As to the second question. It is now neither necessary nor proper to frame an issue out of chancery to be submitted to a jury on an issue of title. The proper practice, ²³⁸ when an issue of title to land is raised in the answer, whether in proceedings to partition land or to foreclose a mortgage thereon, is to order the case to be transferred to the docket for trial of issues of fact by the jury, and the jury must try the question on the issues of fact raised in the pleadings: *McGee v. Hall*, 23 S. C. 392; *Reams v. Spann*, 28 S. C. 533; *Carrigan v. Evans*, 31 S. C. 265; *Capell v. Moses*, 36 S. C. 561. In the last-mentioned case, Mr. Justice Pope, speaking for the court, said most explicitly: "Unless a jury trial is waived, actions that involve such issues must be placed on calendar 1 and submitted to the jury; and no interference with such trials, such as framing issues, must be had." This was spoken with reference to an action to partition land, but it applies as well to actions of foreclosure. It applies to any cause in equity wherein is raised the issue of title to land, which, if successful, would defeat plaintiff's recovery as against the party setting up title. It was, therefore, error for the judge to frame an issue of title.

As to the third question, if it was error to prove an issue at all, of course it was error to make the defendant, McKenzie, the actor in such issue, as this is a mere incident to the principal thing, the ordering of the issue. It may not be out of place to say that plaintiffs, having brought defendant into court under allegation that he claims an interest in the premises sought to be foreclosed, and the defendant having set up a defense of title paramount and possession of the land prior to the date of plaintiff's mortgage, plaintiff must be the actor in the issue of title. It would be unjust to a defendant in possession of land to compel

him to be the actor in an issue as to his title: *Carrigan v. Evans*, 31 S. C. 265. Besides, plaintiff, in order to become entitled to judgment of foreclosure, as against the defendant, McKenzie, claiming possession and title paramount to that of plaintiff's mortgagor, must show that the lien of his mortgage is paramount, and to this end it must show that Peterkin, at the time of the execution of the mortgage, had such title to the land as would enable ²³⁹ him to give a lien thereon superior to the alleged title and possession of defendant. The case of *Daniel v. Hester*, 24 S. C. 303, does not conflict with this view. In that case, the defendants did not deny the allegations of the complaint, that they set up some interest in the land "accruing since the execution of the mortgage"; in this case, the defendant does deny a similar allegation by denying every allegation not afterward admitted in the answer, and by not afterward admitting it. In that case the suit was to foreclose a mortgage executed September, 1868, suit brought in 1883; hence the allegation in defendant's answer in that case, that they had been in possession of the land for more than ten years, might have been true, and still their title or possession be subordinate to that of the mortgagor; and in that case the court is careful to say, "Their [defendant's] assertion of title is carefully limited to the present, that they are now seised, et cetera. This does not necessarily exclude the idea that Hester and his wife had title when they executed the mortgage, et cetera." In this case the allegation of the answer is, "that his (defendant's) title and possession to the said six hundred and twenty-seven acres, is derived from different and independent sources than the defendant, J. A. Peterkin, the mortgagor mentioned in the complaint, and that long prior to the date of said mortgage, this defendant, his ancestors, predecessors, and grantors, were seised and possessed of said tract of land, claiming and holding the same adversely to the whole world, et cetera." The case of *Daniel v. Hester*, 24 S. C. 303, correctly holds that while an allegation of title in the mortgagor is not required in an action to foreclose, yet such allegation is involved in the other usual allegations, and the case was treated as if such allegation were in. The answer in that case, because it did not deny the allegation in the complaint that the defendants were claiming some interest accruing subsequent to the mortgage, and because it merely asserted a present title in defendants, was treated as new matter, the burden of establishing which was placed upon the party setting it up. In this case, the pleadings are quite different, ²⁴⁰ and thereunder plaintiff must prove title

in the mortgagor in order to oust a party in possession claiming title paramount.

The question as to the form of the issue as framed, becomes immaterial under the views already announced.

The order appealed from is reversed.

MR. CHIEF JUSTICE McIVER dissented, and said: "I am not prepared to assent to the conclusion that the plaintiff should be the actor upon the trial of the issue presented by the affirmative defense set up by the appellant in his answer. In none of the cases cited is the question as to who should be the actor considered or decided, except the cases of *Reams v. Spann*, 28 S. C. 530, and *Canigan v. Evans*, 31 S. C. 262, where it was held that the plaintiffs should be the actors, and, as I think very properly so held, under the pleadings in those cases. . . . But the cases referred to do not show that where a plaintiff, by his pleadings, presents no issue of title, and such issue arises out of an affirmative defense set up in the answer, the plaintiff must become the actor, and assume the burden of proof. On the contrary, it seems to me, that in such a state of the pleadings the rule is, that where a defendant, in his answer, sets up an affirmative defense, the burden of proof is always upon him who pleads such defense, in accordance with the well-settled doctrine that he who affirms must prove. This view is sustained by the case of *Daniel v. Hester*, 24 S. C. 301. . . . While, therefore, I concur in the conclusion that there was no error on the part of the circuit judge in refusing to dismiss the complaint, but that there was error in framing issues out of chancery to try the question of title set up by appellant's answer, I cannot concur in the conclusion that, when such issue is to be tried, the plaintiff should be the actor. The true view of the case, in my judgment, is that the action, as originally presented, was one of purely equitable cognizance, to which appellant set up a legal defense, as he had a right to do under the code, and that the two issues should be tried under the pleadings—the one on the law side of the court and the other on the equity side of the court as indicated in *Adickes v. Lowry*, 12 S. C. 108, and *McGee v. Hall*, 23 S. C. 392. On the trial of the legal issue, which should be tried by a jury unless that mode of trial is waived, set up by appellant's affirmative defense, the appellant should be the actor, but in the trial of the equitable issue, the plaintiff should be the actor."

MORTGAGES—FORECLOSURE—LITIGATION OF PARAMOUNT TITLE.—The weight of American authority affirms that in a proceeding to foreclose a mortgage, persons claiming the mortgaged premises by title adverse and paramount to that of the mortgagor are neither necessary nor proper parties defendant: See monographic note to *Provident Loan etc. Co. v. Marks*, ante, p. 355, on the litigation of paramount titles in a suit to foreclose a mortgage.

HUNTER v. PELHAM MILLS.

[52 SOUTH CAROLINA, 272.]

TRIAL.—NONSUIT cannot be granted when there is any competent or legal evidence supporting the cause of action.

NEGLIGENCE IS A MIXED QUESTION OF LAW AND FACT, and must be submitted to the jury under proper instructions.

WATERS AND WATERCOURSES—DAMS—RELEASE OF WATER IN TIME OF FLOOD.—The owner of a dam has the right to raise the floodgates therein only for the protection of his own property from immediate and impending danger, when such necessity is caused by a sudden rise in the stream which could not have been anticipated by ordinary prudence and foresight.

NEGLIGENCE—INSTRUCTIONS.—A request to charge the jury that negligence is the gist of the action, and that they must be satisfied that the damage complained of was caused by defendant's negligence before they can find for plaintiff, is properly refused, for the reason that the court is prohibited from charging upon the facts, and negligence is a mixed question of law and fact.

PLEADING—NEGLIGENCE—WILLFUL.—A complaint alleging that "defendant, without having proper regard for the rights of this plaintiff, did open its floodgates" in effect charges that defendant acted willfully.

WATERS AND WATERCOURSES—DAMS.—A dam must be so constructed as to be capable of receiving, if necessary, the water that would originate by such pressure and such rains as would be reasonably expected by a man of ordinary prudence and foresight.

Cothran, Wells, Ansel & Cothran, for the appellant.

J. C. Hunt, C. F. Dill, and Shuman & Dean, for the appellee.

²⁸⁸ **POPE, J.** This action was commenced in the court of common pleas for Greenville county, in this state, on the eighth day of October, 1896, for damages. It was tried before Judge Ernest Gary and a jury at the March, 1897, term of said court. The verdict was for the plaintiff in the sum of three hundred dollars. After entry of judgment on the verdict, the defendant appealed to this court. Before passing to the consideration of the questions ²⁸⁹ raised by appeal, it may not be amiss to state that by the case for appeal, it is made to appear that as the cause above stated was one of eleven, by different plaintiffs against the same defendant, and all involving precisely the same issues, the following order was, by consent, passed by the court: "The State of South Carolina, county of Greenville. In Common Pleas. J. L. Hunter, plaintiff, against The Pelham Mills, defendant. Frank C. Mann against Same. Thomas M. McElreath v. Same. Jane McElreath v. Same. Z. R. Holley v. Same. G. W. Durham v. Same. Boyce Durham v. Same. James Gray v. Same. W. H. Durham v. Same. R. E. Hughes v. Same. E. B. Hughes

v. Same. By consent of counsel on both sides of the above-stated cases, it is ordered that all of said cases be tried at the same time, and all questions of law and fact arising and determined shall be conclusive on all parties concerned, except that in the event that the jury determine that the plaintiff, J. L. Hunter, is entitled to damages as claimed, they shall ascertain the amount thereof and so report by their verdict, and that it be referred to the master to ascertain and report the amount of damages to which the other plaintiffs are respectively entitled. In the event that the jury shall find for the defendant, the same verdict shall be entered in each of the other cases. The right of appeal upon any and all questions arising is expressly reserved in behalf of any and all said parties, plaintiffs and defendants. Ernest Gary, presiding judge. We consent. C. F. Dill, C. J. Hunt, Shuman & Dean, plaintiffs' attorneys. Cothran, Wells, Ansel & Cothran, attorneys for defendant."

Testimony was then offered by the plaintiff tending to prove that he owned a piece of bottom land on the Enoree river, on the Greenville county side; that twenty acres of said bottom land was planted in corn and pumpkins; that said lands were very rich and productive, yielding from fifty to sixty bushels of corn per acre, and that the corn was worth fifty cents per bushel, and that the fodder therefrom was valuable, as well as the pumpkins, in money; that the ²⁰⁰ corn on said bottom land was six or seven feet high on Friday morning, the 10th of July, 1896, and that the rains which had fallen on Monday, Tuesday, Wednesday, and Friday morning, while they had raised the volume of water flowing in the Enoree river, had not, up to that time (Friday morning), injured the corn and pumpkin crops growing on the plaintiff's bottom land; that about midday there was some rain which fell about the plaintiff's land, but the clouds seemed to lay up the river; that the defendant had the mills known as the Pelham Mill on the banks of the Enoree river, about seven miles higher up the said Reedy river, above the lands of plaintiff; that defendant had a large stone dam across the said river, which backed the water some one and one-half miles, and held a large body of water; that about midday on Friday, the 10th of July, 1896, the defendant, through the means of two floodgates in its stone dam, turned loose large quantities of mud and water from its reservoir in said river, made by the said stone dam, when the water was about fifteen feet in depth, into said already swollen river, which caused the said river to throw over the plaintiff's lands water to the depth of from seven to ten feet, accompanied by large quanti-

ties of mud, which remained in said bottom lands from Friday after the 10th of July, 1896, until the Monday then succeeding, by means of which water and mud the crops of the plaintiff on his said bottom lands were completely ruined; that on a previous occasion the plaintiff had remonstrated with the agent of defendant as to the injurious effect of "blowing out" (that is, turning loose the water in its reservoir so as to discharge said water with such force and violence as to rapidly empty the water held by said reservoir, and also carry away with said water the large quantities of mud which had accumulated in said dam).

After the plaintiff had announced that he closed his testimony, the defendant made a motion for a nonsuit upon these grounds: 1. That the cause of damage was the flood alleged by the complaint to have been an unusual one and ²⁰¹ amounted to the vis major; 2. That there is no evidence showing that the damage to the plaintiff was the result of defendant's negligence. The circuit judge promptly overruled this motion, to which ruling the defendant then excepted. This is made an alleged reversible error in the circuit judge by the appeal.

It seems to us that exception 1, as stated in the notice of motion for a nonsuit, was properly overruled, for there was some evidence which tended to show that the injury to plaintiff resulted from the opening of these floodgates in defendant's stone dam; an unusual quantity of water and mud was testified to have been precipitated upon the bottom lands of plaintiff by this action of the defendant. It was a question for the jury to determine, and not the judge, if there was any testimony supporting plaintiff's theory of the cause of his injury; we have repeatedly held that the circuit judge must not grant a nonsuit where there is any legal or competent testimony supporting plaintiff's cause of action.

And then as to the second exception, pertaining to absence of negligence on the part of defendant, this court has repeatedly held that negligence is a mixed question of law and fact. Such question must be submitted to the jury, under instructions of the presiding judge showing what constitutes negligence. The case shows that there was some evidence submitted tending to show negligence. This being so, there was no error in the ruling of the circuit judge as to this phase of the motion for nonsuit.

The defendant then offered its testimony, which tended to show that an unusually heavy rainy season had obtained in that section where its property was located, but that, in addition thereto, there fell during the day of Friday an immense quantity

of water, which caused the Enoree river to rise rapidly and to a considerable height in an hour; that this heavy rainfall caused said Enoree river to rise to a great height, even after the defendant's agents had opened two of the floodgates in its stone dam across the river at its mill ²⁹² seat; that the two floodgates were opened by the defendant's agents to preserve it from an injury through the water before the dam rising to such a height as not only to endanger the abutments of the dam itself, but also to threaten to flood two stories of its millhouse, which, if it had happened, would have entailed a loss to defendant of twenty thousand dollars, in its millhouse alone. Defendant's testimony detailed the way in which the dam was constructed, explaining its different parts, showing that it was about one hundred and seventy-five yards long, and probably more than twenty feet high. After all the testimony for both sides to the controversy had been concluded, each party made requests to charge. The circuit judge charged some of defendant's requests, but refused or modified others. The appeal is intended to question this refusal of the circuit judge, as well as to question the propriety in law of some portions of his charge. We will now examine these matters.

We will first direct our attention to the second ground of appeal, relating to the modification made in the first request to charge, as it was preferred by the defendant, by the circuit judge, adding thereto these words: "If the necessity to raise such floodgates was caused by such a rise in the river, that one of ordinary prudence and foresight could not have anticipated it." The request to charge was in these words: "The plaintiff having alleged in his complaint that there was an unusual flow of water in Enoree river at the time the floodgates were raised, and, this fact being admitted in the answer, it becomes a fact in the case that cannot be disputed by either side; and, such being the fact, I charge you that if it became necessary for the defendant's protection to raise the floodgates, they had the legal right to do so." In order to pass upon this exception, it is necessary to remember, in the first place, that section 26, of article 5, of our present constitution imperatively demands that while circuit judges shall not charge juries on matters of fact, they shall declare the law. By this constitutional provision, we have previously held, it is not meant ²⁹³ that circuit judges shall do more than declare the law applicable to the cause then being tried. So, now, in the second place, let us determine what kind of a cause was then before the court. As we remarked at the opening of this opinion, this was an action by the plaintiff against the defendant to re-

cover damages, which damages were limited by the complaint to six hundred dollars, arising from this cause of action; the plaintiff owned a valuable piece of bottom land containing twenty acres, planted in corn and pumpkins, which crops were in fine growing condition until, on Friday evening, the 10th of July, 1896, the same were covered to the depth of nine or ten feet, by the water of Enoree river, by water and mud discharged into said stream, which, at that time, had in its banks and flowing through its natural channel more than the usual quantity of water on account of recent rains, and the defendant well knew this fact; by the defendant causing two floodgates in its rock dam, extending across said river, and which rock dam by its height caused an immense volume of water in said river to be dammed up, to be opened, and to remain open from Friday, the tenth day of July, 1896, until the Monday succeeding, whereby the flood of water and mud, precipitated upon and remaining for three days upon plaintiff's said crops, caused their utter destruction, to his damage, six hundred dollars. To this cause of action, on the part of the plaintiff, the defendant admitted that it operated its mill on the banks of the Enoree river; that it had erected across said river at its mill the stone dam referred to in the complaint, and alleged that said dam was constructed on the most scientific principles, and of sufficient strength to resist any ordinary or extraordinary pressure of the waters of said river, and also that said dam is capable of containing large quantities of water. The answer further alleges that at the time mentioned in the complaint, the waters of the Enoree river were unusually high, owing to heavy and continuous rains, and were running over said dam with great force, and threatening to overflow the abutment of the dam and flood defendant's mills; that to obviate ²⁹⁴ this danger, and to confine the flow of the water within narrower limits and moderate its force, the defendant, with great care and caution, raised two of its five floodgates in said dam, and thereby obviated said danger to itself and lessened it to lower proprietors. The defendant further alleges that to have allowed the water to run as it was doing, when its two floodgates were raised, would not only have flooded defendant's mills, but would have caused greater danger to plaintiff's property than could possibly have happened after raising said floodgates. Briefly stated, our views of this charge of the judge, as modified, is this: While the plaintiff did set up in his complaint, and the defendant did admit in its answer, that on Friday, the 10th of July, 1896, Enoree river did have an unusually large volume of water flowing through its natural channel,

caused by recent rains, and thereby such fact became an admitted fact, binding both parties to this controversy, yet that the answer of the defendant put in issue its dam as being constructed on the most scientific principles, and of sufficient strength to resist any ordinary or extraordinary pressure of the waters of said river; and, further, the defendant offered proof on these matters; and hence, when the circuit judge came to charge upon the defendant's request in the matter here under consideration, it was entirely proper for him to pause and consider whether a dam, which was alleged by the party who preferred the request to have been built according to the most scientific principles, and in which floodgates had been constructed by it, did not require him, in declaring the law in relation to lifting those floodgates, to see to it that such floodgates in such dam were not to be lifted in the presence of such a rise in the river as could not have been anticipated by one of ordinary prudence and foresight, excepting alone for the protection of the property of the owner thereof from immediate and impending danger. Indeed, we might say that, in our judgment of the law governing such an obstruction in a water-course as a dam, the circuit judge was almost ²⁹⁵ too liberal in even charging the request with this modification.

The third exception relates to the refusal of the circuit judge to charge defendant's second request: "Negligence is the gist of this action. To find for the plaintiff, the jury must be satisfied from the evidence that the defendant negligently opened the floodgates of its dam, and that the raising of said floodgates caused the damage complained of." It is very manifest that the circuit judge sought to protect the defendant from any undue action of the jury, for the very next request, which was: "If the jury believe, from the evidence, that the damage to plaintiff did occur, or would have occurred, notwithstanding the fact that the defendant raised its floodgates, then the verdict must be for the defendant," the circuit judge charged as the law. It is quite true that the complaint did allege that the floodgates were "negligently and carelessly, and without proper regard for the rights of this plaintiff," opened by the defendant; yet it must be remembered that there was no testimony offered by plaintiff to disprove, or tending to disprove, that the manner or methods employed by the defendant in the physical fact of defendant lifting its floodgates, was without negligence in the defendant. The fact is, the legal battle was pitched by the defendant, and joined in by the plaintiff, to show that defendant lifted said floodgates to protect its property from the disasters impending over it by

reason of the fact that, while the waters of the Enoree river were full, very full, about midday on Friday, the 10th of July, 1896, there was a rainstorm in the nature of a "cloudburst" which, added to the full waters of the river, necessitated the raising of the floodgates to save defendant's dam and mill. The defendant thereby invoked the law of self-preservation, and hence the judge no doubt felt he had better not put any impediment in the way of a full and fair trial of this issue, by laying stress upon the law of negligence, or seemingly restrict the issues within limits narrower than, in his judgment of the law governing such cases as the ²⁹⁰ present, they should be restricted. A "cloudburst" is the act of God. If the flood precipitated into the river by such cloudburst was so overwhelming as to endanger defendant's dam and mill, although properly located and constructed, then the circuit judge instructed the jury the plaintiff could not recover. In his charge the circuit judge dwells with care upon this "cloudburst" or "act of God" theory of defendant, and in every instance declares that if the flood which filled the river on the 10th of July was of such a character as to threaten the destruction of defendant's dam or mill, the plaintiff could not recover. Besides all these considerations supporting the judge's refusal to charge the request, would not the circuit judge have, to a certain extent, been trenching upon the constitutional inhibition as to judges charging upon the facts, if he had said that the gist of the action was negligence, when negligence is a mixed question of law and of fact? It seems so to us. The exception must be overruled.

The fourth ground of appeal is disposed of by the matters embraced in our consideration of the third ground of appeal, and is, therefore, dismissed.

As to the fifth ground of appeal, it appears to us the plaintiff in his complaint has effectually put in issue the willfulness of the defendant in opening the two floodgates in its dam, where he charges "that the defendant, . . . without having the proper regard for the rights of this plaintiff, did open its floodgates, et cetera." It is true it is not described in words as "willfulness," but it is charged, in effect, that, governed by his will, without regard to reason, the defendant did open these floodgates. We think the verdict, when fairly considered, is responsive to the issues as made by the complaint and the answer. We, therefore, overrule this exception.

As to the sixth ground, which alleges error in the circuit judge for his refusal to charge the fourth request: "If the jury believe from the evidence that the damages complained of oc-

curred from an act of God and from the negligence ²⁹⁷ of the defendant, occurring 'coincidentally,' there can be no recovery, unless it be affirmatively proved that if there had been no act of God, the damage would still have occurred." We think the circuit judge properly refused this request to charge, for the reason that it would have required the judge to say that the act of God, in allowing a "cloudburst," necessarily required such "cloudburst" to have had the force of a "vis major," while, in fact, such "cloudburst" might not have precipitated a fall of rain more than sufficient for an ordinary freshet in the river. Thus, to have justified the defendant's turning loose the accumulated waters from its reservoir when there was no flood from a "cloudburst" with more power in it than belongs to an ordinary freshet in the river, simply because it was "coincident" with the flood from a "cloudburst," would not be justifiable. We notice that the circuit judge was very careful, in his charge to the jury, to instruct them that: "If you find that the plaintiff was damaged by reason of the act of God, he could not recover." In the form which defendant elected to present the request to charge there was no error in the circuit judge's refusal to so charge the jury.

The seventh ground of appeal ascribes error to the circuit judge for charging the jury: (a) The owner of a dam must use such reasonable care and skill in its construction and maintenance that it will be capable of resisting usual ordinary and expected freshets. A dam must be so constructed, in the first instance, as to be capable of receiving, if necessary, the water that would originate by such pressure and such rains as would be reasonably expected by a man of ordinary prudence and foresight. That is the test." We are utterly unable to perceive any error in this charge; but the appellant suggests that there was no call by the issues in the case for such an expression from the circuit judge in his charge to the jury. We cannot see how it could be, then, more than harmless error, even if we adopt the views of appellant. But it occurs to us ²⁹⁸ that the appellant, in its own answer, raised this question, when it alleged that its dam was built in accordance with "the most scientific principles, and of sufficient strength to resist any ordinary or extraordinary pressure of the water of said river." And, as before remarked, it offered testimony directed to the establishment of these allegations. Then, when the circuit judge, in obedience to the constitutional mandate that he must declare the law, called the attention of the jury to the requirements of the law touching the

construction of dams across rivers, he but discharged his duty. So, also, the items embraced under subdivisions of this seventh ground of appeal, marked "b," "c," and "d," are disposed of by what we have already stated.

The eighth ground of appeal was abandoned at the hearing before us.

It follows, therefore, that the circuit judge did not err as complained of.

The judgment of this court is, that the judgment of the circuit court be affirmed, and the cause be remanded to the circuit court to enforce the order of Judge Ernest Gary, which was consented to by all the counsel engaged in the eleven cases hereinbefore enumerated.

TRIAL—NONSUIT—WHEN SHOULD BE GRANTED.—A nonsuit should be granted only where all the facts proved and all reasonable deductions from them do not entitle the plaintiff to recover: *Dixon v. Bristol Sav. Bank*, 102 Ga. 461; 66 Am. St. Rep. 193, and note.

NEGLIGENCE—WHEN A MIXED QUESTION.—Negligence is usually a mixed question of law and fact, and is never purely one of law, unless the facts are wholly undisputed and admit of no conflicting evidence: *Isham v. Post*, 141 N. Y. 100; 38 Am. St. Rep. 766. See *Watson v. Portland etc. Ry. Co.*, 91 Me. 584; 64 Am. St. Rep. 268; *American Brewing Assn. v. Talbot*, 141 Mo. 674; 64 Am. St. Rep. 538; *Wade v. Columbia Electric etc. Power Co.*, 51 S. C. 296; 64 Am. St. Rep. 676, and notes thereto.

NEGLIGENCE—COMPLAINT CHARGING WILLFUL INJURY. To constitute willful injury there must be design, purpose, and intent to do the wrong and inflict the injury, and a complaint failing to allege such design, purpose, and intent does not properly charge willful injury: *Louisville etc. R. R. Co. v. Anchors*, 114 Cal. 492; 62 Am. St. Rep. 116, and note.

WATERS AND WATERCOURSES—DAMS—RIGHTS OF OWNERS.—The rule is perfectly well settled that the owner of a dam must use reasonable care and skill in so constructing and maintaining it that it will not be the means of injuring another, either above or below, by throwing the water back, or being incapable of resisting it in times of usual, ordinary, and expected floods; but his liability extends no further, and he is not held responsible for inevitable accidents, or for injuries occasioned by extraordinary freshets which could not be anticipated or guarded against: See monographic note to *McCoy v. Danley*, 57 Am. Dec. 690, 691; *McKee v. Delaware etc. Canal Co.*, 125 N. Y. 363; 21 Am. St. Rep. 740, and note.

MACK v. SOUTH BOUND RAILROAD COMPANY.

[32 SOUTH CAROLINA, 323.]

NEGLIGENCE.—EVIDENCE as to the failure of a railroad train which caused an accident sued for to give the statutory signals upon approaching a public crossing is responsive to an allegation of reckless negligence on the part of the railroad company, and therefore admissible.

EVIDENCE—ADMISSION OF, WHEN HARMLESS ERROR. The admission of irrelevant evidence, if harmless, is not ground for reversal of the judgment.

TRIAL—NONSUIT.—If there is evidence tending to prove every material allegation of the complaint, a nonsuit cannot be granted.

RAILROADS—SPEED OF TRAINS—PERSON NEAR TRACK.—A railroad train does not have to stop or slacken its speed when a person is close to or approaching the track, unless circumstances indicate that he does not, or cannot, see the train, or is going upon the track, or that, if those in charge of the train fail to exercise the care of an ordinary person, some injury may result.

NEGLIGENCE—DAMAGES FOR MENTAL SUFFERING ARISING FROM FRIGHT.—Railroad companies are liable in damages for mental suffering or physical injury arising from fright caused by their negligence.

NEGLIGENCE—DUTY OF MINOR TO LOOK AND LISTEN. The minority of a person approaching a railroad track does not exempt him from looking and listening for approaching trains.

DAMAGES.—EXEMPLARY DAMAGES are given where the injury for which an action is brought has been caused by recklessness, wantonness, willfulness, or malice, or has happened through gross negligence. Ordinary negligence is not ground for punitive damages.

RAILROADS—KILLING STOCK—NEGLIGENCE.—The undisputed killing of stock by a railroad company's train raises, and is sufficient to sustain, the presumption of negligence against it, and such presumption is not destroyed by the mere fact that the circumstances of the killing have been detailed by witnesses.

W. H. Lyles and C. J. C. Hutson, for the appellant.

Abney & Thomas, for the appellee.

325 **GARY, J.** The above-entitled actions were commenced on the 15th of August, 1895, and by consent were tried together before his honor, Judge Buchanan, and a jury, at the September, 1897, term of the court for Lexington county. The fifth paragraph of the first cause of action in the first of the above-entitled actions is as follows: "5. That on the afternoon of the said-mentioned day, between 6 and 7 o'clock, the plaintiff, Stewart Spearman Mack, as was his wont and customary duty, was sent by his father to drive the cows from the pasture, which was on the south side of said railroad, at or near the seven mile-post; that while engaged in driving said cattle from said

pasture to the house of said Barnett Salley Mack, which was on the north side of said railroad track, it being necessary to cross the track at a private crossing which had been in use for years, and which use was well known to the defendant, the plaintiff, who was riding a mule, being unable to control said mule, on account of his tender age and lack of strength, was carried by said mule, which had become unruly and unmanageable, in and upon the track of defendant, at or near the said seven mile-post; and in endeavoring to get said mule off said track, the plaintiff alighted, and was pulling the said mule by the bridle and a plowline attached thereto, away from and across said track; and, while so engaged, his attention being absorbed in his efforts to control the mule and prevent him from going farther down the track and getting away from him—being in open and plain view of an approaching train from the south for half a mile or ³²⁶ more—a locomotive with a train of cars attached, belonging to the defendant, its agent, lessee, or lessees, without any signal or warning whatsoever, running at a rapid and reckless rate of speed toward Columbia, came upon the plaintiff, who was not aware of its approach, on account of his being so engaged in endeavoring to get the mule off said track, and struck the mule and instantly killed the same; the plaintiff, in order to save his own life, threw himself down between and along the cross-ties just outside of the rail, bruising and injuring his person, and just barely escaped being struck by the locomotive and cars of said defendant, its servants and agents, which said locomotive and cars ran immediately over over and above the plaintiff at a rate of speed of more than sixty miles an hour; and being of such tender age, inexperienced and ignorant of the operation of railroads, and the running of locomotive cars thereon, and owing to the great and imminent danger in which he was and the reckless movement of said train over him, was terribly frightened, his nervous system was shocked, his mind was affected and partially destroyed, his reason unbalanced, and he, for a long time, was made ill and sick, and suffered great mental anguish and physical pain, arising from the terrible shock to his nervous system and the fright which he received; and by reason thereof he was incapacitated from performing or attending to his ordinary duties, and his capacity for work greatly diminished; and he will for a long time and probably will for the balance of his life, be affected in mind and body, and it will, to a great extent, affect his means of making a livelihood, and of advancing his happiness in life; that prior to said accident and injury he was

perfectly healthy and sound, both physically and mentally, and had every reason to think and believe that he would so continue; but the injury to his mind and body, by reason of such fright and nervous shock, has greatly diminished his capacity for performing his duties, and will hereafter diminish and affect his capacity and means of acquiring property, and means of advancing his happiness in life, which he had a right to ³²⁷ expect that he would be fully able to do, and acquire all those means of happiness which he, as a perfectly healthy and sound person, could have acquired; and he will hereafter pass through life subject to the effects which said fright and nervous shock have produced." The specifications of negligence are alleged in paragraph 6 thereof, as follows, to wit: "6. That the South Bound Railroad Company, its servants, agents, lessee, or lessees, were negligent in this, that although the plaintiff and the mule he was endeavoring to pull away from the track could be seen for at least one-half a mile, and were in plain and open view of the engineer driving the locomotive—the track at said point being perfectly straight—and although the said train could have been easily stopped before it reached the point on said track where the plaintiff and mule were, the engineer in charge of said locomotive made no effort whatsoever to stop or diminish the rate of speed of the train, nor did he give any signal, either by the sounding of the steam whistle of the locomotive or by the ringing of the bell thereon, nor did he take or exercise any prudence or foresight, or do anything whatsoever to prevent the running of the said train upon the plaintiff and said mule; but that the said engineer and persons in charge of said locomotive and train, although they saw, or could easily have seen, by the exercise of the slightest outlook or observation upon the track in front of said advancing locomotive and train, the plaintiff and the mule, and did see, or could have easily seen, by the slightest observation or outlook from the train, that he was a child of tender years and endeavoring to get his mule across the track; and, although the said engineer or persons in charge of said locomotive saw, or could have easily seen, by the exercise of any prudence or outlook whatsoever, that the plaintiff was not aware of the approach of the train, yet the said engineer or persons in charge of said locomotive and train carelessly, negligently, without any prudence or foresight, or observation or outlook, which he should have kept upon the track before him, ran the said locomotive and train, at a reckless ³²⁸ rate of speed, over said plaintiff and against said mule, and so injured and frightened

the plaintiff as above stated, and instantly killed the mule; and that by reason of the said negligent act and want of care on the part of the defendant, its servants, agents, lessee, or lessees, the plaintiff was damaged in his person, mind, and health, two thousand five hundred dollars."

The allegations of the second cause of action set forth in said complaint are substantially the same as those contained in the first cause of action, except the acts of negligence on the part of the defendant are alleged to have been willful, malicious, wanton, and reckless, by reason of which the plaintiff claimed exemplary damages.

The second complaint was brought by Barnett Salley Mack, the father of Stewart Spearman Mack, in which the allegations are substantially the same as those set forth in the first cause of action in the first complaint. In the first cause of action, he claimed damages for the killing of his mule, which he valued at one hundred and seventy-five dollars. The second cause of action alleged in said complaint was for the injuries alleged to have been sustained by his son, and the plaintiff asked damages for the loss of services of his son, and expenditures for medicines, medical attention, and care of his son in the sum of twelve hundred dollars.

The defendant answered both complaints, and, in effect, denied generally the allegations of the complaint, and set up the defense of contributory negligence both on the part of the father and the son. At the close of the plaintiff's testimony, the defendant made a motion for a nonsuit, which was refused. The jury rendered a verdict in favor of Stewart Spearman Mack for six hundred and fifty dollars, and a verdict for Barnett Salley Mack for three hundred and thirty-five dollars.

The defendant appealed upon exceptions, the first of which is as follows: "1. Because, against the objection of the defendant, his honor, the presiding judge, allowed the witnesses produced for the plaintiff to testify as to the failure of the train which caused the accident to give the statutory signals upon approaching the ³²⁹ August road crossing, and the other road crossings."

Some of this testimony was admitted without objection, and it is questionable whether the objection was properly interposed as to the other part of said testimony. Furthermore, it does not appear that the presiding judge ruled upon the admissibility of said testimony. But said testimony tended to show an utter disregard of the requirements of law as to the manner of running the train, and was responsive to the allegation of reckless negligence. This exception is, therefore, overruled.

The second exception is as follows: "2. Because his honor, the presiding judge, allowed the witness, John Weston, to testify, against the objection of the defendant, in answer to the question, 'Who travels that last road, what kind of people?' when it had been admitted that the accident had not occurred at the crossing, and the crossing had nothing to do with it." The testimony was irrelevant, but harmless. This exception is overruled.

The third exception is as follows: "3. Because his honor, the presiding judge, against the objection of the defendant, allowed other witnesses to testify as to the character of the crossings on the Augusta road and the plantation road crossing." Waiving the objection to this exception, that it is too general, still it cannot be sustained, as the testimony, although irrelevant, was harmless.

The fourth exception is as follows: "4. Because, against the objection of the defendant, his honor, the presiding judge, allowed a witness, Barnett Salley Mack, to testify that the railroad hands worked the plantation road crossing." Even if there was error, it was harmless, and this exception is overruled.

The fifth exception is as follows: "5. Because his honor, the presiding judge, refused the motion for a nonsuit upon the grounds stated in the case for appeal." Waiving the objection to this exception, that it is not sufficiently specific, it cannot be sustained. The ³³⁰ grounds upon which the defendant made the motion for a nonsuit are as follows: "1. That the action could not be maintained as an action under the statute regulating the giving of signals at crossings, because it was proven that it had not occurred at any crossing or traveled place. 2. That the action could not be maintained as a common-law action for negligently injuring the plaintiff, Stewart Spearman Mack, or negligently killing the mule, because the evidence did not tend to establish any negligence on the part of the railroad company, through its servants, in the running of the train which caused the injury." The first ground cannot be sustained, for the reason that the plaintiff distinctly stated upon the trial of the case that the action was not brought under the statute. The second ground cannot be sustained, as the allegations of the complaint and the testimony adduced to support them showed that this was not the case of an ordinary trespasser. There was testimony tending to prove every material allegation of the complaint, and this exception is overruled.

The sixth and seventh exceptions, which will be considered together, are as follows: "6. Because his honor, the presiding

judge, refused, upon request of the defendant, to charge as follows, to wit: 'It being admitted that there was no actual collision between the plaintiff, Stewart Spearman Mack, and the defendant's train, and no physical injury resulting from such a collision at any public crossing, traveled place, or any other place, the defendant's servants were not bound to have stopped the train because it ran in proximity to the plaintiff, and the defendant is not responsible for the consequences of fright occasioned thereby.' 7. Because his honor charged the jury as follows, to wit: 'But if the defendant, by its servants, was guilty of a lack of ordinary care, and had run upon the plaintiff, thus making itself liable for negligence, and, while guilty of such lack of ordinary care, ran so immediately upon the plaintiff that he had to jump, being impressed with the overweening necessity to jump, and such necessity ³³¹ not having been brought upon himself, and he had to jump beyond and off the track, and if he were injured by such lack of ordinary care, then that would be a natural and proximate injury, such as the law gives an action for, and they would be responsible for the consequences of such natural fright, if such fright were so caused'; thereby erring in indicating that a mere 'lack of ordinary care' on the part of the defendant would make the defendant liable for the consequences of natural fright caused by running in proximity to the plaintiff, and that irrespective of questions of contributory negligence on the part of the plaintiff." In disposing of this request, his honor said: "I cannot charge this request as framed, because the court cannot say that no physical injury has resulted to the plaintiff here, and the use of the word 'proximity,' associated with the language here in the request to charge, would be open to a construction that the court could not charge. But I charge you this: They were not obliged to stop, because of the nearness to the track, by reason of the plaintiff being near to the track, nor would they be liable for such injury, provided the plaintiff exercised due and proper care, according to his age and circumstances; but if the defendant, by its servants, was guilty of a lack of ordinary care, and had run upon the plaintiff, thus making itself liable for negligence, and, while guilty of such lack of ordinary care, ran so immediately upon the plaintiff, that he had to jump, being impressed with the overweening necessity to jump, and such necessity not having been brought upon himself, and he had to jump beyond and off the track, and if he were injured by such lack of ordinary care, then that would be a natural and proximate injury, such as the law gives an action for, and

it would be responsible for the consequences of such natural fright, if such fright was so caused. Now I have made that definite for the purpose of showing you the meaning of the word 'proximity.' A railroad does not have to stop, in these days of fast trains, when a person is close to its track, unless they see that he is going upon the track, or unless, if they ³³² stop exercising the care of an ordinary person, some injury would result. But while they don't owe that duty—suppose a man were approaching in such a condition and at such an angle to the railroad, and the fireman or the servants were to see him in time to stop, and they were to see that there was something the matter with this man, judging from his actions, that he could not have heard the train, or to impress them with the fact that he was deaf, and if they did not stop the train he would continue, and it would result in a collision with him upon the track of the railroad, then I say that if they were so impressed, and were to go on and thereby make that an act of willfulness, although he may be guilty of carelessness and negligence in going across the track, yet that would not excuse the railroad, if they could have avoided it by exercising ordinary care, because he is in the wrong and they could have avoided it—they should not go upon and kill a person or run over property when it could be avoided, no matter whether the man is in the wrong—I mean, in the sense that such injury would be willful. I therefore charge that with this modification, and so far as consistent with the matter requested here." For the first time, the question is presented to this court, whether a railroad company is liable for injuries sustained in consequence of fright caused by its negligence. The authorities are very conflicting, and those which decide that the railroad is not liable for such injuries, are not in harmony as to the reason for such rule. In the case of *Mitchell v. Rochester Ry. Co.* 151 N. Y. 107, 56 Am. St. Rep. 604, and cases therein cited, it is held that the railroad company is not liable on the ground that damage for such injuries are too remote. While in the case of *Spade v. Lynn etc. R. R. Co.*, 168 Mass. 285, 60 Am. St. Rep. 393, the court says: "This case presents a question which has not heretofore been determined in this commonwealth, and in respect to which the decisions elsewhere have not been uniform. It is this: whether in an action to recover damages for an injury sustained through the negligence of another, there can be a recovery for a bodily injury ³³³ caused by mere fright and mental disturbance. The jury were instructed that a person cannot recover for mere fright, fear, or mental distress, occasioned by the

negligence of another, which does not result in bodily injury, but that when the fright or fear or nervous shock produces a bodily injury, there may be a recovery for that bodily injury, and for all the pain, mental or otherwise, which may arise out of that bodily injury. . . . The exemption from liability for mere fright, terror, alarm, or anxiety does not rest on the assumption that these do not constitute an actual injury. They do, in fact, deprive one of enjoyment and of comfort, cause real suffering, and, to a greater or less extent, disqualify one for the time being from doing the duties of life. If these results flow from a wrongful or negligent act, a recovery therefor cannot be denied on the ground that the injury is fanciful and not real. Nor can it be maintained that these results may not be the direct and immediate consequence of the negligence. Danger excites alarm. Few people are wholly insensible to the emotion caused by imminent danger, though some are less affected than others. It must also be admitted that a timid or sensitive person may suffer, not only in mind, but also in body, from such a cause. Great emotion may, and sometimes does, produce physical effects. The action of the heart, the circulation of the blood, the temperature of the body, as well as the nerves and appetite, may all be affected. A physical injury may be directly traceable to fright, and so may be caused by it. We cannot say, therefore, that such consequences may not flow proximately from unintentional negligence; and if compensation in damages may be recovered for a physical injury so caused, it is hard, on principle, to say why there should not also be a recovery for the mere mental suffering when not accompanied by any perceptible physical effects. It would seem, therefore, that the real reason for refusing damages sustained from mere fright must be something different, and it probably rested on the ground that in practice it is impossible satisfactorily to administer any other rule. ³³⁴

. . . . The logical vindication of this rule is, that it is unreasonable to hold persons, who are merely negligent, bound to anticipate and guard against fright and the consequences of fright, and that this would open a wide door for unjust claims, which could not successfully be met. These views are supported by the following decisions: *Victorian Ry. Commrs. v. Coultas*, L. R. 13 App. Cas. 222; *Mitchell v. Rochester R. Co.*, 151 N. Y. 107; 56 Am. St. Rep. 604; *Ewing v. Pittsburg etc. R. Co.*, 147 Pa. St. 40; 30 Am. St. Rep. 709; *Haile v. Texas etc. R. Co.*, 9 C. C. A. 134; 23 U. S. App. 80; 60 Fed. Rep. 557. In the following cases a different view was taken: *Bell v. Great Northern Ry. Co.*, 26

I. R. C. L. 428; Purcell v. St. Paul City Ry. Co., 48 Minn. 134; Fitzpatrick v. Great Eastern Ry. Co., 12 U. C. Q. B. 645. See, also, Beven on Negligence, 77, et seq. It is hardly necessary to add that this decision does not reach those classes of action where an intention to cause mental distress or to hurt the feelings is shown, or is reasonably to be inferred—as, for example, in cases of seduction, slander, malicious prosecution or arrest, and some others. Nor do we include cases of acts done with gross carelessness or recklessness, howing utter indifference to such consequences, when they must have been in the actor's mind: Lombard v. Lennox, 155 Mass. 70; 31 Am. St. Rep. 528; and Fillebrown v. Hoar, 124 Mass. 580, already cited; Meagher v. Driscoll, 99 Mass. 281; 96 Am. Dec. 759." We are much impressed with the reasoning of the court in the case of Sloane v. Southern Cal. Ry. Co., 111 Cal. 668, in which the following language is used: "The real question presented by the objections and exception of the appellant is whether the subsequent nervous disturbance of the plaintiff was a suffering of the body or of the mind. The interdependence of the mind and body is in many respects so close that it is impossible to distinguish their respective influence upon each other. It must be conceded that a nervous shock or paroxysm, or a disturbance of the nervous system, is distinct from mental anguish, and falls within the physiological, rather than the psychological, ³³⁵ branch of the human organism. It is a matter of general knowledge that an attack of sudden fright, or an exposure to imminent peril, has produced in individuals a complete change in their nervous system, and render one who was physically strong and vigorous weak and timid. Such a result may be regarded as an injury to the body rather than to the mind, even though the mind be at the same time injuriously affected. Whatever may be the influence by which the nervous system is affected, its action under that influence is entirely distinct from the mental process which is set in motion by the brain. The nervous and nerve centers of the body are a part of the physical system, and are not only susceptible of lesion from external causes, but are also liable to be weakened and destroyed from causes primarily acting upon the mind. If these nerves, or the entire nervous system, are thus affected, there is a physical injury thereby produced, and, if the primal cause of the injury is tortious, it is immaterial whether it is direct, as by a blow, or indirect, through some action upon the mind. . . . The mental condition, which superinduced the bodily harm in the foregoing cases, was fright, but the character

of the mental excitation by which the injury to the body is produced is immaterial. If it can be established that the bodily harm was the direct result of the condition, without any intervening cause, it must be held that the act which caused the condition set in motion the agencies by which the injury was produced, and is the proximate cause of such injury." In the case of *Purcell v. St. Paul City Ry. Co.*, 48 Minn. 134, the court says: "Of course, negligence without injury gives no right of action. On the argument there was much discussion of the question whether fright and mental distress alone constitute such injury that the law will allow a recovery for it. The question is not involved in the case. So it may be conceded that any effect of a wrongful act or neglect on the mind alone will not furnish ground of action. Here is a physical injury, as serious, certainly, as would be the breaking of an arm or leg. Does ³³⁶ the complaint show that defendant's negligence was the proximate cause of that injury? If so, the action will, of course, lie. What is in law a proximate cause is well expressed in the definition often quoted with approval, given in *Milwaukee etc. Ry. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256, as follows: "The primary cause may be the proximate cause of a disaster, though it operate through successive instruments—as an article at the end of a chain may be moved by force applied to the other end, that force being the proximate cause of the movement; or, as in the oft-cited case of the squib thrown in the market place: *Scott v. Shepherd*, 2 W. Black. 892. The question always is, Was there an unbroken connection between the wrongful act and the injury—a continuous operation? Did the facts constitute a continuous succession of events so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury?" There may be a succession of intermediate causes, each produced by the one preceding, and producing the one following it. It must appear that the injury was the natural consequence of the wrongful act or omission. The new, independent, intervening cause must be one not produced by the wrongful act or omission, but independent of it, and adequate to bring the injurious result. Whether the natural connection of events was maintained or was broken by such new, independent cause, is generally a question for the jury. In this case, the only cause that can be suggested as intervening between the negligence and the injury, is plaintiff's condition of mind, to wit, her fright. Could that be a natural adequate cause of the nervous convulsions? The mind

and body operate reciprocally on each other. Physical injury or illness sometimes causes mental disease; a mental shock or disturbance sometimes causes injury or illness of body, especially of the nervous system. Now, if the fright was the natural consequence of—was brought about, caused by—the circumstances of peril and alarm in which defendant's negligence placed plaintiff, and the fright caused the nervous ³³⁷ shock and convulsions, and consequent illness, the negligence was the proximate cause of those injuries. That a mental condition or operation on the part of the one injured comes between the negligence and the injury, does not necessarily break the required sequence of intermediate causes." Mr. Sedgwick, in his work on Damages, eighth edition, volume 2, page 642, in commenting on the opinion of Palles, C. B., in the case of *Bell v. Great Northern Ry. Co.*, L. R. 26 Ir. Exch. Div. 428, says: "The learned chief baron then referred to the case of *Victorian Ry. Commrs. v. Coultas*, 13 App. Cas. 222, in which the privy council held that mere mental terror was not a consequence which would ordinarily flow from the negligence proved in that case. This case, however, was not approved; but the court followed an earlier unreported Irish case (*Byrne v. Great Southern etc. Ry. Co.*, in the court of appeals), where compensation for injury resulting from nervous shock was allowed in a much stronger case than the one at bar. The learned chief baron continued (page 442): 'In conclusion, I am of opinion that, as the relation between fright and injury to the nerve and brain structures of the body is a matter which depends entirely upon scientific and medical testimony, it is impossible for any court to lay down, as a matter of law, that if negligence cause fright, and such fright, in its turn, so affects such structures as to cause injury to health, such injury cannot be a consequence which, in the ordinary course of things, would flow from the negligence, unless such injury accompany such negligence in point of time.' The principle adopted in this case would seem to be the true one. The negligence of the company being admitted, any injury directly resulting should be compensated": See, also, *Mentzer v. Western Union Tel. Co.*, 93 Iowa, 752; 57 Am. St. Rep. 294. These views are in harmony with the principles laid down in the case of *Harrison v. Berkley*, 1 Strob. 525, 47 Am. Dec. 578, which was an action for damages against a shopkeeper for unlawfully selling whisky to a slave, by means whereof he became intoxicated and died. In that case the court said: "It is therefore required ³³⁸ that the consequences to be answered for, should be natural as well as proximate: *Ward v. Weeks*,

7 Bing. 211; Kelly v. Partington, 5 Barn. & Adol. 645. By this I understand not that they should be such as upon a calculation of chances would be found likely to occur nor such as extreme prudence might anticipate, but only that they should be such as have actually ensued, one from another, without the concurrence of any such extraordinary conjunction of circumstances or the intervention of any such extraordinary result as that the usual course of nature should seem to have been departed from. In requiring concurring consequences, that they should be proximate and natural to constitute legal damage, it seems that in proportion as one quality is strong, may the other be dispensed with; that which is immediate cannot be considered unnatural; that which is reasonably to be expected, will be regarded, although it may be considerably removed: Bennett v. Lockwood, 20 Wend. 223; 32 Am. Dec. 532. . . . The defendant, however, has further insisted that if the drinking and intoxication were the proximate and natural consequences of his act, the exposure and death were not; but that the death resulted mainly from the exposure, and not from the intoxication only. It may well be said (speaking in the language of everyday life, which attempts no philosophical analysis), that the exposure was the immediate effect of the intoxication, and that the two produced the death. Thus, without any unconnected influence to be perceived, the death has come from the intoxication, which the defendant's act occasioned. The defendant cannot complain that an agent, which his own act naturally brought into operation, has occurred to produce this result." We are satisfied that the reasoning is in favor of the liability of a railroad company in such cases, and that as a general proposition it is liable for such injuries where there is a lack of ordinary care. These exceptions are overruled.

The eighth and ninth exceptions will be considered together, and are as follows: "8. Because his honor, the presiding judge, refused, upon request of the defendant, to charge as follows, to wit: 'It being admitted that ²³⁰ the plaintiff, Stewart Spearman Mack, suffered no injury at any traveled place or public crossing referred to in the statute, any failure on the part of the defendant's servants to ring a bell or blow a whistle at any such traveled place or public crossing was not evidence of such negligence on the part of the defendant in this case as will entitle the plaintiff to a recovery.' 9. Because his honor, the presiding judge, in connection with his refusal of such request, charged as follows, to wit: 'It is not charged that it was at a public highway or

crossing, and that, therefore, the mere omission to ring the bell or blow the whistle would not be conclusive presumption of negligence, this being a common-law action, should be taken as a circumstance only. I so charge that request with that qualification; that the injury is not charged to have been committed at a crossing, whereby the application of this principle and rule of evidence, making it conclusive presumption of negligence from the omission to ring the bell or blow the whistle, will apply; thereby erring in indicating that the failure to give the statutory signals at the Augusta road crossing and other crossings was a circumstance from which the jury might infer negligence." A request to charge must be construed with reference to the issue made by the pleadings and the testimony adduced upon the trial of the case. If the presiding judge had charged the request in the form in which it was presented, he would have invaded the province of the jury. The testimony, as we have said, was competent for the purpose of showing an utter disregard of the requirements of law, as to the blowing of the whistle, and was responsive to the allegation of recklessness on the part of the defendant. Even if the defendant was not required by the statute to blow the whistle in approaching the crossing before it reached the plaintiff, still it was a matter for the consideration of the jury whether there was negligence in blowing the whistle at that time, not as a requirement of the statute, but as a fact showing a want of due care on the part of the defendant, under the circumstances of the case: *Czech v. Great Northern Ry. Co.*, 68 Minn. 38; 64 Am. St. Rep. 452. These exceptions are overruled.

The tenth exception is as follows: "10. Because his honor, the presiding judge, refused the request of the defendant to charge as follows, to wit: 'If the jury believe that the plaintiff, while looking and listening, could hear the train, and that any ordinary prudent person would, under like circumstances, have done so, then he was negligent; and if, then, under those circumstances, he went on the track, in view of an approaching train, the plaintiff cannot recover'; but modified the same by adding, 'I charge you that, with this modification: The person there refers to an adult, and due care is owing to the circumstances of the person—his duty would be greater to a minor'; thereby erring in indicating to the jury that the mere minority of the plaintiff, Stewart Spearman Mack, although a boy of fourteen or fifteen years of age, would exempt him from the obligation to look and listen for an approaching train." The intention of the presiding

judge, in modifying the request, was to make it responsive to the allegations of the complaint. The charge of the presiding judge is not susceptible of the construction set forth in the exception. The minority of the plaintiff was a fact to be considered by the jury in determining the question of negligence; but his honor did not charge the jury that the mere minority of the plaintiff would exempt him from the obligation to look and listen for an approaching train. This exception is overruled.

The eleventh exception is as follows: "11. Because his honor, the presiding judge, refused, upon request of the defendant, to charge as follows, to wit: 'If the jury find that the defendant's servants had every reason to suppose that the plaintiff, or any prudent person, would not go upon the track, there was no negligence in running trains at a fast speed, and the plaintiff cannot recover'; but modified the same by adding, 'I charge you that, with the modification of the preceding charge; charge both together'; ³⁴¹ thereby erring in indicating that the mere minority of the plaintiff, Stewart Spearman Mack, would make it negligence on the part of the servants of the company to have run the train rapidly, even though they had every reason to suppose that the plaintiff would not go upon the track." This exception is disposed of by what was said in considering the tenth exception.

The twelfth exception is as follows: "12. Because his honor, the presiding judge, refused, upon request of the defendant, to charge the jury that 'the defendant was not bound to slacken speed of train where no reasonable ground existed for the supposition that the plaintiff would go on or near the track,' but modified the same by saying, 'I charge you that, with the limitation of nearness to the track that I have indicated heretofore.' " Waiving the objection to this exception, that it fails to point out any specific error of law, still the modification of the request by the presiding judge was not erroneous.

The thirteenth exception is as follows: "13. Because his honor, the presiding judge, refused, upon the request of the defendant, to charge: "That even if the jury should believe that no signals were given at or near any crossing, yet the defendant would not be liable if it was reasonable to suppose that no ordinarily prudent person would attempt to go near or upon a track when the train was plainly in sight and advancing, and when the defendant's servants had every reason to suppose that the plaintiff was aware of the fact'; but modified the same by adding, 'Well, as an abstract proposition, that is so. Prudent per-

son of ordinary intelligence applies to an adult, applies to a person who can take care of himself, who is supposed to have average intelligence'; thereby erring by indicating that the mere minority of the plaintiff, Stewart Spearman Mack, would make the failure to give the signals at or near the crossing negligence toward the plaintiff, although the train was plainly in sight and advancing, and the servants of the defendant had every ³⁴² reason to suppose that the plaintiff was aware of the fact." This exception does not contain all the remarks of his honor in charging the request. They are as follows: "Well, as an abstract proposition, that is so. Prudent person of ordinary intelligence applies to an adult, applies to a person who can take care of himself, who is supposed to have average intelligence. In addition to that, as I have indicated before in my charge on one of these requests, signals were required at a traveled place; that conclusiveness of presumption from the omission to ring the bell or blow the whistle applied to a public highway, street, or some crossing like that; but that does not deprive the plaintiff of his right at all, nor does it relieve them of their duty that the law lays upon them, if necessary to make signals for the purpose of avoiding an accident in exercising ordinary care and prudence." This exception is disposed of by what was said in considering the other exceptions, and is overruled.

The fourteenth exception is as follows: "14. Because his honor, the presiding judge, refused, upon request of the defendant, to charge the jury: 'That the jury cannot render any verdict for punitive damages, unless the evidence is clear that the defendant's servants were guilty of the most reckless, gross, and malicious negligence'; but modified the same by adding, 'Well, I cannot charge that as stated there, because the plaintiff must recover by the preponderance of the evidence. I suppose what counsel meant to say was, "guilty of reckless, wanton, willful, malicious, or acts of gross negligence"—that is the general rule; punitive or smart money is given where the action has been prompted by recklessness, by wantonness, by willfulness, by malice, or happened through negligence'; thereby erring in indicating that the jury might give punitive damages or smart money upon injury suffered through ordinary negligence." When the charge is considered in its entirety, and when all of his honor's language in refusing to charge the request is taken into consideration, it is evident that the presiding judge did not intend to charge that the defendant ³⁴³ was liable for exemplary damages in case there was only ordinary negligence. This exception is overruled.

The fifteenth exception is as follows: "15. Because his honor, the presiding judge, in summing up, charged the jury as follows, to wit: 'This is not an action for a collision at a street or highway or public traveled place; therefore, the omission of the signals (as I have already charged you) required by the statute for such crossing does not necessarily presume or make carelessness in cases of this character, but you may take them as circumstances that may or may not throw light upon the subject, and show a presence of want of ordinary care with reference to either or all the causes of action'; thereby erring in indicating to the jury that the failure to blow the statutory signals at the Augusta road crossing and other public crossings were circumstances that might be considered as proving negligence on the part of the defendant." This exception is disposed of by what was said in considering the other exceptions, and is overruled.

The sixteenth exception is as follows: "16. Because his honor, the presiding judge, charged the jury as follows, to wit: 'While the mere finding of cattle, horses, or mules killed upon the railroad raises presumption of negligence, making it a rule of negligence, has not been modified by the adoption of the stock law, yet it is an element to be taken into consideration in considering the question of negligence'; thereby indicating to the jury that the mere finding of the body of the mule near the railroad track was a circumstance that they might take into consideration in determining the question of negligence, although the plaintiff's witnesses had given full testimony as to all the circumstances attending the killing. The killing of the mule by the defendant raised the presumption of negligence on the part of the defendant, and this presumption continued until it was rebutted by the testimony. The fact that the witnesses were examined by plaintiff in regard to the killing of the mule did not destroy the presumption ³⁴⁴ arising from the mere fact of killing, nor prevent the application of that rule. If the facts showed that there was no negligence, then, of course, the presumption would be ineffectual. This exception is overruled.

The seventeenth exception is as follows: "17. Because his honor, the presiding judge, further charged the jury: 'I say the finding of the animal upon the track raises a presumption of negligence; it is only a presumption—it may be rebutted—but that is a presumption the law raised; and if you come to the conclusion that the mule was killed through the lack of care upon the part of the railroad, and the presumption is confirmed, the presumption is not rebutted, then the value would be the value of the mule'; thereby indicating that the mere finding of

the body of the mule near the railroad track was a circumstance to be taken into consideration by the jury in determining the question of negligence." The killing of the mule was not disputed, and this was sufficient to sustain the presumption of negligence. So that, even admitting that there was error, it was harmless. This exception is overruled.

The eighteenth exception is as follows: "18. Because his honor, the presiding judge, charged the jury as follows, to wit: 'The damages to the son may be ordinary compensatory damages, or, if there be gross negligence, gross carelessness, or recklessness, or wanton disregard, or malice, then go one step further: you may give him not only such damages as will compensate him, but give him smart money, punitive damages, to punish defendant'; thereby indicating that it was the duty of the jury in such case to give smart money, punitive damages, to punish defendant." His honor stated the circumstances under which the jury had the right to give smart money, and there was no error in his charge. This exception is overruled.

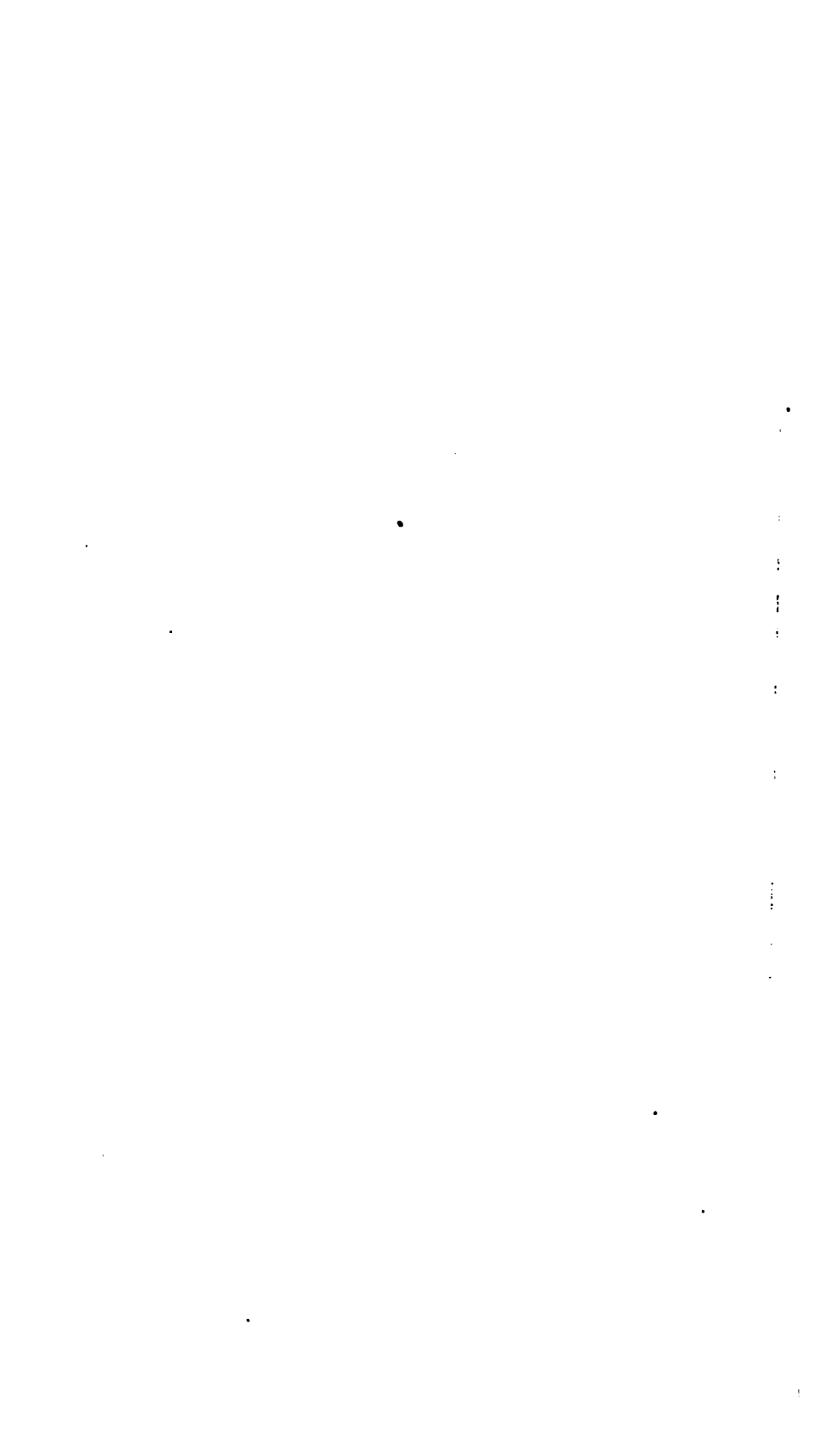
It is the judgment of this court that the judgment of the circuit court be affirmed.

NEGLIGENCE.—The word "reckless," when applied to negligence, has no legal significance per se which imports other than simple negligence or want of due care; but the use of the word "reckless," in connection with averments of facts to which it refers and explains, may imply more than mere heedlessness or negligence: *Louisville etc. R. R. Co. v. Anchors*, 114 Ala. 492; 62 Am. St. Rep. 116.

RAILROAD—COMPANIES—DUTIES AT CROSSINGS—SIGNALS.—In attempting to cross a railway track, a traveler must listen for signals, notice signs put up as warnings, and look attentively up and down the track: *Pittsburgh etc. R. R. Co. v. Frazee*, 150 Ind. 576; 65 Am. St. Rep. 377, and note. The fact of his infancy does not excuse his failure to do so if he is old enough to know the danger of going upon railroad tracks: *Spillane v. Missouri Pac. Ry. Co.*, 135 Mo. 414; 53 Am. St. Rep. 580. Contributory negligence in this regard bars his recovery for injuries, though the proper signals were not given by those in charge of an approaching train: *Blackwell v. St. Louis etc. R. R. Co.*, 47 La. Ann. 268; 49 Am. St. Rep. 371.

DAMAGES—EXEMPLARY—WHEN PROPERLY GIVEN.—A tort that sounds in exemplary damages exists when some right or property of a person is invaded maliciously, violently, wantonly, or with reckless disregard of social or civil obligations: *Samuels v. Richmond etc. R. R. Co.*, 35 S. C. 493; 23 Am. St. Rep. 833. See monographic note to *Spellman v. Richmond etc. R. R. Co.*, 28 Am. St. Rep. 870.

RAILROAD COMPANIES—KILLING OF STOCK—PRESUMPTION OF NEGLIGENCE.—Mere proof of the killing on a railroad track is not sufficient to charge the company. Wanton, willful, or gross negligence on the part of the company must be shown in order to make it liable: *Chicago etc. R. R. Co. v. Patchin*, 16 Ill. 198; 61 Am. Dec. 65, and note. Compare *Murray v. South Carolina R. R. Co.*, 10 Rich. 227; 70 Am. Dec. 219.



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ACTIONS.

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When the time between the service and the return day of a summons is less than the time allowed by law, the action ought not to be dismissed, but the defendant should be allowed the statutory time for an appearance. (*Stafford v. Gallops*, 816.)

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ADULTERY.

1. FORNICATION.—TO COMMIT THE OFFENSE of fornication, in the state of Georgia, both parties to the illicit sexual intercourse must be unmarried. (*Bennett v. State*, 77.)

2. FORNICATION—INDICTMENT—PROOF.—An indictment for fornication must allege that both parties to the illicit intercourse were, at the time, single or unmarried, and this fact must be proved by the state before a conviction can be had. (*Bennett v. State*, 77.)

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AGENCY.

1. AGENCY.—EVIDENCE of the previous course of dealing between parties is admissible to show that at a certain time one was agent for the other. (*Perry v. Dwelling House Ins. Co.*, 868.)

2. AGENCY, DISCLOSURE OF—WHAT DOES NOT AMOUNT TO—UNDISCLOSED PRINCIPAL—UNDISCLOSED AGENCY.—If a person named O. H. Campbell, having the exclusive and entire management and control of a business, employs another to perform services, his mere use, in making the contract, of the name of "Campbell & Co.," without indicating, in any other way, that he does so as agent for another person or firm doing business by that name, does not amount to a disclosure of his agency for his wife, Della Campbell, doing business under the name of "Campbell & Co."

The case is one not merely of an undisclosed principal, but of an undisclosed agency. (*Amans v. Campbell*, 547.)

3. AGENCY, FACT OF—LIABILITY OF AGENT WHO FAILS TO DISCLOSE.—A person acting as agent for another is personally answerable, if, at the time of making the contract in his principal's behalf, he failed to disclose the fact of his agency. Under such circumstances, he is subject to all the liabilities, express or implied, created by the contract, in the same manner as if he were the principal in interest. (*Amans v. Campbell*, 547.)

4. AGENCY—ILLEGAL TRANSACTION—ACCOUNTABILITY OF AGENT FOR MONEYS RECEIVED FROM PRINCIPAL.—While the courts will not enforce an illegal contract, yet if the agent of another has, in the prosecution of an illegal enterprise for his principal, received money or other property belonging to the principal, he is bound to turn it over to him, and cannot shield himself from liability therefor upon the ground of the illegality of the original transaction. (*Smith v. Blachley*, 887.)

5. AGENCY—FRAUD—ILLEGAL TRANSACTION—AGENTS ACCOUNTABILITY FOR EXTORTION FROM PRINCIPAL.—An agent cannot set up a pretended illegal transaction to retain money extorted from his principal by the grossest falsehood to further a mythical illegal transaction. The money still belongs to the principal, and he can rightfully demand it as soon as he discovers the fraudulent conduct of his agent. (*Smith v. Blachley*, 887.)

6. AGENCY—EXAMINATION OF BOOKS—IMPUTED KNOWLEDGE.—If, in making trial balances, an employer's set of books is, to some extent, examined, the knowledge of the agent who makes such examination is not imputable to the employer, where such examination is not made in the performance of a duty owed by the employer to any other party, nor is the employer to be charged with information, which his means of knowledge may disclose, where he is not willfully ignorant, and has not purposely neglected to use the means of knowledge within his power. (*Shepard etc. Lumber Co. v. Eldridge*, 446.)

7. CHECKS, UNINDORSED — COLLECTION OF, UPON FORGED INDORSEMENT—IMPUTED KNOWLEDGE.—If a clerk defrauds his employer by forging the latter's indorsement and collecting his checks, for the clerk's own use, the clerk's knowledge of the fraud, acquired in its perpetration, is not imputable to the employer. (*Shepard etc. Lumber Co. v. Eldridge*, 446.)

See Husband and Wife, 12; Sheriffs, 4.

AMOUNT IN DISPUTE.

See Appeal, 2, 3.

APPEAL.

1. APPEAL—SPECIAL FINDING MAY BE DISREGARDED FOR WRONGFUL EXCLUSION OF EVIDENCE.—A special finding of fact by a judge sitting without a jury, that a defendant's position has not been changed to his prejudice, must be disregarded, if evidence relevant and material to the question was wrongly excluded, although the finding may be correct upon the evidence admitted. (*Shepard etc. Lumber Co. v. Eldridge*, 446.)

2. JURISDICTION—AMOUNT IN DISPUTE.—For the purpose of determining the amount in dispute and ascertaining therefrom whether the supreme court of Missouri has jurisdiction of a cause, the amount claimed in the petition must be accepted as the amount in dispute, when the judgment appealed from wholly denies the

plaintiff's right of recovery. It is not material that at a former trial the plaintiff recovered a designated amount, much less than that sued for, and, on appeal to the court of appeals, the cause was reversed, and a new trial awarded, and rules of decision stated in the opinion of the court which, if correct, must defeat the plaintiff's action. (*Hennessey v. Bavarian Brewing Co.*, 554.)

3. DEATH OF MINOR CHILD.—THE AMOUNT IN DISPUTE in an action to recover for the death of a minor child is not restricted to compensation for his services at the wages received just prior to his death, nor can the appellate court determine what such amount is, for it cannot know to what extent the earning power of the child might have been increased during his minority, had his life been spared. (*Hennessey v. Bavarian Brewing Co.*, 554.)

4. RES JUDICATA—JURISDICTION OF COURTS.—The decision of the Kansas city court of appeals is not *res judicata* nor binding on the supreme court of the state, on a subsequent appeal. (*Hennessey v. Bavarian Brewing Co.*, 554.)

5. APPELLATE PRACTICE.—ASSIGNMENTS of error are sufficiently specific and definite when they point out the number of the exception relied upon as it appears in the abstract on appeal, and also point out the page of such abstract where such exception may be found. (*Manatt v. Scott*, 293.)

6. APPELLATE PRACTICE.—INSTRUCTIONS ARE SUFFICIENTLY IDENTIFIED in the bill of exceptions by referring to them as filed in the case by their numbers, and as duly indorsed by the presiding trial judge. (*Manatt v. Scott*, 293.)

7. APPELLATE PRACTICE—OBJECTIONS TO RECORD.—The evidence, rulings, and exceptions taken in the trial court cannot be stricken from the record on appeal, if the bill of exceptions contains directions to the clerk of the court to copy the shorthand reporter's report of the trial in full as extended, certified, and signed by such reporter, merely on the ground that such clerk was not directed to copy the original notes. (*Manatt v. Scott*, 293.)

8. APPELLATE PRACTICE—HUSBAND AND WIFE—INTENT TO DEFRAUD CREDITORS.—The intent of a husband to defraud his creditors by a conveyance to his wife is a question of fact under the statute, to be determined in the trial court, and the findings on such question, if supported by any evidence, cannot be reviewed on appeal. (*Poulson v. Stanley*, 73.)

9. APPELLATE PRACTICE—DELIVERY OF DEED.—Whether the conduct and acts of a person after the time when he claims to have received a deed were such as to authorize the inference that such deed had not been delivered to him, is a question to be determined by the trial court upon the evidence before it, and cannot be reviewed on appeal. (*Poulson v. Stanley*, 73.)

10. APPEAL—OBJECTION NOT MADE BELOW CANNOT BE FIRST URGED ON.—An objection to the admission of evidence not made on the trial cannot be urged on appeal for the first time. (*State v. Myers*, 521.)

11. TRIAL—LEADING QUESTIONS—DISCRETION OF COURT.—It is within the discretion of the trial court to allow leading questions, and its judgment in that regard is not, in the absence of abuse of discretion, the subject of review on appeal or proceeding in error. (*Perry v. German American Bank*, 593.)

12. APPELLATE PRACTICE—LAWFUL CONCLUSIONS on disputed questions of fact cannot be interfered with on appeal. (*Wilson v. Trenton*, 714.)

13. APPELLATE PRACTICE—QUESTION NOT REVIEWABLE.—The determination by municipal authorities as to who

among several bidders is the lowest, if supported by evidence, cannot be reviewed on appeal or error. (*Wilson v. Trenton*, 714.)

14. EVIDENCE—ADMISSION OF, WHEN HARMLESS ERROR.—The admission of irrelevant evidence, if harmless, is not ground for reversal of the judgment. (*Mack v. South Bound R. R. Co.*, 913.)

15. APPELLATE PRACTICE—OPINION OF TRIAL COURT—RECORD ON APPEAL.—The opinion of the trial court is not an essential part of the record on appeal. The judgment of such court must stand or fall upon the statutory record, the pleadings, findings, judgment, and bill of exceptions. (*Phenix Ins. Co. v. Fuller*, 637.)

16. APPELLATE PRACTICE—PRESUMPTIONS—OPINION OF TRIAL COURT.—If general findings are made by the trial court and a judgment pronounced thereon, it must be conclusively presumed on appeal that the trial court considered all the competent evidence before it, and determined all the material and necessary issues presented by the pleadings, although from the language of the opinion the contrary should appear. (*Phenix Ins. Co. v. Fuller*, 637.)

17. APPEAL—EXCEPTIONS TO ACTS OF JUDGE IN PRESENCE OF THE JURY—CONSTRUCTION OF STATUTE.—A statute authorizing exceptions to rulings, orders, and remarks of the judge made in the hearing of the jury at any stage of the proceedings, is a provision of very doubtful wisdom, and, under it, the ordinary rule that the error assigned must appear to have been injurious to the appellant will be most rigidly applied. (*Beardslee v. Columbia Township*, 883.)

18. APPEAL—EXCEPTIONS—REMARKS OF JUDGE—WHAT DOES NOT JUSTIFY A REVERSAL.—If the defendant, in an accident case, obtains a verdict, a judgment thereon will not be reversed because of remarks made by the trial judge in sustaining the plaintiff's objection to an offer made by the defendant, where his meaning is not entirely clear, and his remarks are susceptible of another interpretation than that put upon them by the plaintiff, especially where he sustained the plaintiff's objection, as the jury, in that event, could hardly have drawn any inference from the occurrence adverse to the plaintiff. (*Beardslee v. Columbia Township*, 883.)

19. ATTACHMENT—APPEALABLE ORDER.—An order of court for the release of attached property on the ground that it is not liable to seizure under the writ is, in effect, an order dissolving the attachment and may, therefore, be appealed from. (*Risdon Iron etc. Works v. Citizens' Traction Co.*, 25.)

See Habeas Corpus, 1.

APPURTENANCES.

See Deeds, 6.

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See Former Jeopardy, 2, 3; Railroad Companies, 6.

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See Contracts, 10; Mortgages, 3, 5, 6.

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See Election.

ASSOCIATIONS.

ASSOCIATIONS—PROOF THAT NO PROPERTY RIGHT IS INVOLVED.—While a political committee may, from time to time, disburse large sums of money for campaign purposes, this fact does not prove that any property right is involved, where a dissatisfied member is seeking a remedy against the association, because no member has any personal ownership in the funds. (*Kearns v. Howley*, 852.)

See Equity, 1.

ASSUMPSIT.

See Chattel Mortgages.

ATTACHMENT.

1. ATTACHMENT—JUSTIFICATION.—The rule that an officer attaching property in the possession of a stranger claiming title must, in order to justify, not only prove that the attachment defendant was indebted to the attachment plaintiff, but also that the attachment was regularly issued, only requires such a substantial compliance with every essential requirement of the attachment proceedings as creates a valid lien. Irregularities not going to the existence and validity of such lien are immaterial. (*Horkey v. Kendall*, 623.)

2. ATTACHMENT—AFFIDAVIT—COLLATERAL ATTACK. An affidavit to procure an attachment taken before a notary public, who is also the attorney for one of the parties, is merely irregular, and not a nullity, and cannot be collaterally attacked. (*Horkey v. Kendall*, 623.)

3. AFFIDAVITS—ATTORNEYS PROHIBITED FROM TAKING.—Under the Nebraska statutes, an attorney for either party is prohibited from taking, as a notary public, the affidavit whereby a provisional remedy, such as an attachment, is obtained. (*Horkey v. Kendall*, 623.)

4. ATTACHMENT—BONA FIDE PURCHASER.—Neither an attaching creditor nor officer is in the position of a bona fide purchaser for value without notice of defects in the title of the property attached. (*Cleveland etc. Works v. Lang*, 675.)

5. ATTACHMENT OF RIGHT TO PURCHASE GOODS—CONDITIONAL SALES.—The interest of a vendee in a conditional sale of goods is attachable, and the attaching creditor can hold the goods, as against the vendor, by seasonably tendering him the amount due on the purchase price. (*Hervey v. Dimond*, 673.)

6. ATTACHMENT OF REAL ESTATE—DAMAGES.—An attaching creditor is not liable for the depreciation in value of real estate levied upon which occurs while the attachment is in force, provided there is no change of possession. (*Tisdale v. Major*, 263.)

7. ATTACHMENT—WRONGFUL—DAMAGES FOR MENTAL SUFFERING.—Mental suffering resulting from the wrongful and malicious suing out and levying of a writ of attachment does not afford ground for the recovery of compensatory damages. (*Tisdale v. Major*, 263.)

8. GARNISHMENT—KNOWLEDGE OF OWNERSHIP OF FUND.—If a draft comes to a bank indorsed by one of its directors as secretary and treasurer of the defendant in attachment, a corporation, and is forwarded for collection, and, upon collection, one-half of the proceeds are used to pay an overdraft due the bank from such defendant, while the balance is credited to the teller of the bank as agent of the indorser at the time when the bank is served

with process of garnishment in the attachment proceeding, and is subsequently turned over to the corporation whose stock is held by the bank as security, and it also has possession of the corporation's books, it is for the jury to determine whether the bank had such knowledge of the ownership of the fund at the time of the service of the garnishment as to make it liable as garnishee. (Ferry v. Home Savings Bank, 487.)

9. GARNISHMENT—BONA FIDE CREDITOR—EVIDENCE.—If a judgment against the principal defendant in attachment is attacked by the garnishee on the ground that it is based upon a note received by the plaintiff in attachment after maturity, without consideration, and after the payments sought to be reached by garnishment were made, evidence is admissible on behalf of such plaintiff to show that such note was given for a bona fide indebtedness existing prior to the payments of the garnishee. (Ferry v. Home Savings Bank, 487.)

10. GARNISHMENT — KNOWLEDGE OF OWNERSHIP OF FUND—PAYMENT AFTER SERVICE OF PROCESS.—If a bank, at the time of the service of garnishment upon it, knows that a fund in its hands belongs to the defendant in attachment, it is liable as garnishee for such fund subsequently paid over, although the deposit stands in the name of a third person. (Ferry v. Home Savings Bank, 487.)

11. GARNISHMENT — PAYMENT OF INDIVIDUAL DEBT OUT OF CORPORATE FUNDS.—If moneys belonging to the defendant in attachment, a corporation, are paid to, and received by, a bank, without authority, as interest upon the individual debt of such defendant's president, with knowledge that they are corporate funds, they can be reached by the creditors of the defendant by garnishment or otherwise, as the bank is liable therefor. (Ferry v. Home Savings Bank, 487.)

12. GARNISHMENT AGAINST EXECUTORS OR ADMINISTRATORS.—Funds in the hands of an executor or administrator are not subject to garnishment by the creditor of the decedent, before final distribution of the estate has been ordered by the court, although the rights of the parties have become fixed by judgment, and the executor or administrator admits having funds on hand with which to pay the debt. (Hudson v. Saginaw Circuit Court, 465.)

13. EXECUTION SALES—ATTACHMENT OF PURCHASER'S INTEREST.—The estate or interest of a purchaser in land purchased by him at an execution sale may be attached and sold under execution both before and after the expiration of the time for redemption, and this rule applies to a redemptioner, other than the judgment debtor, who redeems from the purchaser. (Bennett v. Wilson, 61.)

See Appeal, 19; Executions, 12, 13; Judgment, 16; Replevin; Sales, 2.

ATTORNEY AND CLIENT.

See Attachment, 2.

BAGGAGE.

See Carriers, 2.

BANKS AND BANKING.

1. BANKS AND BANKING—PAYMENT ON LOST BANK-BOOK—EVIDENCE OF FRAUD.—In an action against a bank to recover money paid by it on a lost bank-book, upon the issue whether

the owner of the book or someone with whom he was in collusion had drawn the money to defraud the bank, evidence is admissible to show the amount of money possessed by the owner of such book at the time of his death, shortly after the money was thus paid out. (*Brown v. Merrimac River etc. Bank*, 700.)

2. **BANKS AND BANKING—PAYMENT OF BANK-BOOK TO STRANGER—NEGLIGENCE.**—Payment by a bank of the money due on a bank-book presented by a stranger, without any inquiry as to his identity and without comparing his signature with that of the real owner, is negligence, which is not excused by the owner's negligent loss of such book. (*Brown v. Merrimac River etc. Bank*, 700.)

3. **BANKS AND BANKING—LOSS OF BANK-BOOK—BY-LAWS.**—A by-law of a bank providing that it is "not responsible for loss sustained when the depositor has not given notice of his book being lost or stolen, if such book be paid in whole or in part on presentation," does not relieve the bank from the duty of acting in good faith and with reasonable care. (*Brown v. Merrimac River etc. Bank*, 700.)

4. **BANKS—INSOLVENCY—REPLEVIN TO RECOVER DEPOSIT FRAUDULENTLY ACCEPTED.**—An insolvent bank which accepts a deposit commits a fraud upon the depositor, and he may maintain replevin for the money if it has not been used, or mixed with the common funds, and can be identified. (*Corn Exchange National Bank v. Solicitors' etc. Co.*, 872.)

See Attachment, 10, 11; Checks; Equity, 4; Guaranty, 1; Usury, 1.

BLACKMAIL.

See Limitations of Actions, 4.

BONA FIDE PURCHASER.

See Attachment, 4.

BOUNDARIES.

BOUNDARIES.—**DECLARATIONS OF A DECEASED OWNER** of land, made while in possession, are competent evidence upon the question of its boundaries, in favor of, as well as against, one claiming under him. (*Nutter v. Tucker*, 647.)

BOYCOTTING.

See Conspiracy, 4; Damages, 6.

BUILDING CONTRACTS.

1. **BUILDING CONTRACTS, WHEN ENTIRE AND NOT DIVISIBLE.**—If two persons enter into a building contract, and one of them obligates himself to build four houses for the other, and the latter, in turn, obligates himself to pay a gross sum therefor, the agreement is an entire contract, and not divisible, although different amounts are to be paid for each house. (*Broxton v. Nelson*, 97.)

2. **BUILDING CONTRACTS—ENTIRE CAUSE OF ACTION CANNOT BE DIVIDED SO AS TO MAINTAIN TWO SUITS UPON IT.**—If one institutes an action in a justice's court for a specified sum claimed to be due upon a building contract, a copy of which is set forth, and for other demands connected with it, all of the alleged items of indebtedness sued for being stated in one account, the same being credited with various sums as partial payments, and the plaintiff's net demand in the case being for a "balance due on contract," he cannot afterward maintain a suit for alleged breaches

of the same contract which occurred before the first suit was instituted. (*Broxton v. Nelson*, 97.)

BURDEN OF PROOF.

See Corporations, 16; Cotenancy, 5; Homestead, 2; Insurance, 10; Mortgages, 11; Railroad Companies, 10.

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See Conspiracy, 2.

CARRIERS.

1. CARRIERS—DEGREE OF CARE REQUIRED.—The care due from a common carrier and his servants toward passengers in their charge, is a high degree of care under all circumstances. (*Whalen v. Consolidated Traction Co.*, 723.)

2. CARRIERS—NEGLIGENCE—PRESUMPTION.—If a passenger shows that he was injured while in charge of a common carrier through some defect in the appliances of the carrier or through some act or omission of the carrier's servant, which might have been prevented by due care on the part of the carrier, negligence is properly inferred, in the absence of any proof of the exercise of such care. (*Whalen v. Consolidated Traction Co.*, 723.)

3. IT IS A CARRIER'S DUTY TO PROTECT PASSENGERS from injury, violence, insult, and ill-treatment at the hands of its employes, during the course of transportation. (*Savannah etc. Ry. Co. v. Quo*, 85)

4. CARRIERS—TICKET AS CONTRACT.—A ticket issued to a passenger by a common carrier does not constitute the contract between the parties unless made so by express agreement. (*Boyd v. Spencer*, 146.)

5. CARRIERS—BAGGAGE—WHAT MAY BE CARRIED AS. In addition to the baggage committed to the custody of the carrier, a passenger, who has paid fare, has a right to take with him for use his personal baggage appropriate to the journey and its object—that is, not only wearing apparel for use and ornament, but also other articles, within reasonable limit, the use of which is personal to him during his journey and in accomplishing its purposes. (*Runyan v. Central R. R. Co.*, 711.)

6. CARRIERS—BAGGAGE—WHAT MAY BE CARRIED AS—LIMITATION BY TICKET.—A railroad ticket, stating that "free transportation is allowed for one hundred and fifty pounds of baggage (wearing apparel) only, and company's liability expressly limited to one dollar per pound," does not restrict, nor in any way affect, the right of the passenger to carry personal baggage with him, but simply limits the extent of accommodation he may have with respect to baggage committed to the custody of the carrier. (*Runyan v. Central R. R. Co.*, 711.)

7. CARRIERS—BAGGAGE—MERCHANDISE AS CUSTOM—EVIDENCE.—If a common carrier has for a long time acquiesced in, and made accommodation for, the carriage of small packages of merchandise of its passengers as personal baggage, so as to lead them to accept and rely upon its attitude in that respect as one of its regulations, it can deprive them of such privilege only after reasonable notice of its rescission of such regulation; and a passenger refused admission to the carrier's cars, because he desires to take with him such merchandise, may prove the existence of such regulation in an action to recover for such refusal of admission. (*Runyan v. Central R. R. Co.*, 711.)

CAVEAT EMPTOR.

See Dower, 5.

CHATTEL MORTGAGES.

CHATTEL MORTGAGES—RIGHT OF MORTGAGEE TO RECOVER PURCHASE PRICE.—A mortgagee of chattels may recover the purchase price thereof from a purchaser from the mortgagor, under the common counts in assumpsit, if the mortgage, while it authorized a sale of the goods by the mortgagor, expressly provided that the sale shall be in the name of the mortgagee, and that his lien shall follow the property. (*Flood v. Butzbach*, 501.)

CHECKS.

1. CHECKS, UNINDORSED — FORGED INDORSEMENT — CARE REQUIRED OF PAYEE TO PREVENT—RIGHT OF ACTION AGAINST DRAWER.—The holder of an unindorsed check, payable to his own order, is under no legal obligation to the drawer to exercise care as to how the check shall be kept, or to whom he shall commit its custody, or to see to it that the check shall not be put in circulation by the forgery of his indorsement, so long as he acts honestly without collusion. Hence, he is not deprived of his remedy against the drawer by his mere negligence in intrusting such a check to a clerk who, due care would have told him, was dishonest, thus giving the clerk an opportunity to commit crime. (*Shepard etc. Lumber Co. v. Eldridge*, 446.)

2. CHECKS — PAYMENT BY — DUTY IMPOSED UPON PAYEE.—The fact that the drawer of a check has bought goods of the payee for many years, and made payment by checks, does not impose any liability upon the latter as to the methods in which he shall conduct his own business, or as to what clerks he shall employ. (*Shepard etc. Lumber Co. v. Eldridge*, 446.)

3. CHECKS, UNINDORSED—PAYMENT OF, UPON FORGED INDORSEMENT—LOSS FALLS WHERE.—The circumstance that a check has been taken by the payee in absolute extinguishment of the drawer's debt to him does not relieve the drawer from his legal obligations as such. The fact, therefore, that the check has been stolen from the payee, and collected upon a forged indorsement, is not a sufficient reason why the loss should fall upon the payee rather than upon the drawer. (*Shepard etc. Lumber Co. v. Eldridge*, 446.)

4. CHECKS, UNINDORSED—FORGED INDORSEMENT—OBLIGATION OF PAYEE TO PREVENT.—The holder of an unindorsed negotiable check, payable to his own order, is under no other legal obligations with reference to it than those which rest upon any holder of commercial paper, completed and put in circulation by the maker. He is not, therefore, under any legal obligation, either to the drawer of the check, or to the public, to see to it that the check is not put in circulation with a forged indorsement. (*Shepard etc. Lumber Co. v. Eldridge*, 446.)

5. CHECKS, UNINDORSED — COLLECTION OF, UPON FORGED INDORSEMENT—DUTY OF PAYEE AS TO GIVING NOTICE.—One who has become the holder of a check, which his clerk steals and collects upon forged indorsements, is under no duty to give notice to the drawer and the drawee, or to the public, of the theft and forgery, where he is honestly ignorant of such facts, and incorrectly, but honestly, assumes that it has been collected in the regular course of his business. There is no duty to anyone connected with the check in such a case, which requires the holder to examine his books of account, or to make trial balances, or to dis-

cover, by any means, what has become of the check, and, since he owes no duty to others, he is not to be charged with knowledge which he does not in fact have. (*Shepard etc. Lumber Co. v. Eldridge*, 446.)

6. CHECKS, UNINDORSED — COLLECTION OF, UPON FORGED INDORSEMENT — PAYEE'S ACTION AGAINST DRAWER—ESTOPPEL.—Although a seller of goods receipts subsequent bills without informing the buyer that a previous debt for which checks were given had not been extinguished, this will not estop the seller, in an action to recover the amount of the checks, from showing that they had been stolen by his clerk and collected upon forged indorsements, where the seller's failure to mention the previous checks was not due to any intent to mislead the buyer. Such an act on the part of the seller could not justify an inference on the part of the buyer that the checks had been collected by the seller, so as to estop the latter from showing the truth. (*Shepard etc. Lumber Co. v. Eldridge*, 446.)

7. CHECKS, UNINDORSED — COLLECTION OF, UPON FORGED INDORSEMENT — PAYEE CANNOT RECOVER AFTER MISLEADING DRAWER.—If a check is stolen from the payee, is put into circulation by forgery, and paid by the drawee, the payee is estopped from maintaining an action against the drawer upon the check, where he has misled the drawer to his prejudice, and thereby placed him in a worse position than he would otherwise have been in with reference to the assertion or protection of his rights resulting from what has been done with the check. (*Shepard etc. Lumber Co. v. Eldridge*, 446.)

8. CHECKS, UNINDORSED — COLLECTION OF, UPON FORGED INDORSEMENT—EVIDENCE ADMISSIBLE IN ACTION BY PAYEE AGAINST DRAWER.—If a check has been stolen by the payee's clerk, who forges indorsements thereon and puts the check into circulation, and it is paid by the bank upon which it is drawn, but is returned to the drawer, from whom the payee, who has been informed of the forgery, afterward obtains it, evidence of what was done by the payee after he learned of the forgery is admissible in an action brought by him against the drawer of the check. (*Shepard etc. Lumber Co. v. Eldridge*, 446.)

9. CHECKS, UNINDORSED — THEFT AND COLLECTION OF, UPON FORGED INDORSEMENT—IMPUTED KNOWLEDGE.—The payee of a check is not chargeable with knowledge that it has been stolen or embezzled, and collected upon forged indorsements made by his clerk, either because his clerk has that knowledge, or because the means of knowledge existed in his books of account, so that he could have made the discovery if his monthly trial balances had been made by an honest clerk. (*Shepard etc. Lumber Co. v. Eldridge*, 446.)

See Forgery.

CLAIM AND DELIVERY.

See Limitations of Actions, 6.

COLLATERAL ATTACK.

See Attachment, 2; Executors and Administrators, 1; Justice of the Peace, 2, 3; Officers, 3, 4.

COLLATERAL SECURITY.

See Corporations, 17.

COLLUSION.

COLLUSION is an agreement between two or more persons to defraud another of his rights by the forms of law, or to secure an object forbidden by law. (*Warren v. Union Bank of Rochester*, 777.)

CONFLICT OF LAWS.

See *Contracts*, 5; *Insurance*, 1; *Sales*, 2-4.

CONSIDERATION.

See *Suretyship*, 6, 7.

CONSPIRACY.

1. CONSPIRACY—CIVIL LIABILITY FOR.—A conspiracy may, when accompanied by an overt act, create a liability by reason of the fact that one or more conspirators may do an unlawful act which causes damage to another by which all those engaged in the conspiracy for the accomplishment of the purpose for which the injury was done in pursuance of the conspiracy would be alike liable, whether actively engaged in causing the injury or not. (*Doremus v. Hennessy*, 203.)

2. BUSINESS COMPETITION—WHAT IS NOT.—An act maliciously done with the intent and purpose of injuring another is not lawful competition. Acts done for the purpose of breaking up the business of another, because he will not join in making a scale of prices, must be deemed malicious, and, therefore, the doers of them are personally liable to the person injured thereby. (*Doremus v. Hennessy*, 203.)

3. BUSINESS OF ANOTHER—LIABILITY FOR INTERFERING WITH.—No person or combination of persons has the right, directly or indirectly, to interfere with or disturb another in his lawful business, or to threaten to do so for the purpose of compelling him to do some act which, in his judgment, his interest does not require. For any loss sustained by him for such interference he is entitled to recover. (*Doremus v. Hennessy*, 203.)

4. BOYCOTTING—LIABILITY FOR.—It is unlawful and actionable for one man, from unlawful motives, to interfere with another's business, by fraud or misrepresentation, or by molesting his customers or those who would be his customers, or by preventing others from working for him, or causing them to leave his employ by fraud or misrepresentation, or physical or moral intimidation or persuasion, with intent to inflict an injury which causes loss. (*Doremus v. Hennessy*, 203.)

CONSTABLE.

See *Executions*, 10.

CONSTITUTIONS.

CONSTITUTIONAL PROVISIONS, WHEN NOT SELF-EXECUTING.—The provision of the constitution of Kansas that dues to a corporation shall be secured by the individual liability of stockholders to an additional amount equal to the stock owned by each stockholder and such other means as shall be provided by law is not self-executing. (*Bell v. Farwell*, 194.)

See *Municipal Corporations*, 6.

CONTEMPT.

1. CONTEMPT—RECESS OF COURT—CONSTRUCTION OF STATUTE.—A statute providing punishment for "contemptuous or insolent behavior toward a court while engaged in the discharge of

a judicial duty" does not limit such behavior to the time the court is actually in session and to acts committed in its presence. It includes such behavior during the intermission of the court while a trial is in progress. Such judicial duty is not performed until the particular case is finally disposed of. (*Field v. Thornell*, 281.)

2. CONTEMPT—LIBERTY OF THE PRESS.—Under a plea of liberty of the press a newspaper has no right to assail litigants during the progress of the trial, intimidate witnesses, dictate verdicts or judgments, or spread before juries its opinion of the merits of cases on trial. The liberty of the press stops when a further exercise would invade the rights of others. (*Field v. Thornell*, 281.)

3. CONTEMPT OF COURT—NEWSPAPER ARTICLE.—The publication of an article in a newspaper commenting on proceedings in court then pending and undetermined, or upon the court, the witnesses, or the jury in relation thereto, made at a time and under circumstances calculated to affect the course of justice in such proceedings, and obviously intended for that purpose, may be punished as a contempt, even though the court was not in session when the publication was made. (*Field v. Thornell*, 281.)

4. CONTEMPT.—A NEWSPAPER ARTICLE headed, "A Put-up Job," which does not contain a fair account of the trial, but rather a statement of the editor's opinion, in effect or by innuendo, that one witness for the state was a jail bird, another silly and suitable for the insane asylum, that four of them were in a deal to convict the defendant, and that, whatever the jury might do, there was no doubt in the mind of every intelligent man familiar with the facts that it should acquit him, if placed in the hands of two of the jurors during the progress of the trial, but during an intermission of the court, and read aloud by one of the jurors in the jury-room during the deliberation of the jury, is a contempt of court and punishable as such. (*Field v. Thornell*, 281.)

5. CONTEMPT—MOTION FOR DISCHARGE—WAIVER OF OBJECTIONS.—If, in contempt proceedings, the defendant moves for a discharge upon the conclusion of the evidence for the prosecution, and the court declines to decide the motion at that time, whereupon the defendant introduces evidence without insisting upon a ruling or saving an exception, he is deemed to have waived the right to make any objection and to have acquiesced in the conduct of the trial. (*Field v. Thornell*, 281.)

6. CONTEMPT OF ONE COURT BY RECEIVER OF ANOTHER.—The agent of a receiver is the agent of the court appointing him, and neither he nor his agents can be punished by any court for contempt of it in resisting the enforcement of its judgment. If it is insisted that the receiver has run counter to the jurisdiction or claim of authority of a court other than that appointing him, the forum to which to apply for the correction of his conduct and the punishment of his offense is the court appointing and controlling him. (*Atwood v. State*, 393.)

See Judgment, 12.

CONTRACTS.

1. CONTRACTS—WHEN COMPLETED.—A proposition does not become a contract until the maker or his agent is notified of its acceptance. (*Perry v. Dwelling House Ins. Co.*, 668.)

2. CONTRACTS—CONTEMPORANEOUS ORAL PROMISE.—The breach of an oral promise honestly made to pay part of the agreed price in advance of curing a crop, if in conflict with the written contract that payment would be made on delivery of the crop, is no excuse for a breach of the latter by the seller, and is

within the rule forbidding proof of a contemporaneous or prior oral agreement to detract from the terms of a contract in writing, but if such oral promise was made without any intention of performing it and for the purpose of securing the execution of the written contract, it is a fraud, and is ground for the avoidance of the written contract. (*Langley v. Rodriguez*, 70.)

3. **CONTRACTS—BREACH—PROOF OF DAMAGE IMMATERIAL.**—The payment of a promised advance to enable a vendor to gather and cure a crop, if fraudulently promised, is a condition precedent to the duty of the vendor to deliver the crop, and precludes the necessity of proof that he was damaged by the failure to receive the promised advance. (*Langley v. Rodriguez*, 70.)

4. **ESTATES OF DECEDENTS—AGREEMENT TO MAKE CONVEYANCE—STATUTE OF FRAUDS.**—An oral agreement by a decedent's parents to obviate the necessity of making a will and as a condition for the conveyance of certain land made to the mother of the decedent, to the effect that her parents would convey certain other land to the husband of the decedent upon her death, is not within the statute of frauds, requiring trusts in land to be in writing. (*Simons v. Bedell*, 35.)

5. **CONFLICT OF LAWS.—IN THE CONSTRUCTION OF CONTRACTS** and in ascertaining their validity the law of the country wherein they were made or are to be performed governs. (*Bell v. Farwell*, 194.)

6. **CONTRACTS TO DO WORK FOR FIXED SUM—EXTRA COMPENSATION FOR FAULT OF SPECIFICATIONS.**—One who voluntarily enters into an absolute contract, without qualification or exception, to construct certain work according to certain specifications at a stipulated price must abide by his contract and perform his undertaking no matter at what cost, if performance is not absolutely impossible, and cannot recover compensation for extra work made necessary by a fault in the specifications. (*Leavitt v. Dover*, 640.)

7. **CONTRACTS—RESTRAINT OF TRADE—CONSIDERATION.**—If a stockholder sells his stock in a corporation and receives his own price therefor, upon an agreement not to again engage in that vicinity in the same business that is carried on by such corporation, there is sufficient legal consideration to support the agreement. (*Up River Ice Co. v. Denler*, 480.)

8. **CONTRACTS—RESTRAINT OF TRADE—CONSTRUCTION.** An agreement by one who sells his stock in a corporation doing an ice business in a city, not to again engage in such business in that city or "adjacent thereto," sufficiently defines the limit of prohibited territory, and is valid, as it means that he will not thereafter do an ice business in that city or vicinity which would come in competition with such corporation. (*Up River Ice Co. v. Denler*, 480.)

9. **CONTRACTS—RESTRAINT OF TRADE—LIMITATION AS TO TIME.**—An agreement, based on a sufficient consideration, not to engage in a certain business within designated territory, is valid, though unlimited as to time. (*Up River Ice Co. v. Denler*, 480.)

10. **CONTRACTS—RESTRAINT OF TRADE—ASSIGNABILITY.**—The right to enforce a valid agreement not to engage in a certain business within specified territory may be passed by assignment. (*Up River Ice Co. v. Denler*, 480.)

11. **TRADE SECRETS—RESTRAINT OF TRADE.**—An agreement between a manufacturer and his employé as a condition of employment, that the former is not to disclose any of the secrets of the business or machinery about which he is employed, is not an agreement in restraint of trade. (*Thum v. Tloczynski*, 469.)

12. CONTRACT NOT TO COMPETE IN BUSINESS, WHEN VALID—SALE OF GOOD-WILL—CORPORATIONS—PUBLIC POLICY—RESTRAINT OF TRADE—INJUNCTION.—If three corporations, one of which is engaged in installing and constructing electric plants and appliances, and the other two in manufacturing and dealing in electrical appliances, organize a new company to carry on different, but closely connected, departments of the electrical business, under a written agreement that the manager of each of the old companies, who is a shareholder therein, shall become an officer and director of the new company, and that each shall subscribe for, and take, one-third of the capital stock of the new company, and each corporation further agrees to sell its assets and good-will to the new company, to discontinue business, to promote the interests of the new corporation, and not to enter into, conduct, or assist in conducting, any business that shall, in any way, interfere with, or compete, for a period of five years, with the proposed business of the new company, which is of a nature that may extend over the whole country, and the agreement is fully executed in all its parts, except the stipulation not to compete against the new company, a manager of one of the three corporations, who seeks to violate the agreement on the part of his company, will be enjoined from so doing, as such stipulation is necessary for carrying out the agreement, and is not void as against public policy on account of being in restraint of trade, for it goes no further than is reasonably necessary to protect the good-will of the business sold by the defendant's corporation, and should, therefore, be held valid and binding on the defendant, particularly where no clear distinction can be made concerning competition with one department of the new company and competition with another. (*Anchor Elec. Co. v. Hawkes*, 403.)

13. CONTRACTS—WHAT BREACHES MUST BE INCLUDED IN ONE ACTION.—One suit only can be maintained for several precedent breaches of an entire contract. (*Broxton v. Nelson*, 87.)

14. CONTRACTS—CAUSING PERSON TO VIOLATE, LIABILITY FOR.—Though a person who violates a contract is personally liable, yet if he is induced to do so by the acts and persuasion of another, who intended thereby to injure the other contracting party or to coerce him to adopt a line of business against his will and judgment, he also has a right to recover against the persons thus inducing the breaking of the contract. (*Doremus v. Hennessy*, 208.)
See Building Contracts; Carriers, 4; Evidence, 4; Goodwill, 2; Husband and Wife, 7; Officers, 1, 2; Railroad Companies, 8, 9; Specific Performance, 4, 5; Usury, 8.

CONVEYANCES.

See Deeds.

CORPORATIONS.

1. CORPORATIONS—TRANSFER OF STOCK.—A marginal note made by the secretary of a corporation on the stubs of stock certificates does not amount to a transfer of the stock on the books of the corporation, when no transfer is authorized by either of the parties thereto, and it is contrary to the express desire of one of them. (*McFall v. Buckeye Grangers' etc. Co.*, 47.)

2. CORPORATIONS—SHARES OF STOCK—NEGOTIABLE PAPER.—A certificate of shares in a corporation is not negotiable paper. (*Wallace v. Carpenter Electric etc. Co.*, 530.)

3. CORPORATIONS—RIGHT TO NEW STOCK.—The right to take new stock issued by a corporation belongs to the shareholders

therein in all the classes constituting such shareholders, in proportion to the number of shares held by each. (Jones v. Concord etc. R. R., 650.)

4. CORPORATIONS.—DISTRIBUTION OF NEW STOCK issued by a corporation is a partial division of capital. (Jones v. Concord etc. R. R., 650.)

5. CORPORATIONS.—A SHARE OF STOCK is the right which the owner has in the management, profits, and ultimate assets of the corporation. (Jones v. Concord etc. R. R., 650.)

6. CORPORATIONS.—DISTRIBUTION OF NEW STOCK.—If a statute authorizing a corporation to increase its capital stock contains no express provision as to the distribution of the new stock, the corporation may authorize any legal disposition of the new shares that it may elect. The general and valid custom is to compel the stockholders to buy the new stock at par, or to sell the right to buy it at that price in order to save their corporate interests. (Jones v. Concord etc. R. R., 650.)

7. CORPORATIONS.—ISSUE OF NEW STOCK—REPEAL OF FORMER STATUTE.—A legislative grant of power to a corporation to increase its capital, in conflict with an earlier statute prohibiting such increase without the consent of the legislature, acts as a repeal of the latter so far as it would apply to such corporation if not repealed. (Jones v. Concord etc. R. R., 650.)

8. CORPORATIONS.—DISTRIBUTION OF NEW STOCK.—The right to an unequal distribution of new stock issued by a corporation among the stockholders is not established by the fact that different classes of stockholders under the corporate charter share unequally in the dividends derived from the net earnings. (Jones v. Concord etc. R. R., 650.)

9. CORPORATIONS.—BY PREFERRED STOCK in a corporation is understood stock which gives the holders a priority of dividends, but no priority of assets or capital unless expressly stipulated for. (Jones v. Concord etc. R. R., 650.)

10. CORPORATIONS.—NEW STOCK—INJUNCTION TO RESTRAIN ISSUE OF.—The issue of new stock by a corporation authorized by statute cannot be restrained by injunction, when it is not shown that such stock is a dividend of earnings belonging to different classes of shareholders, or a violation of some provision of the charter relating to dividends. (Jones v. Concord etc. R. R., 650.)

11. CORPORATIONS.—INCREASE IN CAPITAL STOCK.—If a corporation has legislative authority to increase its capital stock for certain defined purposes, and the question of the necessity of such increase has not been submitted to the court by the legislature, evidence that no increase in capital is necessary is not admissible in an action to restrain the issue of new stock. (Jones v. Concord etc. R. R., 650.)

12. CORPORATIONS.—ISSUE OF NEW STOCK—INJUNCTION. Stockholders in a corporation who join in procuring a legislative grant of power to increase the capital stock for certain defined purposes, and allow money to be expended therefor without objection, are not entitled to an injunction to restrain the corporation from issuing new stock. (Jones v. Concord etc. R. R., 650.)

13. CORPORATIONS.—MEETING OF STOCKHOLDERS—NOTICE.—A notice of a meeting of the stockholders of a corporation, to the effect that it is called to ascertain whether the corporation will adopt a statute authorizing an increase of its capital stock, and vote to increase such capital stock to an amount within the limits authorized by existing laws, and to pass such other votes relating

to the increase of the capital stock as the stockholders may desire, is legal and sufficient. (*Jones v. Concord etc. R. R.*, 850.)

14. **CORPORATIONS—INSOLVENCY—LIABILITY OF HOLDERS OF "WATERED" STOCK—EQUITABLE RIGHTS OF CREDITORS.**—If a corporation issues stock as fully paid up, when in fact it is not, and afterward becomes insolvent, the original holders of such "watered" stock, as well as their transferees with notice, are answerable to a creditor, who became such after the stock was issued, for the difference between the par value of the stock and the amount paid the corporation therefor to the extent necessary to satisfy his claim, and the creditor is entitled to maintain an action in equity to compel such stockholders to pay his claim, on the ground that the stock of the corporation was fraudulently issued as fully paid up, when in fact it was not. (*Wallace v. Carpenter Electric etc. Co.*, 530.)

15. **CORPORATIONS—INSOLVENCY—SALE OF STOCK BELOW PAR—CONSTRUCTION OF STATUTES.**—If the price at which the stock of a corporation may be sold is already fixed by a former statute, at a price to be not less than par, a subsequent statute giving authority only to create, issue, and dispose of such an amount of paid-up, special, or preferred stock as the directors may deem advisable, does not authorize the corporation to issue its stock as fully paid up, and to sell it for less than par, and on such terms as its directors deem advisable. (*Wallace v. Carpenter Electric etc. Co.*, 530.)

16. **CORPORATIONS—INSOLVENCY—SUIT AGAINST HOLDER OF "WATERED" STOCK—BURDEN OF PROOF.**—A judgment creditor who seeks to collect his debt against an insolvent corporation from the holder of "watered" stock must assume the burden of showing that he acquired his stock in good faith, without actual notice of facts making its issue fraudulent as to him, or that he purchased it from a bona fide transferrer. (*Wallace v. Carpenter Electric etc. Co.*, 530.)

17. **BANKS—INSOLVENCY—ONE WHO HOLDS STOCK AS COLLATERAL SECURITY IS A STOCKHOLDER—LIABILITY.** One who holds a certificate of stock in a banking corporation as collateral security for a debt is, under the Minnesota statute, answerable as a stockholder, and is liable for debts of the corporation in an amount equal to double the amount of stock standing in his name upon the books of the bank during the time he holds the stock and for one year after any transfer thereof by him. Hence, if the bank becomes hopelessly insolvent during that time, the statutory liability may be enforced against such stockholder. (*State v. Bank of New England*, 538.)

18. **EVIDENCE—BOOKS OF A CORPORATION TO SHOW MEMBERSHIP THEREIN.**—In an action to charge the defendant with liability as a stockholder in a corporation against one who denies his membership, a stub of a blank certificate book containing memoranda indicating that a certificate of shares of stock had been issued to him is not admissible against him. (*Hinsdale Savings Bank v. New Hampshire Banking Co.*, 391.)

19. **CORPORATIONS, FOREIGN—ACTION AGAINST STOCKHOLDERS ON THEIR LIABILITY.**—If, by the law of a state in which a corporation was organized, each of its stockholders is personally liable to its creditors, and such liability is, by the courts of that state, deemed contractual, an action to enforce it may be maintained in the courts of another state against a stockholder resident therein. (*Bell v. Farwell*, 194.)

20. **CORPORATIONS—STATUTES IMPOSING LIABILITY ON STOCKHOLDERS ARE NOT PENAL.**—A statute of Kansas pro-

viding that if a corporation shall have suspended business for a year it shall be deemed dissolved, and its stockholders shall be liable to its creditors in an additional amount equal to the amount of their stock, to be recovered directly in an action against them without joining the corporation, is not penal in its nature or purpose. Hence, the liability created thereby may be enforced in the courts of other states. (*Bell v. Farwell*, 194.)

21. CORPORATIONS—LIABILITY OF STOCKHOLDERS, WHEN CONTRACTUAL.—If a statute provides that stockholders of corporations shall be liable to their creditors, such liability must be regarded as contractual and not as penal. (*Bell v. Farwell*, 194.)

See Constitutions; Contracts, 7, 12; Insurance, 8.

COSTS.

COSTS IN EQUITY.—Where, after a suit was brought to enforce the enforcement of a void municipal ordinance, it was repealed, and another ordinance passed which was free from objection, the suit should be dismissed, but at the cost of the defendant. (*Cicero Lumber Co. v. Cicero*, 155.)

COTENANCY.

1. COTENANTS—ADVERSE TITLE—ACQUISITION OF BY.—One coming into the possession of lands under a common title with others cannot assert such title while he remains in possession, nor can he purchase an outstanding title and assert it against his cotenants. (*Boyd v. Boyd*, 169.)

2. COTENANTS—ADVERSE POSSESSION BY.—After a cotenant enters into the possession of the property of the cotenancy with nothing to show that his entry was hostile or that his subsequent possession became adverse, a state of facts must be proved from which an actual ouster may be inferred. (*Boyd v. Boyd*, 169.)

3. COTENANTS—KNOWLEDGE OF RIGHTS NECESSARY TO AN ADVERSE POSSESSION.—Where a cotenant was a minor when exclusive possession of the lands was taken by his cotenant, and he knew nothing of his interest in the lands, such possession, however long continued, does not amount to an ouster nor ripen into a prescriptive title until he obtains knowledge of his rights and that the cotenants in possession hold in hostility to him. (*Boyd v. Boyd*, 169.)

4. COTENANCY—ADVERSE POSSESSION.—If one cotenant has the sole use and possession of the subject of the tenancy, knowing that such tenancy exists, for more than thirty years without making claim of entire ownership, his possession is not adverse to his cotenants who have no knowledge of the tenancy nor of their rights or that the tenant in possession claims to hold adversely to them. (*Bader v. Dyer*, 332.)

5. COTENANCY—ADVERSE POSSESSION—BURDEN OF PROOF.—The possession of one cotenant is presumed to be the possession of all, and, in order to rebut this presumption and make the possession adverse, it must be shown that the possession was with the intent to hold adversely, and such intent must be indicated by acts calculated to exclude the cotenant. (*Bader v. Dyer*, 332.)

See Husband and Wife, 5; Partition, 1, 2.

COURTS.

1. COURTS—POWER TO COMMIT—WAIVER.—There is nothing in the law establishing the criminal court of Atlanta, and regulating trials therein, which authorizes the judge of that court to discontinue a trial and bind over the accused to the next superior court.

if, after hearing the evidence, he should be of opinion that the defendant is guilty of an offense which is beyond the jurisdiction of such court. Hence, a defendant, by waiving indictment and demanding a jury trial in such court, does not consent for the judge of that court to exercise such power, a power not conferred upon it by law. (*Bell v. State*, 102.)

2. COURT—SPECIAL AND LIMITED JURISDICTION.—A court, in proceedings to authorize a guardian to mortgage the property of his ward, is exercising a special and limited jurisdiction, wholly dependent upon the statute, and no presumption can be indulged in favor of that particular jurisdiction, though the court is one of general jurisdiction. (*Warren v. Union Bank of Rochester*, 777.)

See Contempt, 1; New Trial, 2.

CRIMINAL LAW.

1. CRIMINAL LAW — INSTRUCTIONS ON REASONABLE DOUBT.—A requested instruction that "if, after consideration of the whole case, any juror should entertain a reasonable doubt of the guilt of the defendant, it is the duty of such juror not to vote for a verdict of guilty, nor to be influenced in so voting, for the single reason that a majority of the jury should be in favor of a verdict of guilty," is a correct statement of the duty of a juror, and should be given. (*People v. Dole*, 50.)

2. CRIMINAL LAW.—IN CASES OF CIRCUMSTANTIAL EVIDENCE, facts should be proved which are not only consistent with the guilt of the defendant, but inconsistent with any reasonable hypothesis of innocence, and every single fact from which the deduction of guilt is to be drawn must be proved by evidence which satisfies the minds of the jury to the same extent that they are required to be satisfied of the fact in issue in cases where the evidence is direct. (*People v. Dole*, 50.)

3. CRIMINAL LAW—INSTRUCTIONS ON CIRCUMSTANTIAL EVIDENCE.—An instruction that "where the evidence is entirely circumstantial, yet it is not only consistent with the guilt of the defendant, but inconsistent with any other rational conclusion, the law makes it the duty of the jury to convict, notwithstanding such evidence may not be as satisfactory to their minds as the direct testimony of credible eye-witnesses would have been, though incorrect and illogical, is not sufficient ground for reversal of the judgment. (*People v. Dole*, 50.)

4. CRIMINAL LAW—AIDING AND ABETTING CRIME—INSTRUCTIONS.—An instruction in a criminal case to the effect that if the "jury believe from the evidence, beyond a reasonable doubt, that the defendant committed the offense charged, or aided, abetted, or assisted any other person or persons to commit the same," they "should find the defendant guilty," is erroneous in using the words "aid or abet" instead of "aid and abet." Such error is cured by another instruction, from which the jury cannot fail to understand that merely aiding or assisting in the commission of a crime, without guilty knowledge, is not criminal. (*People v. Dole*, 50.)

5. CRIMINAL LAW — WITNESSES—CROSS-EXAMINATION. Any fact may be called out on cross-examination which the jury may deem inconsistent with the direct testimony of a witness. An accused person testifying in his own behalf is, in this respect, put upon the same plane with other witnesses. (*People v. Dole*, 50.)

6. CRIMINAL LAW — EVIDENCE—CROSS-EXAMINATION.—If an accused person testifying in his own behalf has offered an explanation of circumstances tending to incriminate him, he may be

asked on cross-examination whether he has not done, or omitted to do, something which it might be thought he would probably have done, or omitted to do, if his explanation were true. (*People v. Dole*, 50.)

7. TO MAKE A TRANSACTION ILLEGAL, there must be an illegal intention, accompanied by an act which is criminal or prohibited by law, for the law takes no cognizance of an intent existing only in the mind, nor does it impose as a penalty for such intent immunity to him who has plundered one guilty of it. (*Smith v. Blachley*, 887.)

See Adultery; Collusion; Extortion; Forgery.

CUSTOM.

USAGE IS NOT ADMISSIBLE TO CONTRADICT a written agreement unambiguous in its terms. (*Cummings v. Blanchard*, 664.)

See Carriers, 7; Fisheries, 2.

DAMAGES.

1. DAMAGES—DIMINUTION IN VALUE OF PROPERTY.—An owner of property is entitled to use it in its present condition; and, if a defendant has, by his wrongful act, caused a diminution, either in the market value of the plaintiff's property, or in its value for use, the plaintiff is entitled to compensation from him for the loss thus sustained. (*Farkas v. Towns*, 88.)

2. DAMAGES FOR "MENTAL SUFFERING" CANNOT BE AWARDED in an action to recover damages for the unlawful seizure and detention of personal property. If the act was accompanied by circumstances of aggravation, exemplary damages may be allowed, but the doctrine of "mental anguish" is not applicable to it. (*Chappell v. Ellis*, 822.)

3. DAMAGES.—EXEMPLARY DAMAGES are given where the injury for which an action is brought has been caused by recklessness, wantonness, willfulness, or malice, or has happened through gross negligence. Ordinary negligence is not ground for punitive damages. (*Mack v. South Bound R. R. Co.*, 913.)

4. DAMAGES.—SPECIAL DAMAGES to be recovered must be specially pleaded. (*Chicago etc. R. R. Co. v. Emmert*, 602.)

5. DAMAGES.—PLEADING.—An allegation in a complaint for damages, averring that plaintiff's farm has been damaged by the construction of a railway embankment, for the reason that such farm has thus come to be known in the neighborhood as one liable to overflow, does not state a cause of action. (*Chicago etc. R. R. Co. v. Emmert*, 602.)

6. BOYCOTTING—DAMAGES—QUESTION FOR THE JURY.—Where, in an action to recover damages from persons for persuading and inducing others to break, and to refuse to perform, their contract with the plaintiff, it is claimed that the wrongs complained of could not have produced the injury alleged without the intervention of some independent force, to wit, the acts of the parties in breaking their contracts, the question thus presented is one of fact for the determination of the jury, and its verdict in favor of the plaintiff will be sustained, where the evidence tends to show that the defendants persuaded, or sought to procure, the breaking of the contracts for the purpose of injuring the plaintiff, and that they were so broken and such injury resulted. (*Doremus v. Hennessy*, 203.)

See Attachment, 6, 7; Parent and Child, 2, 3; Railroad Companies, 3, 18; Setoff, 1, 2; Telegraph Companies, 3; Trespass.

DEEDS.

1. **DEEDS—DELIVERY AFTER DEATH.**—The death of a grantor does not prevent the valid delivery of a deed, if the conditions under which it is held by a third person are complied with by the grantee, and the delivery to the latter relates back to the delivery to such third person. (*Dettmer v. Behrens*, 326.)

2. **DEEDS—DELIVERY AFTER DEATH.**—If the owner of a homestead sells it, receiving the greater part of the consideration during her life, and leaves a deed thereof with the depository of her will, to be delivered to the purchaser after the death of the grantor, upon the payment of the remainder of the purchase price to her executor, such transaction is valid as against her creditors, whether the deed is regarded as testamentary in character, or as deposited in escrow. (*Dettmer v. Behrens*, 326.)

3. **DEEDS—PRIMA FACIE EVIDENCE OF DELIVERY ON DAY OF DATE.**—The date of a deed is prima facie evidence of its delivery at that date, although it was not acknowledged until a later day. (*Conley v. Finn*, 399.)

4. **CONVEYANCES.—AN UNRECORDED CONVEYANCE IS,** by the law of Kansas, invalid while it remains unrecorded, nor does it, upon its recordation, become operative or valid as of the day of its execution as against one who had no knowledge of it prior to such recordation. If, before that time, he has commenced a suit against the grantor, omitting to make the grantee a party, because of want of notice of the conveyance, such suit may proceed; but, after the conveyance is recorded, the grantee, with respect to it, will be regarded as a purchaser pendente lite. (*Smith v. Worster*, 385.)

5. **DEEDS—DECLARATIONS AS EVIDENCE.**—If a father induces his daughter to convey land to her mother on condition that her parents will convey other land to her husband after her death, to which they will succeed as her heirs, her declarations made at the time of such inducement are admissible in an action by her husband, after her death, to compel such conveyance from her parents, although the mother was not present when the promise was made. (*Simons v. Bedell*, 35.)

6. **APPURTENANCES—WHAT MAY PASS AS.**—A right of way or other easement may pass by a conveyance as appurtenant to the land conveyed. (*Mattes v. Frankel*, 804.)

See Appeal, 9; Husband and Wife, 3, 4.

DEFINITIONS.

"Accident." (*Carnes v. Iowa State etc. Assn.*, 306.)

"Baggage." (*Runyon v. Central R. R. Co.*, 711.)

"Collusion." (*Warren v. Union Bank*, 777.)

"Erroneous judgment." (*Stafford v. Gallops*, 816.)

"Forcible entry." (*State v. Lawson*, 844.)

"Illegal transaction." (*Smith v. Blachley*, 887.)

"Irregular judgments." (*Stafford v. Gallops*, 816.)

"Preferred stock." (*Jones v. Concord etc. R. R. Co.*, 650.)

"Share of stock." (*Jones v. Concord etc. R. R. Co.*, 650.)

"Void judgment." (*Stafford v. Gallops*, 816.)

DESCENT.

See Assignment.

DISTRIBUTION.

1. **ESTATES OF DECEDENTS—DECREE OF DISTRIBUTION—EFFECT OF.**—The final decree of distribution in an estate is conclusive of the rights of all persons. (*Cunha v. Hughes*, 27.)

2 ESTATE OF DECEDENTS—SALE OF LAND—DISTRIBUTION OF PROCEEDS.—If an heir of an estate is entitled to a conveyance from the other heirs of the land of such estate, which has been sold by order of the probate court, such court may, if it still retains control of the proceeds, make a decree in the alternative directing payment to such heir, or that he is entitled to the distribution of such proceeds subject to the payment of debts, charges, and expenses of the estate. (*Simons v. Bedell*, 85.)

See Equity, 7, 8; Husband and Wife, 11.

DOCKET ENTRY.

See Justice of the Peace, 4-7.

DOWER.

1 DOWER—RIGHT OF, IN LAND TAKEN BY THE RIGHT OF EMINENT DOMAIN.—If the land of a married man is taken by the right of eminent domain during his lifetime, his wife is not entitled, on account of her inchoate right of dower, to have any portion of the money received for the land either paid to her directly, or set aside for her benefit, by a court of equity, on the contingency of her surviving her husband. (*Flynn v. Flynn*, 437.)

2 DOWER—RIGHTS OF WIDOW.—Under the statutes of Nebraska, a widow cannot be deprived of dower, in the lands of which her husband died seised, without her consent. (*Motley v. Motley*, 608.)

3 DOWER—WHEN BECOMES ABSOLUTE.—On the death of her husband intestate, a widow's inchoate right of dower, which, up to that time, was a mere lien, charge, or encumbrance upon the real estate of her husband, becomes her absolute estate, free from the payment of the ordinary unsecured debts of the intestate. (*Motley v. Motley*, 608.)

4 DOWER—SALE BY ADMINISTRATOR AS BAR.—A sale made by an administrator under order of court of his intestate's lands to pay ordinary unsecured debts proved against his estate does not bar the widow of the intestate from dower. (*Motley v. Motley*, 608.)

5 DOWER—ADMINISTRATOR'S SALE—CAVEAT. EMPTOR. A sale of lands by an administrator to pay the debts of his intestate is a judicial sale, and the doctrine of caveat emptor as to the widow's dower rights applies to the purchaser at such sale. (*Motley v. Motley*, 608.)

6 DOWER—ADMINISTRATOR'S SALE—NOTICE TO PURCHASER.—A purchaser at an administrator's sale of lands of his intestate to pay his debts is charged with notice disclosed by the record of the proceedings that the intestate's widow had a dower estate in the lands which were being sold. (*Motley v. Motley*, 608.)

7 DOWER—ESTOPPEL TO CLAIM.—The receipt by the widow of part of the proceeds of a judicial sale of the lands of intestate husband by his administrator to pay his debts, such payment to the widow being made as the distributive share of her husband's estate and not in lieu of dower, does not estop her from claiming her dower in the lands sold. (*Motley v. Motley*, 608.)

8 DOWER—ESTOPPEL TO CLAIM.—A widow is not barred from prosecuting an action for the assignment of dower in lands, of which her husband died seised and which have been sold under judicial proceedings by her husband's administrator, to which she was a party, but made no appearance; nor is she estopped from claiming such dower merely because she was present at the administra-

tor's sale and kept silent in regard to her dower estate in the lands being sold. (*Motley v. Motley*, 608.)

9. DOWER—HUSBAND'S DEBTS.—The dower of a widow in the lands of which her husband dies seised and intestate comes to her free of any charge for debts or claims against her husband. (*Motley v. Motley*, 608.)

10. DOWER—MORTGAGE BY WIFE ALONE DOES NOT CONVEY OR RELEASE.—Under constitutional and statutory provisions requiring the assent of a husband to any instrument of conveyance which affects the property of his wife, such assent must be expressed in the instrument itself. It cannot be manifested by a separate conveyance. Hence, a mortgage executed by a wife alone, of her interest in her husband's land, is not sufficient to convey or release her right of dower, where her husband alone has previously mortgaged the land. (*Slocumb v. Ray*, 839.)

EASEMENT.

EASEMENTS.—ADVERSE RIGHTS to an easement cannot grow out of a mere permissive enjoyment for any length of time. (*Beach v. Morgan*, 692.)

See Deeds, 6.

ELECTION.

ELECTION—WHEN NOT ENFORCEABLE—CONFLICT OF LAWS—INSOLVENCY—PREFERRED CREDITOR HOLDING A JUDGMENT LIEN ON LAND IN ANOTHER STATE.—If a debtor in one state makes an assignment in trust for his creditors, including therein lands in another state, a creditor who has been provided for, and preferred, in such assignment, who, after the date of the trust deed, but before it is recorded in such other state, has a judgment confessed to him there, and has it docketed, and who is proceeding to enforce it against the land, has a right to file his whole claim and receive from the trustees his proportion of the fund in their hands, and to satisfy the balance out of the sale of the lands in such other state, if he can, paying the balance of the proceeds of the land, if any, to the trustees. He cannot, under the doctrine of election, be required to surrender his judgment lien on the land, before claiming his preference under the assignment, as the doctrine does not apply to such a state of facts. (*Davenport v. Gannon*, 827.)

EMINENT DOMAIN.

See Dower, 1.

ENTIRETIES.

See Husband and Wife.

EQUITY.

1. EQUITY—JURISDICTION—UNINCORPORATED ASSOCIATIONS.—Courts of equity have no authority to interfere with the action of voluntary and unincorporated associations where no right of property is involved. (*Kearns v. Howley*, 852.)

2. EQUITY—JURISDICTION—UNINCORPORATED ASSOCIATION—COMMITTEE OF POLITICAL PARTY.—A court of equity has no jurisdiction, by injunction, to restrain the chairman of a county committee of a political party from filling vacancies in violation of the rules of the party, where it appears that no property rights are involved. (*Kearns v. Howley*, 852.)

3. ACCOUNTS — EQUITY JURISDICTION—COMPLICATIONS—INADEQUACY OF LEGAL RELIEF.—A suit in equity for an accounting may be maintained, although the accounts are all on one side, if there are circumstances of great complication or difficulty in the way of adequate relief by an action at law. (*Blodgett v. Foster*, 504.)

4. EQUITY—JURISDICTION—MONEY RECEIVED BY TRUST COMPANY UNDER IMPLIED MISREPRESENTATION AS TO SOLVENCY—TRUST FUNDS.—If a bank, upon the request of a trust company, which is at the time insolvent, accommodates it, without charge, with a large number of small bills, receiving a worthless check for its favor, and, on the next morning, the company, without opening its doors, makes an assignment for the benefit of creditors, the package of bills, unbroken, passing into the hands of the assignee, a court of equity has jurisdiction of a suit brought for the restoration of the package, for it, having been obtained by a clearly implied misrepresentation as to solvency, is impressed with a trust, and the bank is entitled to its return. (*Corn Exchange Nat. Bank v. Solicitors etc. Co.*, 872.)

5. EQUITY—RIGHT OF WOMAN TO APPLY TO WHO HAS CONTRACTED A VOID MARRIAGE.—A woman who, having a husband living, contracted marriage and lived with her supposed husband many years as his wife, is not precluded from resorting to a court of equity to compel a division of the property accumulated with her assistance, where it appears that before contracting the second marriage, she told of her former marriage and the circumstances connected therewith as she understood them, and was thereupon persuaded by her intended husband that the former marriage was invalid and constituted no obstacle to the contracting of a second marriage. (*Werner v. Werner*, 372.)

6. EQUITY—RELIEF FROM ORDER OF COURT.—If an order of court, purporting to authorize a guardian to mortgage property of his ward is procured by collusion and fraud, and when the estate of the ward is not liable for the debt secured by the mortgage, equity has jurisdiction to relieve the ward from such order and the mortgage made pursuant thereto. (*Warren v. Union Bank of Rochester*, 777.)

7. ESTATES OF DECEDENTS — DISTRIBUTION — EQUITY JURISDICTION.—Although, strictly speaking, it is within the jurisdiction of the superior court sitting in probate to determine who is entitled to the distribution of the estate of a deceased person, yet, if such issue is tried in such court sitting as a court of equity, and no objection is made to the jurisdiction, the subject matter must be treated on appeal as properly within the equity jurisdiction of the court. (*Simons v. Bedell*, 35.)

8. ESTATES OF DECEDENTS — DISTRIBUTION — SUFFICIENCY OF BILL IN EQUITY.—A bill in equity by the husband of a decedent praying for a distribution of her estate, and alleging that the deceased expressed a desire to will land in California to him and land in New York to her mother, and that it was agreed between them that if the deceased would make no will, and would deed the land in New York to her mother, the latter and her husband would convey the California land to the plaintiff, and that the decedent complied with her part of such agreement, although not specifically alleging that she refrained from making such will in consideration of the promise of her parents, is not subject to general demurrer for want of such allegation, nor for violation of the rule that only ultimate and not evidentiary facts should be pleaded. (*Simons v. Bedell*, 35.)

See Costs; Injunctions.

ESTATES OF DECEDENTS.

See Distribution; Equity, 7, 8; Executors and Administrators; Specific Performance, 7.

ESTOPPEL.

1. ESTOPPEL OF RECORD, TO BE EFFECTUAL, must be pleaded if there is an opportunity to plead it. (*Water Commissioners v. Cramer*, 705.)

2. ESTOPPEL—STATUTE OF FRAUDS DOES NOT PREVENT THE ENFORCEMENT OF.—The fact that the party to be estopped made representations in hostility to his record title does not prevent the court from enforcing as against him the general rule, that when a party, either by his declarations or conduct, has induced a third person to act in a particular manner, he will not afterward be permitted to deny the truth of his representations, if the consequences work an injury to such third person or some one claiming under him. Hence, an easement in land may be created by estoppel, though the statute of frauds requires a title or interest in real estate to pass only by operation of law or by a conveyance in writing. (*Mattes v. Frankel*, 804.)

See Checks, 6; Dower, 7, 8; Executions, 8; Judgment, 11, 14; Mortgages, 4; Municipal Corporations, 15; Private Ways; Suretyship, 2.

EVIDENCE.

1. EVIDENCE.—THERE IS NO PRESUMPTION, either of law or of fact, that a man or a woman is single or unmarried. (*Bennett v. State*, 77.)

2. EVIDENCE—PRESUMPTION OF DELIVERY OF TELEGRAM.—If a telegraph company is intrusted with a telegram for transmission, properly addressed, a presumption arises that such message was duly delivered. (*Perry v. German American Bank*, 593.)

3. EVIDENCE—PRESUMPTION OF DELIVERY OF TELEGRAM.—A similar presumption of delivery results from intrusting to a telegraph company for transmission a telegram properly addressed, as that which follows the posting of a letter duly stamped and addressed for transmission by means of the United States mail. Such presumption results from the relation of the telegraph company to the public, which is that of a public carrier of intelligence, with rights and duties analogous to those of a carrier of goods and passengers. (*Perry v. German American Bank*, 593.)

4. EVIDENCE—PRESUMPTION AS TO CONTRACT BEING IN WRITING.—In cases where the statute, in derogation of the common law, requires certain contracts to be executed in a prescribed manner in order to be binding upon the parties, the law will not presume, in the absence of proof, that either party has violated the statute. (*Draper v. Macon Dry Goods Co.*, 136.)

5. EVIDENCE—LAWS OF ANOTHER STATE—HOW PROVED. The law of another state must be proved like any other matter of fact. (*Davenport v. Gannon*, 827.)

6. EVIDENCE—PHOTOGRAPHS — RULE — PRELIMINARY PROOF.—Photographs are competent evidence, and, when properly taken, are judicially recognized as of a high order of accuracy; but in careless, or inept, or interested, hands they are capable of very serious misrepresentation of the original. Their use on a trial should not, therefore, be permitted until there has been preliminary proof of care and accuracy in the taking of them, and of their relevancy to the issue before the jury. (*Beardslee v. Columbia Township*, 883.)

7. EVIDENCE—PHOTOGRAPHS—CHANGE IN LOCALITY.—

In an action to recover damages of a township for personal injuries alleged to have been caused by a dangerous and unguarded place in a road, a photograph of such place is admissible in evidence, although not taken until after changes were made in the condition of the road between the time of the accident and the time of photographing, if proof is made of the nature of such changes. (*Beardslee v. Columbia Township*, 883.)

8. EVIDENCE OF THE EXPECTANCY OF HUMAN LIFE—

SECONDARY EVIDENCE OF THE OARLYSLE AND OTHER TABLES.—A witness should not be permitted to testify to the expectancy of life of a deceased person based upon recollection of mortality tables used by life insurance companies. The tables themselves should be introduced as the best evidence of their contents. (*Erb v. Popritz*, 362.)

9. EVIDENCE—INCREASE OR DECREASE IN MARKET

VALUE.—If a plaintiff claims that the wrongful act of the defendant has caused a diminution in the market value of the former's property, the defendant has a right to show that the market value has, in consequence of the act complained of, been increased, but such proof of increase would simply show that there had been no decrease, and that the plaintiff could not recover on that account. It would not give the defendant any right to recoup against the plaintiff for the amount of such increase. (*Farkas v. Towns*, 88.)

10. EVIDENCE — RES GESTAE — DECLARATIONS ABOUT

POSSESSION.—When the nature of a person's possession is a material subject of inquiry, his acts and declarations accompanying and characterizing the possession, are admissible as part of the *res gestae*. (*Lehmann v. Chapel*, 550.)

11. EVIDENCE—RES GESTAE—ADMISSIBILITY OF DECLARATIONS TO CHARACTERIZE POSSESSION AFTER A SALE.

If a vendor, with the consent of the vendee, remains in possession of personal property after a sale, and the creditors of the vendor attack the sale as fraudulent, the declarations of the vendor while thus in possession are admissible in evidence against the vendee as part of the *res gestae*, to characterize the possession. (*Lehmann v. Chapel*, 550.)

See *Boundaries*; Criminal Law, 2, 3; Custom; Deeds, 5; Forgery; Husband and Wife, 8; Insurance, 18; Judgment, 12; Justice of the Peace, 6; Landlord and Tenant, 4, 8; Master and Servant, 2; Negligence, 6; Payment, 1-3; Physicians and Surgeons; Railroads, 15-17; Replevin; Seduction, 3, 4; Specific Performance, 7; Trial, 4, 9; Trover; Wills, 1-6, 9-11, 18; Witnesses, 3, 5, 6.

EXECUTION.

1. EXECUTION WITHOUT A SEAL WHETHER VOID.—An order of sale issued without a seal is void, and cannot be amended so as to support a sale previously made thereunder, if the constitution of the state provides that all courts of record shall have a seal, to be used in the authentication of all process. (*Gordon v. Bodwell*, 341.)

2. EXEMPTIONS IN FAVOR OF NONRESIDENTS NOT

HEADS OF FAMILY NOR MINORS.—If a statute provides that the library of a professional man residing in the state is exempt from execution, and that, on the death of a person leaving a child but no widow, all exempt property shall belong to such child, a son of a deceased professional man leaving no widow is entitled to his library free of the claims of his creditors, though such son resides in another state, and is not the head of a family nor a minor. (*Taylor v. Winnie*, 339.)

3. EXECUTION SALE—WHEN DOES NOT SATISFY THE JUDGMENT NOR PREVENT A RESALE.—A sale under execution to the judgment creditor, void for want of appraisement, the issuing of a deed thereon, and the holding of the writ by the sheriff for more than two years, do not satisfy the judgment. Hence he may return the writ unsatisfied, and a venditioni exponas may issue, under which the same property may be sold, and, if the proceedings are regular, title will vest in the purchaser. (*Touhey v. Touhey*, 233.)

4. EXECUTION SALES—REDEMPTION FROM—EFFECT OF. A redemptioner from an execution sale succeeds to all of the rights of the purchaser, and acquires an equitable estate in the land sold, which, although conditional, may become absolute by mere lapse of time. The legal title remains in the judgment debtor with a right to defeat the sale within the statutory time, failing in which the rights of such redemptioner become indefeasible, and the legal title of the judgment debtor may be divested by applying for and obtaining a sheriff's deed. (*Bennett v. Wilson*, 61.)

5. EXECUTION SALES—REDEMPTION—ACTION TO DETERMINE INVALIDITY OF JUDGMENT.—A redemptioner from a valid execution sale may maintain an action to determine the invalidity of a judgment claimed to support a subsequent redemption, and also to determine that the holder thereof is not in fact a redemptioner, and that plaintiff is entitled to a sheriff's deed. (*Bennett v. Wilson*, 61.)

6. EXECUTION SALES—REDEMPTION—FRAUDULENT JUDGMENT.—A redemptioner from an execution sale, who brings an action to determine the invalidity of a judgment claimed to support a junior redemption, is entitled to show that such junior judgment was fraudulently obtained by default, upon a false and collusive return of service of process, and that it is void for want of jurisdiction of the person of the defendant. (*Bennett v. Wilson*, 61.)

7. EXECUTION SALES—REDEMPTION MONEY.—Although it is immaterial where the money comes from with which redemption from an execution sale is offered to be made, yet such tender, to be valid, must be made by a lawful redemptioner. (*Bennett v. Wilson*, 61.)

8. EXECUTION SALES—REDEMPTION—ESTOPPEL.—The sheriff is not so far the agent of a prior redemptioner from execution sale as to estop the latter from attacking the validity of a subsequent redemption under which the money is paid to the sheriff for such redemptioner. (*Bennett v. Wilson*, 61.)

9. EXECUTION SALES—REDEMPTION—PARTIES.—The purchaser from whom redemption from an execution sale is made by a prior redemptioner is not a necessary party to an action by him attacking the validity of a subsequent redemption. (*Bennett v. Wilson*, 61.)

10. CONSTABLES—NEGLECT TO ARREST ON EXECUTION—ACTION—DEFENSE.—In an action against a constable to recover damages for his neglect to arrest a person on execution, the defendant may prove, if he can, that the judgment and execution were, in fact, absolutely void. (*Belcher v. Sheehan*, 445.)

11. EXECUTION—INSOLVENT CORPORATION—PARAMOUNT LIEN—SALE OF LAND IN RECEIVER'S HANDS—LEAVE OF COURT.—Land belonging to an insolvent corporation cannot be sold upon execution, after the appointment and possession of a receiver, upon a valid judgment obtained before such appointment, without leave of the court, but this will always be granted in

proper cases, for a court of equity is not required to retain possession of the property when it would be inequitable to do so. (*Pelletier v. Greenville Lumber Co.*, 837.)

12. EXECUTION—LEVY, WHEN UNNECESSARY.—If property is held under an attachment to satisfy a judgment, no levy of execution beyond giving notice of sale is necessary. (*McFall v. Buckeye Grangers' etc. Assn.*, 47.)

13. EXEMPTIONS—FRANCHISES—ROLLING STOCK.—The exemption from attachment or execution which pertains to the franchise of a street railway company does not extend to its cars, trucks, iron safes, or other movables, although they may be proper or even necessary to its operation under its franchise. Such property does not emanate mediate or immediately from the state, and has no character of a personal trust. It is subject to attachment or execution in like manner as other property not exempt by statute. (*Risdon Iron etc. Works v. Citizens' Traction Co.*, 25.)

14. EXECUTIONS—REDEMPTION—RIGHTS OF PRIOR REDEMPTIONER AS AGAINST VOID JUDGMENT.—A redemptioner who has made a valid redemption succeeds to all the rights of the purchaser at an execution sale, and retains in addition the rights of a redemptioner, and has such an equitable estate in the land as entitles him to protection against a subsequent redemption under a void judgment. (*Bennett v. Wilson*, 61.)

See Attachment, 13; Judgment, 15, 16; Mortgages, 15-17; Receivers, 1-4.

EXECUTORS AND ADMINISTRATORS.

1. EXECUTORS AND ADMINISTRATORS—SALE OF LAND—COLLATERAL ATTACK.—If letters of administration purporting to be sealed are issued to a regularly appointed administratrix, who takes oath, gives bond, and claims to hold valid letters of administration, and is repeatedly recognized as administratrix by the court in its orders reciting that she is such, a conveyance made by her as such administratrix after confirmation of a sale of land ordered by the court, cannot be collaterally attacked by the heirs of the deceased, on the ground that such letters of administration were void because they did not bear upon their face the impress of the seal of the court. (*Dennis v. Blint*, 17.)

2. EXECUTORS AND ADMINISTRATORS—TRANSPORTATION OF DECEDENT'S BODY FROM ABROAD—CLAIM FOR, BY ATTORNEY.—If, while a man and his wife are traveling abroad the husband dies, and the wife telegraphs the fact of death to her attorney in this country, and requests him to meet her in a foreign city, which he does, and makes all arrangements, under vexatious circumstances, for the transportation of the decedent's body to America, the sum of eighteen hundred dollars is not an unreasonable allowance for such services, and should be paid out of the decedent's estate, though the services were not strictly professional, where such call took the attorney away from his professional duties for fifty-five days, and he expended considerable money out of his own pocket. He might well have inferred from the telegram that the widow needed his legal advice in matters connected with the decease of her husband. (*Parry's Estate*, 850.)

3. EXECUTORS AND ADMINISTRATORS—LIABILITY OF ESTATE FOR TRANSPORTATION OF DECEDENT'S BODY FROM ABROAD.—If a person having an estate in this country dies while traveling in a foreign country, there is a legal liability on the part of his estate for services in connection with embalming and transporting his body from the place of death to the place of burial.

here, rendered at the request of his widow, and, where the estate is ample, it should be subjected to such charges. (*Parry's Estate*, 850.)

4. ADMINISTRATOR'S SALE, PRESUMPTION RESPECTING THE PUBLICATION OF THE NOTICE OF THE APPLICATION FOR.—From an order to sell real property and the confirmation of sale and the conveyance by the proper officer to the purchaser, a presumption will be indulged that all necessary, antecedent steps were taken to authorize the sale. This presumption is not conclusive, and is overthrown when it affirmatively appears from the records in the case that the notice of the intention to apply for the order of sale could not have been published for the time prescribed by statute. (*Young v. Downey*, 568.)

5. ADMINISTRATOR'S SALE, VOID FOR WANT OF NOTICE OF APPLICATION FOR LEAVE TO SELL.—If a statute provides that an administrator seeking an order to sell real property shall give notice of his application for the order, a failure to give such notice for the length of time prescribed by statute renders the sale void. (*Young v. Downey*, 568.)

6. EXECUTORS—DELEGATION OF POWER TO APPOINT. A testator may by his will provide that his children, or a majority of them, shall appoint the executor, and their selection of a person as executor has the same effect as if he had been named as such in the will. This is the rule of the common law, and it is not abrogated by a statute declaring that if there be no person named in the will as executor, or if those named shall have failed to qualify, have renounced, or have been removed, letters of administration, with the will annexed, shall be granted to any competent residuary legatee named in such will, et cetera. (*Wilson v. Ourtis*, 236.)

See Attachment, 12; Dower, 4-8; Limitations of Actions, 1, 2.

EXEMPTIONS.

See Executions.

EXTORTION.

EXTORTION—PUBLIC OFFICER—INDICTMENT SHOULD BE QUASHED, WHEN.—An indictment charging one with the offense of extortion, in that he did, by color of his office as policeman of a certain county, wrongfully take money from a person, should be quashed on demurrer, where no such office has ever been created by the laws of the state, and there is no such public officer known. (*Herrington v. State*, 95.)

See Agency, 5.

EXTRADITION.

See Habeas Corpus.

FISHERIES.

1. FISHERIES — UNNAVIGABLE STREAMS. — The right of fishing in un navigable stream is limited exclusively to the riparian owner or his tenant, unless another shows a right acquired in some way recognized by law. (*Beach v. Morgan*, 692.)

2. FISHERIES.—A CUSTOM TO TAKE FISH from an unnavigable stream in the land of another is not a lawful custom. If such a right is available at all, it must be set up by prescription as belonging to some estate, and should be pleaded with a que estate. (*Beach v. Morgan*, 692.)

3. FISHERIES.—STOCKING OF STREAMS with young fish, raised at the expense of the state by the fish commissioner, does

not operate as a license to the public for fishing in waters not public, nor in unnavigable streams on private lands. The public thus benefited are the landowners along the stream. (*Beach v. Morgan*, 692.)

FIXTURES.

See Landlord and Tenant, 2, 3.

FORCIBLE ENTRY AND DETAINER.

1. **FORCIBLE ENTRY AND DETAINER—FORCIBLE TRESPASS.**—THE ONLY DISTINCTION between forcible trespass and forcible entry and detainer is that the former is as to personal property and the latter as to realty, and this distinction is not always observed. (*State v. Lawson*, 844.)

2. **FORCIBLE ENTRY AND DETAINER.—TO CONSTITUTE A FORCIBLE ENTRY**, it is not necessary that the party in possession shall be actually put in fear. It is sufficient if there is such demonstration of force as to create a reasonable apprehension that he must yield to avoid a breach of the peace, and such demonstration may be by an intimidating number of persons, or by weapons. (*State v. Lawson*, 844.)

3. **FORCIBLE ENTRY AND DETAINER—ENTRY UPON LEASED PREMISES BECOMES FORCIBLE, WHEN.**—Although a tenant in possession, through intimidation or indifference, does not forbid parties from going upon the leased premises and plowing up the land under a claim of ownership against the landlord, yet if they refuse to go after the landlord orders them off, but continue to plow up the land, the entry becomes forcible after being forbidden, if not so at the beginning. (*State v. Robbins*, 841.)

4. **FORCIBLE ENTRY AND DETAINER — INDICTMENT — COUNTS, WHEN NOT REPUGNANT.**—If an indictment for forcible entry and detainer has two counts concerning the same transaction, the possession in one being stated as that of the landlord, and in the other as that of the tenant, the two counts are not repugnant, but a mere statement of the same transaction to meet the different phases of proof. The court may, therefore, properly refuse to quash, to compel an election, or to arrest judgment. (*State v. Robbins*, 841.)

5. **FORCIBLE ENTRY AND DETAINER — INDICTMENT.**—Separate indictments for forcible entry and detainer, and at different terms, may be treated as different counts of one bill, if germane. (*State v. Robbins*, 841.)

6. **FORCIBLE ENTRY AND DETAINER.—AN INDICTMENT** for forcible entry and detainer may consist of two papers pinned together, and returned into court as one bill, where the two charges are numbered first and second count. (*State v. Robbins*, 841.)

See Former Acquittal.

FORGERY.

1. **FORGERY—UNCERTIFIED CHECK.**—An information charging the defendant with forgery in raising a certified check, forging certain indorsements, and, knowing its fictitious character, passing it on a certain named corporation with intent to defraud the latter, although it does not show that the bank upon which it was drawn had any legal existence, or that the person certifying it had any authority therefor, sufficiently charges the forgery of an uncertified check which is as much the subject of forgery as a certified check. (*People v. Dole*, 50.)

2. **FORGERY—SEVERAL INDORSEMENTS ON CHECK—SINGLE OFFENSE.**—An information for forgery which alleges that

after raising a check, the defendant forged certain indorsements thereon with intent to defraud a named corporation, does not charge more than one offense, and is not objectionable on that ground. (People v. Dole, 50.)

3. FORGERY—EVIDENCE—CROSS-EXAMINATION.—A person charged with the forgery of a check, who testifies in his own behalf as to the manner in which he became the owner of such check, may be compelled on cross-examination to state whether he related how he came into possession of the check to the arresting officer, or to the officers in whose custody he was placed, or to the person who informed him of the particulars of the charge against him. (People v. Dole, 50.)

4. FORGERY—EXPERT EVIDENCE—MEANS OF REMOVING WRITING.—If, on a trial for forgery, it is part of the case of the prosecution to prove that writing on a check has been removed and other writing substituted in its place, expert evidence is admissible to show that there is a fluid by means of which writing may be removed from paper without first showing that a solvent fluid has been used, and that the defendant is conversant with its use. (People v. Dole, 50.)

5. FORGERY—INSTRUCTIONS.—If there is no theory upon which a defendant, charged with the forgery of a check, can be convicted unless the check was raised as charged in the information, a requested instruction that if the jury entertain a reasonable doubt as to whether the check was thus raised, it is their duty to acquit, is correct, and should be given. (People v. Dole, 50.)

6. FORGERY—CROSS-EXAMINATION OF ACCUSED.—If a person charged with forgery has not testified on his direct examination as to obtaining money on the alleged forged check, it is error to compel him to testify on cross-examination as to whether he has thus obtained money, as he cannot be compelled to be a witness against himself. (People v. Dole, 50.)

7. FORGERY—EVIDENCE.—AN ALLEGED FORGED CHECK is admissible in evidence on a trial for forgery, if there is no material variance between it and the paper set out in the information. (People v. Dole, 50.)

8. FORGERY—EVIDENCE.—On a trial for the forgery of check, the teller of the bank at which the check was presented and passed is a competent witness to testify that he has examined the books of such bank to ascertain whether the accused had any account at the bank at the time when the check was presented and paid and that he had no account there at that time. (People v. Dole, 50.)

9. FORGERY—EVIDENCE OF EXISTENCE OF CORPORATION.—On a trial for the forgery of a check, it is competent and sufficient to prove by parol that the bank at which such check was presented and cashed is a de facto corporation, but this fact must be proved by reputation, and not by the direct statement of the witness. (People v. Dole, 50.)

10. CHECKS, UNINDORSED—COLLECTION OF, UPON FORGED INDORSEMENTS—RATIFICATION.—The act of a clerk in indorsing checks with his employer's name, or in collecting them upon forged indorsements, is not actually or impliedly ratified by the act of the employer, who, after being informed that his clerk has been depositing, to his own credit, in a certain bank, checks payable to the employer, asks and receives from the clerk a check on such bank for the amount of a bill due to the employer from him, which check is paid by the bank, and who further consents that another check drawn by the clerk upon the bank named may

be paid and charged to the clerk's account therein. (Shepard etc. Lumber Co. v. Eldridge, 448.)

See Agency, 7; Checks, 1, 3-9.

FORMER ACQUITTAL.

FORMER ACQUITTAL—WHAT PROOF WILL SUSTAIN.—The plea of former acquittal, upon the trial of an indictment for forcible entry and detainer, is sustained by proof of an acquittal of forcible trespass involving the same transaction as to the same land. (State v. Lawson, 844.)

FORMER JEOPARDY.

1. FORMER JEOPARDY AS A BAR TO A SUBSEQUENT PROSECUTION.—When a person has been put in legal jeopardy of a conviction of an offense which is a necessary element in, and constitutes an essential part of, another offense, such jeopardy is a bar to a subsequent prosecution for the latter offense, if founded upon the same act. (Bell v. State, 102.)

2. FORMER JEOPARDY—WHEN A BAR—ASSAULT—INTENT TO RAPE.—Assault is an absolutely necessary element in, and essential to, the crime of assault with intent to commit a rape, and, if one is tried for an assault and battery, he is in jeopardy of a conviction of assault. Hence, when a man has been tried for the offense of assault, he may interpose the plea of former jeopardy as a complete defense to a subsequent indictment for the crime of assault with intent to commit a rape, where such indictment is founded on the same act. (Bell v. State, 102.)

3. FORMER JEOPARDY—ATTACHES WHEN, AND WHEN A BAR—ASSAULT—INTENT TO RAPE.—When a person is put upon trial, for an assault and battery, in a court which has no power to stop the trial and bind him over for a greater offense, if the evidence justifies it, and a jury is impaneled and sworn to try the case, he is in legal jeopardy and may avail himself of this defense in a subsequent trial for assault with intent to commit a rape founded upon the same act. (Bell v. State, 102.)

FORMER RECOVERY.

See Judgment, 12.

FORNICATION.

See Adultery.

FRAUD.

1. FRAUD—ORAL PROMISE—PLEADING.—In pleading fraud in the making of an oral promise, it is not necessary to allege in so many words that there was no intention to fulfill the promise at the time it was made. It is sufficient that such is the effect of the averments on the subject. (Langley v. Rodriguez, 70.)

2. PLEADING FRAUD.—If facts are alleged which were wrongful or necessarily fraudulent, they need not be charged to have been wrongfully or fraudulently performed. Where the law presumes fraud because it is the necessary consequence of alleged acts, they need not be characterized as fraudulent or otherwise. (Warren v. Union Bank of Rochester, 777.)

See Banks and Banking, 4; Limitations of Actions, 3; Marriage and Divorce; Mortgages, 7.

FRAUDULENT CONVEYANCE.

1. FRAUDULENT CONVEYANCES—EVIDENCE OF FRAUDULENT INTENT—EXISTING AND SUBSEQUENT CREDITORS.

While no fraudulent intent is necessary to set aside voluntary conveyances as to existing creditors, it must be established in order to set them aside as to subsequent creditors. (*Cole v. Brown*, 491.)

2. **FRAUDULENT CONVEYANCES — RECONVEYANCE.** — If one person conveys his property to another for the purpose of avoiding anticipated claims against him, he cannot invoke the aid of equity to obtain a reconveyance. (*Poppe v. Poppe*, 503.)

3. **STATUTE OF FRAUDS—PAROL PROMISE—ADMISSION OF TRUST.**—If a grantee, in his answer in proceedings to compel a reconveyance of land, admits a parol promise to reconvey, this will not entitle the complainant to a reconveyance, when the original conveyance was made for the avowed purpose of defrauding creditors, present or prospective. (*Poppe v. Poppe*, 503.)

4. **FRAUDULENT CONVEYANCES — MECHANICS' LIENS.**—A conveyance of land to be held by the grantee under a secret trust for the grantor is void as against mechanics' liens for labor subsequently performed under a contract with the grantor. (*Quimby v. Williams*, 685.)

5. **FRAUDULENT CONVEYANCES. — A CONVEYANCE OF PROPERTY ABSOLUTE IN TERMS**, but without consideration, or as a mere security, is fraudulent as against the creditors of the insolvent grantor. (*Quimby v. Williams*, 685.)

6. **FRAUDULENT CONVEYANCES — NOTICE.**—A conveyance made to defraud creditors of the grantor is valid as against a subsequent purchaser from the grantor for a valuable consideration, but with notice of the first conveyance. (*Quimby v. Williams*, 685.)

7. **HUSBAND AND WIFE—FRAUDULENT CONVEYANCES—CONSIDERATION.**—A conveyance from a husband to his wife cannot, under the California statute, be adjudged fraudulent solely on the ground that it was not made for a valuable consideration. (*Poulson v. Stanley*, 78.)

See Judgments, 20.

GARNISHMENT.

See Attachment.

GOODWILL.

1. **GOODWILL OF BUSINESS — SALE OF — COVENANT BINDING ON SELLER.**—A person who sells the goodwill of a business is bound by any covenant which is reasonably necessary for the preservation and protection of the property which he sells. (*Anchor Elec. Co. v. Hawkes*, 403.)

2. **GOODWILL OF BUSINESS—RIGHT TO CONTRACT FOR SALE OF.**—Whenever one sells a business, with its good will, it is for his benefit, as well as for the benefit of the purchaser, that he should be able to increase the value of that which he sells by a contract not to set up a new business in competition with the old; and the right to make reasonable contracts of this kind in connection with the sale of the goodwill of a business is well-established. (*Anchor Elec. Co. v. Hawkes*, 403.)

See Contracts, 12.

GUARANTY.

1. **GUARANTY, WHO MAY MAKE.**—A banking corporation dealing in commercial paper may bind itself by a guaranty thereof. (*Commercial Bank v. Cheshire Prov. Inst.*, 368.)

2. **A GUARANTY OF A NEGOTIABLE INSTRUMENT IS NEGOTIABLE.**—Hence if one indorses on a negotiable note that

he guarantees prompt payment of the interest and payment of the principal at maturity, and the note is afterward indorsed by the payee, the guaranty of payment is thus transferred to the indorsee, who may recover thereon upon default in the payment of the principal or interest. (*Commercial Bank v. Cheshire Prov. Inst.*, 308.)

GUARDIAN AND WARD.

1. GUARDIAN AND WARD—POWER TO ENGAGE IN BUSINESS.—The general guardian of a minor has no authority to embark in, or conduct the business of, brewing, or the purchase and sale of barley or other merchandise in the name of his ward, and employ therein the capital or credit of the latter. The employment of trust property in trade or speculation, or in manufacturing, is a gross breach of the trust. (*Warren v. Union Bank of Rochester*, 777.)

2. GUARDIAN'S MORTGAGE, WHEN VOID.—A mortgage made by a guardian for the purpose of imposing a liability on the estate of his ward for losses resulting in conducting a business in the latter's name to a mortgagee charged with notice of the facts, is void. (*Warren v. Union Bank of Rochester*, 777.)

3. GUARDIAN'S MORTGAGE, ORDER OF COURT, WHEN DOES NOT VALIDATE.—If a guardian of a minor and a corporation collude to obtain a mortgage of the property of the minor to secure a liability for which his estate is not answerable, and an order of court is secured by them purporting to authorize such mortgage, relief may nevertheless be granted in equity from such order and mortgage. (*Warren v. Union Bank of Rochester*, 777.)

4. GUARDIAN—MORTGAGE BY—JURISDICTION OF COURT TO ORDER.—If a statute prescribes the circumstances in, and the purposes for, which a court may authorize a guardian to mortgage the estate of his ward, an order purporting to authorize such a mortgage, when the petition, proofs, and all the papers in the proceeding show that the purpose is not one sanctioned by the statute, is beyond the jurisdiction of the court, and hence void. In such a proceeding the requirements of the statute must be strictly pursued. (*Warren v. Union Bank of Rochester*, 777.)

5. GUARDIAN AND WARD—SURETY'S LIABILITY—RES JUDICATA.—An order of court granting leave to sue on a guardian's bond, is not res judicata of the surety's liability. (*Perkins v. Cheney*, 495.)

6. GUARDIAN AND WARD—DISCHARGE OF GUARDIAN—LIABILITY OF SURETIES—STATUTE OF LIMITATIONS.—A guardian is "discharged," within the meaning of a statute providing that no action shall be maintained against the sureties on his bond unless commenced within four years from the time the guardian is discharged, whenever the guardianship is effectually determined and brought to a close, either by the removal, resignation, or death of the guardian, the marriage of a female guardian, the arrival of a minor ward at the age of twenty-one years, or otherwise. (*Perkins v. Cheney*, 495.)

See Equity, 6; Suretyship, 1, 2; Trusts, 3.

HABEAS CORPUS.

1. HABEAS CORPUS—RIGHT OF APPEAL.—A WRIT OF ERROR lies directly to the supreme court of Georgia from a decision of the judge of the city court of Richmond county, of that state, in a habeas corpus case. (*Barranger v. Baum*, 112.)

2. HABEAS CORPUS—INTERSTATE EXTRADITION—ILLEGAL DISCHARGE.—If the chief executive of a state honors a requisition for the surrender, to another state, of an alleged fugitive from the justice of that state, it is reversible error for a court, on habeas corpus, to discharge the offender from the custody of the agent of the demanding state, where the surrendering governor acted on an indictment which sufficiently charged such fugitive with obtaining property by false pretenses in the demanding state. (*Barranger v. Baum*, 113.)

3. HABEAS CORPUS—INTERSTATE EXTRADITION—INDICTMENT IS EVIDENCE THAT ACT CHARGED IS A CRIME. A properly authenticated indictment, accompanied by requisition papers, in due and legal form, is sufficient, on habeas corpus proceedings for the release of an alleged fugitive from justice, to raise a presumption that the act charged is a crime against the laws of the demanding state, and that the indictment conforms to the laws of that state in charging the crime. The burden is, therefore, upon the petitioner to show the contrary. (*Barranger v. Baum*, 113.)

4. HABEAS CORPUS—INTERSTATE EXTRADITION—LAWS OF DEMANDING STATE—CONSIDERATION OF.—A court, on habeas corpus proceedings for the release of an alleged fugitive from the justice of another state, is necessarily called upon to decide whether a crime has been charged against the laws of the demanding state, and its laws alone are, therefore, in issue. Hence, in such a case, involving, as it does, not only the liberty of a citizen, but the rights of another state, it is not only the right, but the duty of the court to seek the highest sources of information at its command, such as the statutes and published decisions of the highest judicial tribunals of the demanding state, to ascertain its laws on the subject. (*Barranger v. Baum*, 113.)

5. HABEAS CORPUS—EXTRAORDINARY REMEDY—APPEAL—BILL OF EXCEPTIONS.—A proceeding by habeas corpus is not an extraordinary remedy. Hence, a statute prescribing a time in which a bill of exceptions shall be presented in cases involving such a remedy does not apply. (*Barranger v. Baum*, 113.)

6. HABEAS CORPUS—FUGITIVE FROM JUSTICE—BOND IN BAIL TROVER—EVIDENCE.—The fact that an alleged fugitive from justice, under arrest, has given a bond in bail trover, in a suit against him for the recovery of goods involved in the crime charged, is no reason for his discharge on habeas corpus, and is not admissible in evidence on a hearing of the writ. (*Barranger v. Baum*, 113.)

7. HABEAS CORPUS—INTERSTATE EXTRADITION—SUFFICIENCY OF INDICTMENT—HOW DETERMINED.—Upon habeas corpus proceedings for the release of an alleged fugitive from the justice of another state, the sufficiency of an indictment, which is the foundation of the extradition proceeding, must be tested by the laws of the demanding state, for every state has a right to determine what shall be deemed a sufficient indictment in its own courts; and its sufficiency, as a matter of technical pleading, will not be inquired into, on habeas corpus, for, if the indictment sufficiently charges a crime under the laws of the demanding state, it will sustain a requisition, even though insufficient under the laws of the asylum state. (*Barranger v. Baum*, 113.)

8. HABEAS CORPUS—INTERSTATE EXTRADITION—CHARGE OF CRIME—SUFFICIENCY OF.—Whenever one state has made a demand upon another for the return of a fugitive from its justice, the question whether or not such offender is charged with the commission of a crime against the laws of the demanding state, is one of law, and is always open, on the face of the papers, in a habeas corpus proceeding, to judicial inquiry; but it is no cause for

his discharge that an indictment which forms the basis of the extradition proceeding is defective either at common law or under the laws of the state in which the person is apprehended, so long as it substantially charges a crime in conformity with the laws of the demanding state. (*Barranger v. Baum*, 113.)

9. **HABEAS CORPUS—EXECUTIVE POWER AND DISCRETION AS TO RENDITION WARRANT.**—The executive of the asylum state can, with impunity, refuse to issue a warrant for the rendition of a fugitive from justice who is under arrest, and, after issuing the same, he can revoke it and order the release of the prisoner; but when it has been issued and executed, and release is sought on habeas corpus, the only question of which the judiciary has jurisdiction is whether or not the executive has acted contrary to law. (*Barranger v. Baum*, 113.)

10. **HABEAS CORPUS—RENDITION WARRANT—WHAT EVIDENCE IS INADMISSIBLE.**—After a governor has issued a warrant for the rendition of a fugitive from justice, a court will not, on habeas corpus, inquire into the motive and purpose of the extradition proceedings, to ascertain whether the object thereof is to punish a crime or to collect a debt. Such evidence simply throws light upon the guilt or innocence of the prisoner, and is inadmissible, because the court has no jurisdiction, in such a case, to inquire into the guilt or innocence of the accused. (*Barranger v. Baum*, 113.)

HIGHWAYS.

1. **STREETS, PUBLIC, POWER OF THE LEGISLATURE OVER.**—The legislature of a state represents the public at large, and has, in the absence of special constitutional limitation and subject to the property rights of the abutting owners, full and paramount authority over the public streets and public places, though they are within a municipal corporation. (*Cicero Lumber Co. v. Olcero*, 155.)

2. **STREETS, PUBLIC—CHANGE IN USE OF.**—The power to vacate and discontinue a street necessarily involves the power to change its use, as by limiting it to a designated class of travel and excluding other modes of travel or use. When no property rights are involved, the legislature may close a highway altogether, or may regulate its use, or restrict it to peculiar vehicles, or to the use of a particular motive power. (*Cicero Lumber Co. v. Olcero*, 155.)

HOMESTEAD.

1. **HOMESTEADS—PRE-EXISTING DEBTS.**—A debtor may acquire a homestead and hold it exempt from execution for pre-existing debts not then reduced to judgment, although the homestead is purchased with, or obtained by exchange for, nonexempt property. Fraud cannot be imputed to such an act. (*Paxton v. Sutton*, 589.)

2. **HOMESTEADS—ABANDONMENT—LIEN OF JUDGMENT—PRESUMPTION—BURDEN OF PROOF.**—If the owner of a homestead removes therefrom and takes up his residence and votes in a new place before he sells and conveys the homestead, a presumption of abandonment thereof before the sale arises, and in an action by his grantee to quiet his title as against the apparent lien of a judgment against his grantor, the burden of proof is upon the former to overcome such presumption of abandonment. (*Conway v. Nichols*, 311.)

3. **HOMESTEADS—ABANDONMENT.**—If the owner of a homestead removes therefrom with the intention and expectation of selling it, and making his home in another place, this must be deemed

an abandonment of the homestead, although he intends to return to it if he fails to sell it. (*Conway v. Nichols*, 311.)

4. **HOMESTEADS—RIGHT OF SELECTION.**—A wife living apart from her husband is primarily entitled to select a homestead in lands owned by her, and after her selection is made it cannot be set aside and the selection of her husband adopted in its stead, merely because she has selected the most unproductive portion of the tract and it is cut off from convenient access to the highway. (*Ehrck v. Ehrck*, 330.)

5. **HOMESTEADS — DESERTION OF WIFE — HUSBAND'S RIGHTS TO BENEFITS.**—A wife, so long as she lives apart from her husband, is not entitled to any benefit in a homestead set off in lands belonging to her, and the husband is entitled to the full right to cultivate it and enjoy the profits thereof, so long as he continues to live upon and occupy it as a homestead. (*Ehrck v. Ehrck*, 330.)

6. **HOMESTEADS—DECLARATION BY WIFE—WHEN FATALY DEFECTIVE.**—A declaration of homestead made by a wife, which fails to contain a statement "showing that her husband has not made such declaration, and that she therefore makes the declaration for their joint benefit," is ineffective to impress the land with the incidents of a homestead. (*Cunha v. Hughes*, 27.)

HUSBAND AND WIFE.

1. **HUSBAND AND WIFE—ESTATE BY ENTIRETIES—CHATTELS—CHOSES IN ACTION.**—An estate by entireties may be created in a chattel as well as realty, in a chose in action and one in possession, and is not abolished, as to choses in action, by legislation affecting joint tenancy. (*Parry's Estate*, 847.)

2. **HUSBAND AND WIFE—ESTATE BY ENTIRETIES—LETTER OF CREDIT—SURVIVORSHIP.**—An estate by entireties is created by a letter of credit, purchased by a husband with his own money, payable to himself and his wife, and intended for use in foreign countries. Hence, the wife is entitled, by survivorship, to any balance that may be due upon such letter of credit if the husband dies before it is exhausted. (*Parry's Estate*, 847.)

3. **HUSBAND AND WIFE—PRIVILEGED COMMUNICATIONS.**—The delivery of a deed from a husband to his wife is not a privileged communication. (*Poulson v. Stanley*, 73.)

4. **DEEDS—HUSBAND AND WIFE—MISTAKE IN GRANTEE.** Although the husband paid the greater portion of the purchase price of land, this is not conclusive that the name of his wife was inserted in the deed as a grantee by mistake, when it appears that the wife contributed substantially to such purchase price, and to improvements on the land, and that the husband read, recorded, and kept the deed. (*Bader v. Dyer*, 332.)

5. **COTENANCY—HUSBAND AND WIFE.**—Under a deed to husband and wife, they take and hold as cotenants and not as tenants by entirety, under a statute providing that conveyances to two or more in their own right create a tenancy in common. (*Bader v. Dyer*, 332.)

6. **COTENANCY—HUSBAND AND WIFE—ADVERSE POSSESSION.**—If land is conveyed to a husband and his wife, and they occupy the premises together and jointly share in its benefits, the husband's possession is not adverse to that of his wife. (*Bader v. Dyer*, 332.)

7. **CONTRACTS—RESTRAINT OF TRADE—BUSINESS IN WIFE'S NAME.**—A husband, who has made a valid contract not to

engage in a certain business in specified territory, either as principal, agent, or employé, cannot legally build up and carry on such business in his own interest, but in his wife's name, on the ground that it belongs to her, and he may be restrained by injunction from so doing. (*Up River Ice Co. v. Denler*, 480.)

8. EVIDENCE—RES GESTAE—HUSBAND IN POSSESSION OF PROPERTY CLAIMED BY HIS WIFE—COMPETENCY OF HIS STATEMENTS AS TO OWNERSHIP.—When a husband is in possession of property, which his wife claims to have bought from a third person, such as a saloon, stock of liquors and cigars, the husband's statements as to its ownership, are, in an action brought by his wife against an execution creditor of her husband, for a wrongful conversion of the property, a part of the *res gestae* and competent evidence, where the material issue is, whether the property actually belonged to the wife, her husband being in possession merely as her agent, or whether, as the creditor claims, the transfer to the wife and pretended agency of the husband were merely colorable, the property being, in fact, the husband's and his possession really in his own right. (*Lehmann v. Chapel*, 550.)

9. COMMUNITY PROPERTY.—A surviving widow takes her share of the community property by succession from her husband, and whatever right she may have in the estate of which he died seised is to be ascertained by the same means, as is the right of any claimant to his estate, whether by succession or by will. (*Cunha v. Hughes*, 27.)

10. PARTITION—ALLOTMENT OF COMMUNITY PROPERTY. The community character of property purchased by a husband is not changed by a subsequent decree in partition allotting it to him and his wife. (*Cunha v. Hughes*, 27.)

11. ESTATES OF DECEDENTS—RIGHTS OF WIDOW—COMMUNITY PROPERTY—DECREE OF DISTRIBUTION—EFFECT OF.—The rights of the surviving widow in the community property are determined and concluded by the decree of distribution of her husband's estate, unless such decree is reversed, set aside, or modified on appeal, whether she has elected to take her one-half of such property, or to take a life estate in the whole under her husband's will. (*Cunha v. Hughes*, 27.)

12. ESTATES OF DECEDENTS—AGREEMENT AND CONVEYANCE BY MARRIED WOMAN—AGENCY.—In an action by a husband to recover land or its proceeds, when his wife, on her father's inducement, made no will, but conveyed certain land to her mother on condition that her parents convey the land in question to her husband after her death, it is not necessary to allege and prove that her father was agent for her mother in inducing the action taken, because the mother cannot accept the conveyance and keep the land without performing the conditions of the agreement. (*Simons v. Bedell*, 35.)

See Appeal, 8; Dower; Fraudulent Conveyances, 7; Homestead, 4-6.

INDICTMENT.

INDICTMENT—TWO COUNTS—WHEN VERDICT UPON ONE WILL SUPPORT JUDGMENT.—If there are two counts in an indictment, a general verdict of guilty on both is a verdict of guilty on each, where the defendant does not exercise his right to require a separate verdict on each count. Hence, if one of the counts is good, it will support the judgment, although an erroneous instruction was given on the other. (*State v. Robbins*, 841.)

See Adultery, 2; Extortion; Forceful Entry and Detainer, 4-6; Habeas Corpus, 3, 7, 8.

INFANTS.

1. **INFANTS—NEGLIGENCE OF.**—An infant of tender years is deemed, in law, not possessed of sufficient discretion to be guilty of negligence for its failure to exercise due care for its safety. (*Evansville v. Senhenn*, 218.)

2. **CONTRIBUTORY NEGLIGENCE OF A PARENT OR CUSTODIAN OF AN INFANT** should not be attributed to it, and hence does not preclude recovery by an infant in an action brought for its benefit to obtain compensation for its injuries suffered from the negligence of the defendant. (*Evansville v. Senhenn*, 218.)

See Appeal, 3; Railroad Companies, 1, 4, 11-13; Real Property, 1, 2

INJUNCTION.

1. **INJUNCTION—TRADEMARKS—DECEPTION.**—A court of equity will not, by injunction, interfere to protect a person in the use of a trademark which is employed to deceive the public. (*Coleman etc. Co. v. Danneberg Co.*, 143.)

2. **INJUNCTION—EXECUTIVE OFFICER OF STATE.**—As to questions concerning offices and officers, an injunction does not lie against an executive officer of the state. (*Coleman v. Glenn*, 108.)

3. **INJUNCTION—QUESTIONS AS TO OFFICERS.**—Courts of equity will not interfere, by injunction, to determine questions concerning the appointment or election of public officers, or their title to office, such questions being of a purely legal nature, and cognizable only by courts of law. (*Coleman v. Glenn*, 108.)

4. **INJUNCTION—REMOVAL OF OFFICERS—BOARD OF EDUCATION.**—An injunction will not lie, either against a removing officer or body to prevent the removal of a public officer, or against the person appointed in the place of an officer removed, to prevent him from exercising the duties of the office. Therefore, if a court, under an unconstitutional statute, orders the removal of members of a county board of education from office, the state school commissioner will not be enjoined from issuing commissions to the persons named as their successors in office, for there is a legal remedy. (*Coleman v. Glenn*, 108.)

5. **INJUNCTION.—A MUNICIPAL CORPORATION** may be enjoined from running a dispensary system of selling liquors where such a power is not expressly conferred by statute. (*Leesburg v. Putnam*, 80.)

6. **INJUNCTION—REMEDY AT LAW.**—An injunction cannot issue when it would be an excessive redress for a technical wrong, for which there is an ample remedy at law. (*Jones v. Concord etc. R. R.*, 650.)

7. **INJUNCTION AGAINST VIOLATION OF CONTRACT NOT TO SELL OR PERMIT OTHERS TO SELL A SPECIFIC ARTICLE.**—If, by the terms of a contract, one of the parties agrees that he will not sell nor allow others to sell on his premises any but a specific make of patterns during the continuance of the contract, an injunction should issue to prevent his disregarding his agreement. (*Standard Fashion Co. v. Siegel-Cooper Co.*, 749.)

8. **TRADE SECRETS—INJUNCTION AGAINST DISCLOSURE OF.**—If one invents or discovers and keeps secret a process of manufacture, he has such a property right therein as will enable him to protect it by injunction against one who, in violation of confidence and contract, undertakes to apply it to his own use, or to disclose it to third persons. (*Thum v. Tloczynski*, 469.)

9. **MUNICIPAL ORDINANCE—INJUNCTION AGAINST ENFORCEMENT OF, WHO MAY OBTAIN.**—When a void municipal

ordinance forbids travel upon a public street with traffic vehicles, one whose place of business is so situate that he cannot carry it on if excluded from such street has such a special interest as entitles him to an injunction against the attempted enforcement of the void ordinance, where it also appears that the officers against whom the injunction is sought are insolvent. (*Cicero Lumber Co. v. Cicero*, 155.)

See Corporations, 10, 12; Master and Servant, 3.

INSANE PERSONS.

1. **INSANE PERSONS—EVIDENCE OF SHERIFF'S INSANITY.**—An official ascertainment of a sheriff's insanity is *prima facie* evidence of the fact that he is insane. (*Somers v. Board of Commissioners*, 834.)

2. **NEGLIGENCE—INSANITY OR MENTAL INCOMPETENCY AS A DEFENSE TO ACTIONS TO RECOVER FOR.**—If the master of a vessel becomes, by reason of his long continuance on duty during a storm, exhausted and mentally incompetent, and the vessel and cargo are lost through his failure, while in such condition, to take measures the omission of which on the part of a sane and competent master would be negligence, he is not answerable. (*Williams v. Hays*, 797.)

See Sheriffs, 1, 2, 4, 5-7.

INSOLVENCY.

See Banks and Banking, 4; Corporations, 14, 16, 17; Election; Fraudulent Conveyances, 5.

INSTRUCTIONS.

1. **TRIAL—INSTRUCTIONS, WHEN PROPERLY REFUSED.** Requested instructions, which are substantially given in other instructions, or which are upon the weight and effect of evidence, or which inform a juror that he has more right to vote not guilty than he has to vote guilty against his conscientious conviction, are properly refused. (*People v. Dole*, 50.)

2. **EVIDENCE—ERRONEOUS INSTRUCTION.**—An instruction that "where weaker evidence is produced when in the power of the party to produce higher, it is presumed that the higher evidence would be adverse if produced," is erroneous in substituting the word "weaker" for the word "inferior" used in the statute, and especially when such instruction is based upon the mere nonproduction of witnesses by a party to corroborate his testimony, as it implies that such other witnesses engaged in the same business would be higher and stronger evidence than that of the party testifying. (*People v. Dole*, 50.)

See Appeal, 6; Criminal Law, 1, 3, 4; Forgery, 5; Negligence, 1, 2.

INSURANCE.

1. **INSURANCE—PLACE OF CONTRACT.**—If an application for insurance is made in one state to an agent therein, and forwarded by him to the insurer in another state, where the policy is executed, and sent to such agent and by him delivered to the insured in the former state, the contract must be regarded as made in the state where delivered, and as subject to its laws. (*Perry v. Dwelling House Ins. Co.*, 668.)

2. **INSURANCE—MISSTATEMENT AS TO TITLE.**—A policy of insurance is not avoided by an innocent mistake or error on the part of the applicant as to his title. (*Perry v. Dwelling House Ins. Co.*, 668.)

3. INSURANCE—PROOF OF LOSS—WAIVER.—An insurer cannot avail himself of the omission of the insured to make proof of loss which the former has induced the latter to abstain from making. (*Perry v. Dwelling House Ins. Co.*, 668.)

4. INSURANCE—ACTION—PARTIES.—Although a policy of insurance is made payable in case of loss to the mortgagee to the extent of the mortgage debt, an action to recover such debt is properly brought in the name of the mortgagor who takes out the policy. (*Perry v. Dwelling House Ins. Co.*, 668.)

5. INSURANCE—KNOWLEDGE OF AGENT—APPLICATION OF STATUTE.—Under a statute relating to insurance companies, and providing that "if any company shall issue any policy upon an application prepared by a third person assuming to act as their agent, or otherwise, they shall be affected by his knowledge of any facts relating to the property insured as if they were stated in the application," an agreement by the insured that his statements in the application for insurance "shall be deemed and taken to be promissory warranties," and that the insurer "shall not be bound by any act done or statement made by or to any agent or other person which is not contained in the application," is invalid and has no legal effect. (*Perry v. Dwelling House Ins. Co.*, 668.)

6. INSURANCE, LIFE—PARTNERS—INSURABLE INTEREST.—If two partners have no capital invested, and neither is indebted to the other, one of the copartners has no insurable interest in the life of the other, and, if a policy is issued thereon, it is void. (*Powell v. Dewey*, 818.)

7. INSURANCE, LIFE—PARTNERS—NO RIGHT OF ACTION UPON A VOID POLICY.—No action can be sustained upon a void policy of insurance. Hence, if one partner is made the beneficiary and assignee of such a policy upon the life of his copartner, pays the premiums, and receives the insurance money upon the death of the insured, no action for such money can be maintained by the personal representative of the insured, either against the beneficiary or the insurance company. Neither could the beneficiary have maintained an action on the policy to enforce the payment of the insurance money. (*Powell v. Dewey*, 818.)

8. INSURANCE—ACCIDENT—AMENDMENT OF CONSTITUTION OF ASSOCIATION—EFFECT ON MEMBER.—The liability of an accident insurance association toward its members is fixed by its constitution and by-laws as they exist at the time when the certificate of membership was issued and not by those in force at the time the member dies, when such constitution does not authorize amendments therein nor in the by-laws, binding the member to any change in the contract without his assent. (*Carnes v. Iowa State etc. Assn.*, 806.)

9. INSURANCE—ACCIDENT—WHAT IS.—An accident, within the meaning of insurance against death from an accidental cause, is an event happening without any human agency, or, if happening through human agency, an event which, under the circumstances, is unusual, and not expected, to the person to whom it happens. (*Carnes v. Iowa State etc. Assn.*, 806.)

10. INSURANCE—ACCIDENT—BURDEN OF PROOF.—In an action to recover insurance against death from an accidental cause, the burden of proof is upon the plaintiff to show that death resulted from such cause, and until this is established no case is made out, but if plaintiff has introduced evidence showing death to have been the result of an accident, the burden of proof is then on the insurer to establish a defense that the insured was within some exceptions of the policy. (*Carnes v. Iowa State etc. Assn.*, 806.)

11. INSURANCE — ACCIDENT — SUICIDE — PRESUMPTION
In an action to recover insurance against death from an accidental cause, the presumption is against suicide. (*Carnes v. Iowa State etc. Assn.*, 306.)

12. INSURANCE—ACCIDENT.—Under insurance against death "from an accidental cause," a recovery may be had if the insured died from taking more morphine than he intended, but if his death is caused by his taking morphine, knowing how much he is taking, but not that the amount taken would cause death, no recovery can be had. (*Carnes v. Iowa State etc. Assn.*, 306.)

13. INSURANCE—WAIVER OF CONDITION AS TO ENCUMBRANCES.—If no inquiries are made of an insured as to the condition of his title to property insured, or as to encumbrances thereon, and he does not intentionally conceal the existence of an encumbrance, and does not keep silent in regard thereto from any sinister motive, while he has an insurable interest in the property, and the premium is paid, accepted, and retained, the insurance company is conclusively presumed to have insured such insurable interest, and to have waived a condition in the policy providing for its forfeiture by reason of an encumbrance upon the property. In case of loss, the insurer cannot avoid liability by reason of such encumbrance. (*Phenix Ins. Co. v. Fuller*, 637.)

14. INSURANCE—UNOCCUPIED BUILDINGS.—An insurance policy, conditioned that it shall be void if the insured buildings shall be or become vacant or unoccupied, is forfeited when the premises on which such buildings stand are leased to and cultivated by one who lives near by but does not occupy nor make any use of such buildings, and they are not occupied by anyone else. (*Stoltenberg v. Continental Ins. Co.*, 323.)

15. INSURANCE — UNOCCUPIED PREMISES — LETTER AS ADMISSION.—A letter from an insurance agent to the adjuster of the insurer, stating that the insured premises had been let and sublet, and that the subtenant had left the premises about four hours before the loss, does not admit the occupancy of the buildings at the time of the fire. (*Stoltenberg v. Continental Ins. Co.*, 323.)

16. INSURANCE—UNOCCUPIED BUILDING.—A policy of fire insurance containing a condition that it shall be null and void if the building insured be or become vacant or unoccupied, is forfeited if the tenant in possession had vacated such building a short time before the loss and it was not subsequently occupied by a tenant or other occupant. (*Stoltenberg v. Continental Ins. Co.*, 323.)

17. INSURANCE—VACANCY OF BUILDING—PRESUMPTION.
Insured buildings appearing to have been recently vacated by a tenant before the loss are presumed to continue vacant, unless shown to have been subsequently occupied. (*Stoltenberg v. Continental Ins. Co.*, 323.)

18. INSURANCE — EVIDENCE — HEARSAY.—The fact that a witness had heard another person tell the agent of the insurer that he was occupying the building insured, is hearsay and inadmissible, as against the insurer, on the issue of occupancy of the building at the time of the loss. (*Stoltenberg v. Continental Ins. Co.*, 323.)

19. INSURANCE—INSOLVENCY OF INSURER—POWERS OF RECEIVER.—If a premium note given by an insured to the insurer provides that the former is to pay to the latter a certain sum of money "in such proportions and at such time or times as the directors of said company may agreeably to their charter require," the power given to such directors by the note, upon the insolvency of the insurance company, passes to the receiver appointed for it, and the insured is bound to pay an assessment on the note levied by the receiver under the charter of the insurer. (*Meley v. Whitake*., 719.)

INTERSTATE COMMERCE.

INTERSTATE COMMERCE—PRISON MADE GOODS.—A statute requiring prison made goods to be stamped before being offered for sale or sold, so as to show when and where they were made, and that they are the product of prison labor, if sought to be applied to goods manufactured in another state, is void as an attempted regulation of interstate commerce. [Per O'Brien, Gray, Martin, and Vann, Judges.] (People v. Hawkins, 736.)

INTOXICATING LIQUORS.

INTOXICATING LIQUORS—DISPENSARY SYSTEM.—The controlling features of the dispensary system of selling liquors are: 1. That no liquors shall be sold by the drink, and none shall be drunk on the premises where sold; 2. That the management and control of the sale of liquors under such a system must be in the hands of a person not peculiarly interested in the quantity of liquors to be sold. (Leesburg v. Putnam, 80.)

See Injunction, 5.

JUDGMENT.

1. JUDGMENT—INSUFFICIENCY OF NOTICE—EFFECT OF. A judgment in an action in which the required number of day's notice was not given to the defendant is erroneous and irregular, but not void, and cannot be collaterally attacked. (Stafford v. Gallops, 816.)

2. AN ERRONEOUS JUDGMENT is one rendered according to the course and practice of the courts but contrary to law; that is, based upon an erroneous application of legal principles. (Stafford v. Gallops, 816.)

3. A VOID JUDGMENT is, in legal effect, no judgment. It neither binds nor bars anyone, and all proceedings founded upon it are worthless. A judgment rendered against a party without service on him, or an appearance, is void. (Stafford v. Gallops, 816.)

4. AN IRREGULAR JUDGMENT is one contrary to the course and practice of the courts, and is held valid until vacated or reversed. (Stafford v. Gallops, 816.)

5. JUDGMENTS—PLEA OF NUL TIEL RECORD.—Under the plea of nul tiel record to an action on a judgment the plaintiff cannot recover, if, upon the production of the record, the judgment upon its face appears to be void, but he may recover if the judgment, though erroneous, is merely voidable, and has not been set aside or reversed. (Caouette v. Young, 643.)

6. JUDGMENTS—ERRONEOUS.—A judgment for a sum larger than the ad damnum in the writ is erroneous, though not a nullity; and in an action thereon a continuance should be granted to enable the defendant to secure a reversal of the judgment. (Caouette v. Young, 643.)

7. JUDGMENTS FOR DEFICIENCY ON FORECLOSURE—SERVICE BY PUBLICATION.—A personal deficiency judgment against a nonresident rendered in foreclosure proceedings and based upon service of summons by publication is void, and no valid sale can be had under an execution issued thereon. (Latta v. Tutton, 30.)

8. JUDGMENTS—PRESUMPTION AS TO JURISDICTIONAL FACTS.—The presumption which the law implies in support of judgments of courts of general jurisdiction arises only with respect to jurisdictional facts concerning which the record is silent. (Latta v. Tutton, 30.)

9. JUDGMENTS.—RECITALS IN JUDGMENTS AS TO DUE SERVICE OF SUMMONS apply as well to service by publication as to personal service, and the recital must be presumed to refer to the mode of service which the record affirmatively discloses. (*Latta v. Tutton*, 30.)

10. JUDGMENT, REVIVOR OF, WHEN WILL BE PRESUMED.—Where a sale has taken place under a judgment after the death of the judgment creditor, and such sale has been confirmed, it will be presumed that the judgment was revived in favor of the administrator of the decedent. (*Cronkhite v. Buchanan*, 379.)

11. A JUDGMENT IN FAVOR OF THE PLAINTIFF IN AN ACTION in which he claimed to be the owner and entitled to the immediate possession of real property, and that the defendants unlawfully kept him out of possession thereof, does not prevent the subsequent assertion by the defendants of a mortgage held by them on the same property, because such mortgage, if presented in the former suit, would not have constituted any defense thereto. (*Prov. Loan etc. Co. v. Marks*, 349.)

12. JUDGMENT—ACTION ON CONTRACT—FORMER RECOVERY—PAROL PROOF TO CONTRADICT RECORD—DAMAGES BEYOND JURISDICTION.—If a plaintiff sues upon an entire contract in a justice's court, and recovers judgment, he cannot afterward sue in a city court for alleged breaches of the same contract, which occurred before the first suit, as against a plea of former recovery, setting out the pleadings in the justice's court, and showing that the two causes of action were identical. This question of identity must be determined by the record, and the plaintiff cannot introduce parol testimony to show that a different subject matter was, in fact, litigated. Neither is the rule requiring all breaches of a contract up to the time of bringing an action thereon to be included in the one action affected by the fact that the damages sought to be recovered in the city court were for an amount beyond the jurisdiction of a justice's court. (*Broxton v. Nelson*, 97.)

13. JUDGMENT FOR POSSESSION—WHO NOT BOUND BY SO AS TO BE GUILTY OF CONTEMPT OF COURT.—If a suit is brought by a plaintiff against a railway corporation and its mortgagee, to have the court declare that the corporation had forfeited its right of way over the plaintiff's lands, and, during the pendency of the action a receiver is appointed, who is denied the right to appear, a judgment in favor of the plaintiff does not so bind the receiver that he is guilty of contempt in entering upon the property and operating it after a writ in favor of the plaintiff has been executed by placing him in possession, nor are the attorneys and agents of such receiver guilty of contempt. (*Atwood v. State*, 393.)

14. JUDGMENTS AS ESTOPPEL.—To work an estoppel, a former judgment must be pleaded, if there is an opportunity to plead it; and it must be shown to be directly in point, and to involve the same parties and the identical matter presented in the new action. (*Water Commissioners v. Cramer*, 705.)

15. JUDGMENTS—ACTIONS ON—EXECUTION AS BAR.—A creditor may sue upon his judgment as soon as it is rendered. His right to do so is neither barred nor suspended by the issuing of an execution. (*Morse v. Pearl*, 672.)

16. JUDGMENTS—ACTIONS ON AFTER ISSUANCE OF EXECUTION.—An action upon a judgment may be maintained, although execution has issued thereon and has not been returned, and property may be attached in such action which could not be taken under execution, notwithstanding the existence of other visible property which might be taken under execution. (*Morse v. Pearl*, 672.)

17. JUDGMENT—DIRECT ATTACK UPON, FOR WANT OF JURISDICTION.—A suit to obtain relief from an order authorizing a mortgage, on the ground that such order was obtained by fraud and collusion, is a direct attack thereon, though the complainant also seeks in the same suit relief from such mortgage. (*Warren v. Union Bank of Rochester*, 777.)

18. NOTICE TO DEFEND—SUFFICIENCY OF—JUDGMENT—REMEDY OVER BY DEFENDANT.—A notice to come in and defend must be such, in substance, as to give the person notified information that he is called upon to come in and defend the suit, or that he is given an opportunity to do so, and that, if he does not defend it, he will be held answerable for the result. Otherwise, a judgment against the defendant in the action, in case he should be beaten, will not bind the person to whom notice is given. (*Consolidated etc. Co. v. Bradley*, 409.)

19. JUDGMENT—REMEDY OVER, BY DEFENDANT—NOTICE TO DEFEND.—If a party is obliged to defend against the act of another, against whom he has a remedy over, and defends solely and exclusively the act of such other party, and is compelled to defend no misfeasance of his own, he may notify such party of the pendency of the suit and may call upon him to defend it. If he fails to defend, then, if liable over, he is answerable not only for the amount of damages recovered, but for all reasonable and necessary expenses incurred in such defense; but this principle does not apply to cases where one is defending his own wrong, or his own contract, although another may be responsible to him. (*Consolidated etc. Co. v. Bradley*, 409.)

20. FRAUDULENT CONVEYANCES—JUDGMENT LIEN.—A judgment based upon indebtedness contracted partly prior and partly subsequent to a fraudulent conveyance, and recovered subsequent thereto, is a lien upon the property of the judgment debtor only to the extent of such prior indebtedness. Such voluntary conveyance is void as to that part of the judgment incurred before the conveyance and valid as to the part incurred subsequently. (*Cole v. Brown*, 491.)

See Execution, 8; Justice of the Peace, 2, 3, 7; Landlord and Tenant, 9; Limitations of Actions, 5; Mortgages, 8, 9; Payment, 4, 5; Seduction, 5.

JUDICIAL SALES.

1. JUDICIAL SALE.—THE DEATH OF A PURCHASER at a judicial sale before its confirmation does not avoid the sale. (*Cronkhite v. Buchanan*, 379.)

2. JUDICIAL SALE—CONFIRMATION OF AFTER THE DEATH OF THE BIDDER.—Though a purchaser at a judicial sale has died, it may be confirmed, and an order made that the sheriff execute a deed to the purchaser. (*Cronkhite v. Buchanan*, 379.)

3. JUDICIAL SALES—CONFIRMATION OF, WHO MAY MOVE FOR.—An administrator of a purchaser of lands at a judicial sale and the assignees of the judgment under which the sale was made are proper parties to move for its confirmation. (*Cronkhite v. Buchanan*, 379.)

4. JUDICIAL SALE OF TWO OR MORE PARCELS OF LAND AS ONE.—Where two quarter-sections of land are included in one mortgage and are ordered to be sold to satisfy the debt, an order confirming the sale will not be reversed, because it appears that the whole land was offered for sale and sold as one parcel, there being, however, no showing that any request was made to have them sold separately, or that they were not at first offered separately, and there being some evidence that they would sell better as one tract

than if divided. The fact that one of the parcels was occupied by the defendants as their homestead did not render it imperative on the sheriff to offer them in separate parcels in the absence of any request that he do so. (*Cronkhite v. Buchanan*, 379.)

5. JUDICIAL SALES, PUBLICATION OF NOTICE FOR FOUR WEEKS, WHAT IS NOT.—If a statute requires the notice of an application for leave to sell real estate to be published for four weeks before the first day of the term at which the order is to be applied for, a publication in four regular issues of a weekly newspaper is not sufficient, if the first publication was less than four weeks prior to the commencement of such term. It is not material that the order of sale was not entered until more than four weeks after such publication. (*Young v. Downey*, 568.)

See Attachment, 13; Mortgage, 12, 14.

JURISDICTION.

JURISDICTION—LAND IN ANOTHER STATE.—A court must have jurisdiction of the subject matter, before it can adjudge anything; and a court of one state is without jurisdiction of land in another state because it lies beyond the territorial line of jurisdiction. (*Davenport v. Gannon*, 827.)

See Appeal, 2; Courts, 2; Equity; Judgment, 17.

JUSTICE OF THE PEACE.

1. PLEADINGS—JUSTICES' COURTS.—In an action by a bank on a note in a justice's court, a copy of such note is a sufficient complaint, without alleging therein that such bank is a corporation. (*McFall v. Buckeye Grangers' etc. Assn.*, 47.)

2. JUDGMENTS—JUSTICES' COURTS—COLLATERAL ATTACK.—A judgment of a justice of the peace in favor of a bank is not void, although the record fails to affirmatively show the corporate capacity of the bank. The judgment cannot be collaterally attacked on that ground to avoid a sale under execution. (*McFall v. Buckeye Grangers' etc. Co.*, 47.)

3. JUDGMENTS—JUSTICES' COURTS—COLLATERAL ATTACK.—A defendant in an action by a bank on a note in a justice's court who fails to avail himself of the right to plead, by demurrer or answer, the want of legal capacity in the plaintiff to sue waives such right, and neither he nor third persons can assert it in a collateral attack on the judgment rendered in such action. (*McFall v. Buckeye Grangers' etc. Assn.*, 47.)

4. JUSTICE OF THE PEACE—DOCKET ENTRIES—EFFECT TO BE GIVEN TO.—Effect must be given to the entries in the docket of a justice of the peace according to the manifest intention of the justice in making them. (*State v. Myers*, 521.)

5. JUSTICE OF THE PEACE—DOCKET ENTRIES—WHEN INFORMALITIES WILL BE DISREGARDED.—All informalities and inaccuracies in the entries on the docket of a justice of the peace will be disregarded if the meaning is ascertainable, and is conformable to law. (*State v. Myers*, 521.)

6. JUSTICE OF THE PEACE—EVIDENCE—VERDICT AS AN AID IN CONSTRUING DOCKET ENTRIES.—The original verdict of a jury before a justice of the peace is competent, relevant, and material as an aid in construing his docket entries. (*State v. Myers*, 521.)

7. JUSTICE OF THE PEACE—JUDGMENT—ENTRY OF VERDICT, WITH COSTS AS TAXED, CONSTITUTES, WHEN.—The entry by a justice of the peace in his docket of the verdict of the

jury, with the costs as taxed, is, in legal effect, a judgment; and it makes no difference that he inserted the costs in the body of his docket after, and as a part of, the verdict, where his manifest intention was, that the amount of the verdict and costs should constitute the judgment. (*State v. Myers*, 521.)

LANDLORD AND TENANT.

1. LANDLORD AND TENANT—NATURE OF POSSESSION.—The possession of leased premises is *sub modo* in the tenant, but it certainly remains in the landlord to the extent that he can warn off intruders and trespassers. (*State v. Robbins*, 841.)

2. FIXTURES—LESSOR AND LESSEE—BUILDING—AGREEMENT—INTENTION.—Whether fixtures placed by a lessee upon leased land thereby become part of the realty is not altogether matter of agreement between the lessor and lessee. The intention of the latter has much to do with the question, and if his intention is that the fixture shall remain his personal property, and that intention is made known, and his acts are consistent therewith, the fixture may remain his personal property, although there may be no agreement to that effect between him and the lessor. (*Ryder v. Faxon*, 417.)

3. FIXTURES—LESSOR AND LESSEE—PROOF OF AGREEMENT THAT A BUILDING IS TO BE THE PERSONAL PROPERTY OF THE LESSEE.—If a lease itself shows the lessor's assent that the lessee may erect a building on the leased land, a finding that there was an agreement that the building should be the personal property of the lessee is justified by evidence that the lessor directed the structure to be so built that it could be moved when the lease expired; that he made no reply when told by the lessee that he would have to mortgage the building to pay for it; and that the lessor told the lessee that he did not want him to put in any wall or anything which would obstruct the place. (*Ryder v. Faxon*, 417.)

4. EVIDENCE—PROOF OF AGREEMENT OUTSIDE OF LEASE—BUILDING AS PERSONAL PROPERTY OF LESSEE—CONTRADICTING LEASE.—Neither a provision in a lease, following the description, that the land is to be occupied by a building erected thereon by the lessee, nor a covenant that, at the termination of the lease, "the lessee should deliver up the premises in as good order and condition as they then were or should be put into by the lessor," is not inconsistent with an agreement, outside of the lease, that the building to be erected should be the personal property of the lessee. Hence, as such agreement does not contradict the provisions of the written lease, evidence of it is admissible in an action for the conversion of the building. (*Ryder v. Faxon*, 417.)

5. MANURE AS PART OF REALTY.—Manure made upon a farm by the consumption of its products in the ordinary course of husbandry is a part of the realty, and cannot be sold or carried away by the tenant without the consent of the landlord. (*Pickering v. Moore*, 695.)

6. MANURE AS PART OF REALTY.—Manure made upon a farm from products not produced thereon is not part of the realty and may be held by the tenant. (*Pickering v. Moore*, 695.)

7. MANURE—PROPERTY IN—INTERMIXTURE OF.—A tenant does not lose his property in manure by intermixing it with the landlord's manure of the same quality and value, without his consent, but without any fraudulent or wrongful intent. (*Pickering v. Moore*, 695.)

8. LANDLORD AND TENANT—LEASE AS EVIDENCE.—A tenant's lease is valid against his lessor, although unrecorded, and

upon being recorded is admissible in proof of his title against any one. (*Beach v. Morgan*, 692.)

9. JUDGMENT—REMEDY OVER BY DEFENDANT LESSEE AGAINST LESSOR—COMMON LAW LIABILITY.—If the lessee of a building, against whom an action is brought, defends against some negligence of his own, or of some person for whom he is made answerable by statute, and damages are assessed, under such statute, with reference to the degree of culpability of himself, or of such person, he has no remedy over against his lessor to recover the amount of the judgment. The latter, if answerable at all to him, is liable at common law for breach of his contract, or of his duty. (*Consolidated etc. Co. v. Bradley*, 409.)

LAW OF THE CASE.

See Appeal, 4.

LEGACY.

LEGACY—BEQUEST OF ARTICLES FOR "PERSONAL USE AND ORNAMENT" DO NOT INCLUDE A SAILING YACHT. A bequest from a husband to his wife of "all his clothing, household and kitchen furniture, linen, china, plate, plated ware, jewelry, pictures, engravings, books, bric-a-brac, and articles of personal use and ornament" does not include a sailing yacht owned by the testator at the time of his death, for the words "articles of personal use and ornament" evidently embrace only articles of that kind previously enumerated, and which are kept in the house or on the premises. (*Parry's Estate*, 847.)

LEGISLATURE.

See Highways, 1.

LIBERTY OF THE PRESS.

See Contempt, 2.

LIENS.

See Judgment, 20; Mechanic's Lien; Mortgage, 18; Receivers, 9; Water Companies, 2.

LIFE TABLES.

See Evidence, 4.

LIMITATIONS OF ACTIONS.

1. STATUTE OF LIMITATIONS—EXECUTOR'S FAILURE TO PROCURE SETTLEMENT OF ACCOUNTS CANNOT PROLONG. Though a statute provides that an action to recover property sold by an executor or administrator shall not be maintained unless commenced within three years after the settlement of his final account, the time cannot be prolonged indefinitely by his failure to file such account and obtain its settlement. The statute must in such a case be deemed to commence running after the lapse of a reasonable time in which to present and procure a settlement of such account. (*Dennis v. Bint*, 17.)

2. EXECUTORS AND ADMINISTRATORS—SALE OF LAND—STATUTE OF LIMITATIONS.—If matters relied upon to impeach an administrator's sale of land are patent of record, and there has been adverse possession since such sale, mere ignorance of

the facts without some valid excuse therefor is not sufficient to stay the running of the statute of limitations. (*Dennis v. Bint*, 17.)

3. IN CASES OF FRAUD, THE STATUTE OF LIMITATIONS does not begin to run until the fraud is discovered, particularly where falsehood, operating upon fear, has been resorted to for the purpose of preventing inquiry. (*Smith v. Blachley*, 887.)

4. AGENCY—PHYSICIAN AS AGENT AND BLACKMAILER—LIABILITY TO PRINCIPAL—STATUTE OF LIMITATIONS.—If two families, one having a son, and the other a daughter, are attended by a physician, who falsely represents that an illness of the girl was the result of a criminal abortion; that the father of each family is about to be prosecuted for the crime by a humane society; and that the matter can be hushed up with money; the physician cannot, after thus putting himself in the position of a mere blackmailer, and after constantly urging the parents to keep quiet about the matter, retain money which he has received from them for that purpose, in consequence of his representations, but is bound to turn it over to those who paid it to him, and the statute of limitations does not begin to run until the fraud is discovered. (*Smith v. Blachley*, 887.)

5. JUDGMENTS—PRESUMPTION OF PAYMENT—LIMITATIONS.—The period of time during which a person is absent from the state must be deducted from the time required by the statute of limitations to bar an action on a judgment against him, and the same rule applies to the presumption of payment arising from lapse of time. Such absence may be proved by ordinary oral evidence. (*Latimer v. Trowbridge*, 893.)

6. CLAIM AND DELIVERY—STATUTE OF LIMITATIONS.—An action of claim and delivery brought by the pledgor within three years after claim of title to pledged property is made by the pledgee, and after tender and demand for its return, is not barred by limitation. (*Latta v. Tutton*, 30.)

7. RAILROAD'S NEGLIGENT CONSTRUCTION OF EMBANKMENT—ACCRUAL OF ACTION.—Cause of action against a railroad company for the negligent construction of an embankment arises when the injury sued for occurred, and not when the construction of the embankment was completed. (*Chicago etc. R. R. Co. v. Emmert*, 602.)

8. RAILROAD COMPANIES—NEGLIGENT CONSTRUCTION OF EMBANKMENT—TIME WHEN ACTION ACCRUES.—The cause of action for an injury to land and crops caused by the negligent construction of an embankment by a railroad company, whereby the flood waters of a natural stream are arrested and held upon such land, accrues at the date of the injury, and not at the time of the completion of such negligent construction. (*Chicago etc. R. R. Co. v. Emmert*, 602.)

See *Guardian and Ward*, 6; *Railroad Companies*, 7; *Statutes*, 8; *Suretyship*, 2-5, 9.

LIS PENDENS.

LIS PENDENS—DEED NOT RECORDED UNTIL AFTER SUIT BROUGHT.—After a suit is brought to foreclose a mortgage to which a grantee of the mortgagor is not made a party, because his conveyance is not recorded, and the plaintiff has no notice thereof, and a decree of foreclosure is entered, and an order of sale issued thereon, after which the conveyance is filed for record, the grantee in such conveyance must be deemed a purchaser pendente lite. Hence, if a sale is made under the decree, though after the record-

ing of the conveyance, the purchaser acquires a perfect title free of the claims of the grantee of such conveyance. (*Smith v. Wester*, 385.)

MANURE.

See *Landlord and Tenant*, 5-7.

MARRIAGE AND DIVORCE.

1. MARRIAGE—ANNULMENT OF, FOR FRAUD.—On grounds of public policy, the law seeks to make the marriage relation, in every case, as nearly permanent as possible without doing injustice, but a marriage may be annulled for fraud in regard to the bodily condition of the libelee, where the fraud is discovered immediately after the ceremony and before the consummation of the marriage. (*Smith v. Smith*, 440.)

2. MARRIAGE—ANNULMENT OF, ON ACCOUNT OF VENEREAL DISEASE.—Under a statute authorizing either party to a marriage to file a libel for its annulment, when the validity of the marriage is doubted, a woman, who is married to a man afflicted with a venereal disease, called syphilis, is entitled to, and a judge of the superior court has power to enter, a decree annulling the marriage, where it appears that the libelee contracted the marriage without informing the libelant of his condition; that she discovered the fraud on the day of the marriage, soon after the ceremony, and before the consummation of the marriage, that she refused to live with him, and never did live with him; that the disease was constitutional and infectious, and would, in case of cohabitation, be communicated to the libelant and be transmitted to any offspring they might have; and that, while the disease might not be absolutely incurable, the chances of a cure being effected, in the state in which the libelee was, were very remote and doubtful. (*Smith v. Smith*, 440.)

3. ALIMONY CANNOT BE ALLOWED where there is no marriage, though the parties lived together as husband and wife, believing themselves to be such. (*Werner v. Werner*, 372.)

4. MARRIAGE VOID, DIVIDING PROPERTY ACCUMULATED DURING THE CONTINUANCE OF SUPPOSED MARITAL RELATIONS.—Where a marriage is void because the woman had a husband living when it was contracted, a court, in annulling it upon that ground, may decree that a division be made of the property accumulated by the parties while living as husband and wife and standing in the name of the man, where it appears that such division is equitable, because the woman was active, industrious, and faithful, and, besides household work, was efficient in conducting different branches of business. (*Werner v. Werner*, 372.)

See *Equity*, 5; *Evidence*, 1.

MARRIED WOMEN.

See *Husband and Wife*; *Specific Performance*, 6.

MASTER AND SERVANT.

1. MASTER AND SERVANT—INJURY TO SERVANT—USE OF MACHINERY—COMMON-LAW LIABILITY—OBVIOUS RISK—TRAP.—If a person is employed to remove cards, as printed, from a lithographic press, and to put other cards in their places, on a revolving cylinder, which stops, automatically, after each card is printed, and which is covered by an iron mask, with jaws that open and shut, automatically, just long enough for the change of

cards to be made, and the employé is given a seat at the machine upon a board which is likely to tip, and which does tip, causing one of his hands to be caught by the iron mask and severely injured, just at a time when he is directed by the man immediately over him how to sit and to use his hands, and at the very moment when the jaw opens and shuts, the employer is answerable at common law for the injury, where the employé was ignorant of the tendency of the board to tip, and the amount of leverage of the projecting edge of the board could be ascertained only by looking under the seat. It is a clear case of a trap, but the employer is also answerable because such a direction concerns the mode of using the permanent machinery. (*Spaulding v. Forbes Lith. Mfg. Co.*, 424.)

2. MASTER AND SERVANT—INJURY TO SERVANT—ADMISSIBILITY OF PREVIOUS OCCURRENCES SIMILAR TO THAT WHICH CAUSED ACCIDENT.—If an employé is injured while working at a lithographic press for his employer, which injury is caused by the tipping of the seat on which he is placed to work, evidence is admissible, in an action by him against his employer for such personal injuries, that the seat had tipped before, when a boy was working upon it, and that this fact was known to the person deputed to instruct and authorized to order the plaintiff. (*Spaulding v. Forbes Lith. Mfg. Co.*, 424.)

3. TRADE SECRETS—INJUNCTION AGAINST DISCLOSURE OF.—An employé upon the termination of his employment, cannot make use of trade or manufacturer's secrets confided to him by his employer and necessary to be confided to him in the conduct of the business, if it is understood and agreed, expressly or impliedly, that he shall not make use of the secret knowledge so imparted to him to the detriment of his employer. If he attempts to do so, he may be restrained by injunction. (*Thum v. Tloczynski*, 466.)

See Contracts, 11.

MAXIMS.

THE MAXIM THAT HE WHO COMES INTO EQUITY must come with clean hands applies where one using a deceptive trademark seeks relief against another who uses the same deceptive trademark on the same character of goods. (*Coleman etc. Co. v. Dannenberg Co.*, 143.)

MECHANICS' LIENS.

1. MECHANIC'S LIEN—GENERAL CONTRACT FOR BUILDINGS ON CONTIGUOUS LOTS—APPORTIONMENT—SEPARATE LIEN STATEMENTS.—If the purpose of a contract is to secure the building of a row of three houses of uniform material, style, and price, all to be erected and completed within the same time, upon one contiguous tract of land, the contract is general, in that it relates to and includes all of the houses. Hence, if the builder constructs the three houses pursuant to the purpose of this one general contract, he is not bound to apportion the amount of his lien between the several houses and file a separate lien upon each, particularly where the statute declares, in effect, that an apportionment and separate filing are not necessary in such a case. (*Johnson v. Salter*, 516.)

2. MECHANIC'S LIEN—CONSTRUCTION OF WORDS, "GENERAL CONTRACT," IN STATUTE—BUILDINGS ON CONTIGUOUS LOTS.—The words "general contract," as used in a statute providing, in effect, that whenever any contractor furnishes labor and materials and erects two or more buildings on contiguous lots pursuant to the purposes of one general contract with the owner, it

is not necessary to file a separate statement upon each building nor to apportion the amount of the entire lien between the several buildings, do not mean an entire and indivisible contract as to its consideration. They simply mean that the contract must be entire, in that it includes all of the buildings and provides for the erection of all of them, or some portions of all of them, pursuant to the purposes of the one general contract. (*Johnson v. Salter*, 516.)

3. MECHANIC'S LIEN—STATEMENT—SUFFICIENCY OF WHERE CLAIM IS ON LOT, BUT NOT UPON BUILDING.—A statement for a mechanic's lien is sufficient, where the building is erected upon the lot for the owner thereof, and a lien is claimed upon the lot, though the statement does not, in express terms, claim a lien upon the building. The building, as to the owner, is a part of the lot, and, where the latter is correctly described, a claim of lien upon the lot includes the building. (*Johnson v. Salter*, 516.)

4. MECHANIC'S LIENS—ENGINE AS PART OF BUILDING. A portable engine is not a building, or even a part thereof, when placed therein, within the meaning of a statute giving a lien for "erecting, altering, or repairing a house or other building or appurtenances" thereto. (*Thompson Mfg. Co. v. Smith*, 679.)

See Fraudulent Conveyances, 4.

MERGER.

See Mortgage, 1.

MORTGAGE.

1. MORTGAGES—MERGER.—The title of a mortgagee, to whom the property is transferred in satisfaction of the mortgage, which is not delivered to the mortgagor or canceled of record, is not thereby merged in his title as owner. (*Quimby v. Williams*, 685.)

2. MORTGAGES.—ASSIGNMENT AND DELIVERY of a mortgage note transfers the mortgagee's title under the mortgage. (*Quimby v. Williams*, 686.)

3. MORTGAGES—ASSIGNMENT—PRIORITIES.—The fact that a mortgage is in the hands of the mortgagee after the property has been transferred to him in payment of the mortgage debt does not necessarily show that the mortgage is invalid; nor does the fact that while in his hands it was invalid against previous encumbrances, because equitably it had been paid, prove that it could have no force, when assigned by him, as against his subsequent assignees or grantees. (*Quimby v. Williams*, 685.)

4. MORTGAGES — ASSIGNMENT—ESTOPPEL.—If a mortgagee, who assigns his mortgage afterward, takes a conveyance of the mortgaged premises from the mortgagor, and agrees to discharge him from liability on the mortgage note, the subsequent assent of the assignee to such discharge does not estop the latter from insisting upon his mortgage security as against the mortgagee or his grantees. (*Quimby v. Williams*, 685.)

5. MORTGAGES — ASSIGNMENT—PRIORITIES.—If a mortgagee takes a conveyance of the mortgaged premises in payment of the mortgage debt, and the mortgage remains uncanceled of record, the title of an assignee of such mortgage for value must prevail over that of a subsequent grantee of such mortgagee. (*Quimby v. Williams*, 685.)

6. MORTGAGES — ASSIGNMENT — PRIORITIES.—An assignment of a mortgage by a mortgagee after the mortgage debt has been paid to him, though the mortgage has not been canceled of

record, is not valid as against his subsequent assignment of a second mortgage executed and recorded prior to the first assignment. (Quimby v. Williams, 685.)

7. MORTGAGES—FRAUD—PRIORITIES.—A conveyance of land merely to enable the grantee to mortgage it back to the grantor, and thereby perpetrate a fraud, does not make the mortgage so executed void in the hands of a bona fide assignee, and the rights of the latter are junior only as to encumbrances on the premises, which he could have discovered by an examination of the record at the time he took the mortgage. (Quimby v. Williams, 685.)

8. MORTGAGE—FORECLOSURE OF—WHEN CONCLUSIVE OF AN ADVERSE TITLE.—If, in a suit to foreclose a mortgage, it is alleged that a party defendant has or claims some interest in the mortgaged premises, which, if it exists, has accrued subsequently and is subordinate to the plaintiff's mortgage, a judgment by default against such defendant is conclusive that his title is subsequent and subordinate to the mortgage, and precludes him from afterward asserting a title held by him at the commencement of the former suit, and which was anterior and paramount to the plaintiff's mortgage. (Provident Loan Trust Co. v. Marks, 349.)

9. MORTGAGE—FORECLOSURE OF.—A claimant of title paramount to a mortgage is a proper party to a suit to foreclose it, and, if the decree is against him, it is conclusive of his claim of title. (Provident Loan Trust Co. v. Marks, 349.)

10. MORTGAGES—FORECLOSURE—PARAMOUNT TITLE.—If a defendant in a foreclosure suit raises the question of paramount title in himself, the complaint should not be dismissed as to him, and he is entitled to have the issue of title tried by a jury. (Loan etc. Bank v. Peterkin, 900.)

11. MORTGAGES—FORECLOSURE—PARAMOUNT TITLE—BURDEN OF PROOF.—If a defendant in a foreclosure suit raises the issue of paramount title in himself by denying the title of the mortgagor, the plaintiff must be the actor and has the burden to prove title in the mortgagor. (Loan etc. Bank v. Peterkin, 900.)

12. MORTGAGES—FORECLOSURE—VOID SALE—PLEDGE TO MORTGAGEE.—A sale under execution upon a void deficiency judgment of bonds pledged to the mortgagee as collateral security for the mortgage debt confers no title. After their purchase by the mortgagee, the pledgor may tender him the remainder of the mortgage debt, and demand a return of the bonds. (Latta v. Tutton, 80.)

13. MORTGAGE—FORECLOSURE—DEFICIENCY JUDGMENT—TENDER—WAIVER OF OBJECTION—EXTINCTION OF LIEN. A tender by the pledgor of the amount of a deficiency judgment in foreclosure with legal interest to the pledgee, who makes no objection to the amount, but does not surrender the pledge nor accept the tender, extinguishes the lien of the pledge, and amounts to a wrongful conversion, even though the tender is in fact less than the amount that may be due the pledgee. (Latta v. Tutton, 80.)

14. EXECUTION OR FORECLOSURE SALE—REDEMPTION FROM—EFFECT OF.—When real property sold under a decretal order for less than the amount due is redeemed from the sale, it is wholly vacated, and the property becomes subject to a resale for the amount remaining unpaid. (Mitchell v. Ringle, 212.)

15. EXECUTION—EFFECT OF ISSUING AN ORDINARY EXECUTION INSTEAD OF AN ALIAS ORDER OF SALE.—If a plaintiff entitled to an alias decretal order for the balance remaining unpaid under a decree of foreclosure instead thereof takes out an

ordinary execution and sells thereunder the property subject to such decree, while such execution might have been vacated on motion, a sale thereunder is valid in the absence of any precedent objection to the writ. (*Mitchell v. Ringle*, 212.)

16. EXECUTION, ISSUING, WAIVER OF IRREGULARITIES IN.—An ordinary execution, instead of an order of sale, issued upon a decree of foreclosure, is irregular, but the defendant, by failing to object until long after the sale, waives the irregularity. (*Mitchell v. Ringle*, 212.)

17. EXECUTION FOR A MORTGAGE DEBT.—The provisions of a statute of Indiana that whenever an execution shall issue upon a judgment recovered for a debt secured by a mortgage of real property, the plaintiff shall indorse thereon a brief description of the mortgaged premises, and the equity of redemption shall in no case be sold on such execution, applies only to a judgment at law where there is no foreclosure of the mortgage. Hence an execution on a decree foreclosing a mortgage need not be so indorsed. (*Mitchell v. Ringle*, 212.)

18. CLERKS OF COURTS—PAYMENT TO IN VACATION.—Payment to the clerk of a court in vacation during the pendency of an action to foreclose a mortgage, before judgment and without an order of court, of the whole amount of the mortgage debt, with costs, does not extinguish the mortgage, as the clerk does not receive such money by virtue of his office, but in his individual capacity as agent of the mortgagor, who is still liable for the mortgage debt in case the clerk embezzles the money so received and absconds. (*Commercial Investment Co. v. Peck*, 598.)

See *Dower*, 10; *Guardian and Ward*, 2-4.

MUNICIPAL CORPORATIONS.

1. MUNICIPAL CORPORATIONS — POWER OF, UNDER "GENERAL WELFARE" CLAUSE OF CHARTER.—A city is not authorized, under the "general welfare" clause of its act of incorporation, to make it unlawful to carry on a lawful trade or business in a lawful manner. (*Cosgrove v. Augusta*, 149.)

2. MUNICIPAL CONCERNS, WHAT ARE.—A general statute purporting to authorize all cities within the state of a designated population to set aside streets therein as boulevards and to prohibit the use of lands fronting on such boulevards except for residence purposes, deals with a subject of strictly municipal concern, and is hence invalid, if such legislature has not the right to interfere with the municipal concerns of such cities. (*St. Louis v. Dorr*, 575.)

3. A MUNICIPAL CORPORATION HAS NO IMPLIED POWER to restrict the use of real property fronting upon any street therein to residence purposes only, nor to inhibit the doing of business on property abutting on any street. (*St. Louis v. Dorr*, 575.)

4. MUNICIPAL CORPORATIONS—CONSTITUTIONAL LAW.—The freeholders' charters of the cities of Missouri of the first class, including St. Louis, cannot be amended by an act of the legislature as to matters of municipal and local concern. (*St. Louis v. Dorr*, 575.)

5. MUNICIPAL CORPORATIONS, RESTRICTING USE OF PROPERTY WITHIN—CONSTITUTIONAL LAW.—A statute purporting to authorize municipal corporations to select streets to be used as boulevards and to exclude the institution and maintenance of any business avocation on the property fronting on such boulevard, is an unwarranted invasion of the right of private ownership of property in so far as it attempts to authorize the exclusion

from such property of any legal and innocent business, such as the keeping of a store for the sale of confectionery. (*St. Louis v. Dorr*, 575.)

6. MUNICIPAL CORPORATIONS—FORBIDDEN SPECIAL LAWS.—If the constitution of a state declares that the legislature shall provide by general laws for the classification of cities and towns, and the number of classes shall not exceed four, and the legislature does proceed to designate the four classes, a subsequent statute purporting to confer a power on cities which have, or may acquire, a population of three hundred thousand or more, is void, where it, in effect, creates five classes, or, in other words, confers on cities of the first class having a population of more than three hundred thousand powers not possessed by other cities of the first class having a less population. (*St. Louis v. Dorr*, 575.)

7. MUNICIPAL CORPORATIONS—POWER TO LICENSE.—The power of a municipal corporation to license saloons clearly imports that the business must be in the hands of some person other than the licensing authority. One person cannot be the licensing power and the licensee. (*Leesburg v. Putnam*, 80.)

8. MUNICIPAL CORPORATIONS MAY EXERCISE SUCH POWERS as may be reasonably implied from the terms of their charters; but the implied powers of a municipal corporation must be such as are necessary and proper to carry into effect the objects and purposes for which the corporation was created. (*Leesburg v. Putnam*, 80.)

9. MUNICIPAL CORPORATIONS—IMPLIED POWERS—DISPENSARY SYSTEM.—It is not ordinarily within the power of a municipal corporation to engage directly in any commercial enterprise, and it cannot, therefore, establish and operate a dispensary system for selling liquors without express legislative authority. Its power to license and regulate the management of barrooms, saloons, et cetera, does not include the right to run a dispensary. Such a right cannot be implied from the "general welfare" clause of its charter, for its exercise is inconsistent with the usual purposes of municipal government. (*Leesburg v. Putnam*, 80.)

10. MUNICIPAL CORPORATIONS—REGULATIONS AS TO THE KEEPING OF DOGS—VALID ORDINANCE.—A city whose charter authorizes it to "pass such ordinances as may be deemed necessary for the regulation of stock and other animals within the city," and which contains a "general welfare" clause, has power to pass and enforce a penal ordinance requiring all persons keeping dogs on their premises, within the city limits, to register and procure badges for the same, and to pay a fee of one dollar for each registration and badge. (*Griggs v. Macon*, 134.)

11. MUNICIPAL CORPORATIONS—STREETS—POWER OF THE LEGISLATURE TO RESTRICT THE USE OF TO PURPOSES OF PLEASURE.—A statute authorizing a municipal corporation to set aside, on the petition of the owners of more than two-thirds of the frontage of lands thereon, as many as two of the streets of such municipality as pleasure driveways, and to prohibit traffic teams, hearses, and funeral processions thereon, and to free such streets from all business traffic, is not unconstitutional. It does not deprive any person of his property without due process of law, nor take or damage property for a public use without compensation, nor involve any violation of trust on the part of the municipal authorities. (*Cicero Lumber Co. v. Cicero*, 155.)

12. MUNICIPAL ORDINANCES—WHEN VOID AS INVOLVING THE EXERCISE OF AN ARBITRARY DISCRETION.—An ordinance forbidding the taking of any omnibus or heavy vehicle or any traffic vehicle upon a specified street or boulevard, except

upon special permission of the board of trustees, is unreasonable and void, because it undertakes to invest that board with an unregulated official discretion, when the whole matter should be regulated by permanent local provisions operating generally and impartially, and prescribes no conditions upon which the special condition shall be granted or withheld. (*Cicero Lumber Co. v. Cicero*, 155.)

13. MUNICIPAL ORDINANCE, VOID IN PART, WHEN VOID IN WHOLE.—When an ordinance consists of several distinct and independent parts, although one or more of them be void, the rest are equally valid as if the void clauses had been omitted; but where the ordinance is entire, and each part has a general influence over the rest, and one part is void, the entire ordinance is void. If the ordinance undertakes to exclude traffic vehicles from a public street, except upon special permission of the board of trustees, it cannot be assumed that it would have been enacted if the unregulated authority to grant such permission had not been incorporated therein, and hence it is wholly void. (*Cicero Lumber Co. v. Cicero*, 155.)

14. CONSTITUTIONAL LAW.—AN ORDINANCE GRANTING SPECIAL PRIVILEGES to a street railway corporation to construct and operate its road over a designated route on the payment annually of a sum specified for each mile does not violate the fourteenth amendment to the constitution of the United States nor any provision of the constitution of the state of Illinois. Where the municipality is authorized by statute to consent to the construction and operation of such roads, it is not required nor expected to do so by general ordinances applicable to all roads, but to give its consent in each case upon such terms as may seem proper. (*Chicago etc. Ry. Co. v. Chicago*, 188.)

15. MUNICIPAL CORPORATIONS—CONSENT TO AVOID ORDINANCE MAY MAKE IT EFFECTIVE AS A CONTRACT.—Whether or not a municipal corporation had authority to impose, as a condition of its consent to a grant of a right to construct and operate a street railway, that a specified sum per mile should be paid into the municipal treasury, the acceptance of the ordinance with the condition attached, agreeing thereby to perform it, made it a valid contract between the city and the corporation, and estopped the latter from questioning its validity. (*Chicago etc. Ry. Co. v. Chicago*, 188.)

16. MUNICIPAL CORPORATION—MONEY CONSIDERATION—RIGHT OF TO EXACT FOR THE USE OF THE STREETS.—A municipal charter providing that street railways may be constructed and operated with the consent of the city council authorizes it to exact a money consideration as a condition to granting such consent as that the corporation shall grant a sum designated annually for each mile of railway constructed. (*Chicago etc. Ry. Co. v. Chicago*, 188.)

17. MUNICIPAL CORPORATIONS—STREET RAILWAYS—POWER TO EXACT MONEY AS CONDITION OF A FRANCHISE.—An ordinance granting the right to construct and operate a street railway over a designated route upon condition that the grantee and its successors shall pay into the treasury of the municipality five hundred dollars annually for each and every mile of their track laid under the provisions of the ordinance, is valid, and a corporation, having accepted the franchise or grant, cannot avoid the condition. (*Chicago etc. Ry. Co. v. Chicago*, 188.)

18. MUNICIPAL CORPORATIONS—WHAT BUSINESS SHOULD NOT BE PROHIBITED.—If a business can be conducted in a particular place, or on certain premises, by proper persons, without harm or inconvenience to the public, the prosecution of it should not be entirely prohibited, but such necessary police rules

and regulations should be prescribed for carrying on such business in that particular locality as may be necessary for the public good. (*Cosgrove v. Augusta*, 149.)

19. MUNICIPAL CORPORATIONS—PROHIBITIVE ORDINANCE AS TO BUSINESS.—An ordinance which prescribes that certain persons shall not carry on their business, which would otherwise be legitimate, in a particular place or on certain premises, is, as to such place or premises, clearly prohibitive, and to authorize the passage of such an ordinance, where the power is undoubted, the injury to the public, which furnishes the justification for the ordinance, should proceed from the inherent character of the business when conducted at such place or upon such premises. (*Cosgrove v. Augusta*, 149.)

20. MUNICIPAL CORPORATIONS—POWER OVER HACKMEN—INVALID ORDINANCE.—The exercise of a hackman's right to enter the depot grounds of a railroad company, to ply his trade by there soliciting patronage, may be regulated by a city, under the general welfare clause of its charter, so as to protect the traveling public from annoyance, but if there is no provision in its charter authorizing it to regulate hacks, or the hack business, the city cannot, by ordinance, under the power derived from its general welfare clause, completely take away such right, especially where the hackman has secured his privilege from the owner of the premises. (*Cosgrove v. Augusta*, 149.)

21. MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS.—Property owners are not chargeable with the price of municipal improvements, but only with an equivalent for the special benefits they derive therefrom; and such equivalent cannot exceed the reasonable value of the improvement, and hence the municipality, and not the assessable property owners, must bear the excess of price beyond fair cost. (*Wilson v. Trenton*, 714.)

22. MUNICIPAL CORPORATIONS—STREET IMPROVEMENT—CONTRACTS TO KEEP IN REPAIR.—Municipal authorities, when contracting for the paving of a street, may embody in the contract provisions by which the contractor guarantees the durability of the pavement for a stated period and to repave at a stated price all openings made in the street during such period, but such contract must not raise the price of paving to property owners assessed therefor beyond the fair cost of a good pavement, and they may show that the nominal price for paving under the contract includes extra compensation for the guaranty, and for repaving, and thus reduce the assessment to the cost of a proper pavement without the added stipulations. (*Wilson v. Trenton*, 714.)

23. MUNICIPAL CORPORATIONS—LIABILITY OF FOR PERMITTING OBSTRUCTIONS TO REMAIN ON THE PUBLIC STREETS.—If a city suffers an obstruction or other cause of danger to remain for an unreasonable time upon its streets or sidewalks, so that the city may be presumed to have notice thereof, it is answerable for injuries resulting therefrom, to the same extent as if it had itself placed the obstruction or other cause of danger there in the first instance. (*Evansville v. Senhenn*, 218.)

24. A MUNICIPAL CORPORATION IS NOT LIABLE for the act of a person not one of its officers or agents in piling lumber in a street, and if this is done negligently and injury results to another therefrom, the city is not liable unless it had notice, express or implied, that the lumber was in the street and the same was in an unsafe and dangerous condition. (*Evansville v. Senhenn*, 218.)

25. MUNICIPAL CORPORATIONS—LIABILITY OF FOR THE ACT OF AN INDEPENDENT CONTRACTOR.—If a city has a

contract with a person to furnish it with lumber to be delivered in the city, and he delivers it and piles the lumber, his act in so doing is not the act of the city, and it is not liable for his negligence unless it has notice thereof, express or implied. (*Evansville v. Senhenn*, 218.)

28. MUNICIPAL CORPORATIONS — LIABILITY FOR INJURIES CAUSED BY DEFECTIVE DRAINS.—If municipal authorities allow the drains and sewers of the city to fall out of repair, and become clogged, so as to cause surface water to settle and become ponded on a lot, thereby rendering it less valuable for use and occupation, the city is answerable to the owner of the property affected for any damages growing out of the nuisance thus created. (*Brunswick v. Tucker*, 92.)

See Costs; Injunction, 5, 9; Taxation, 2, 3.

NEGLIGENCE.

1. NEGLIGENCE IS A MIXED QUESTION OF LAW AND FACT, and must be submitted to the jury under proper instructions. (*Hunter v. Pelham Mills*, 904.)

2. PLEADING — NEGLIGENCE — WILLFUL.—A complaint alleging that "defendant, without having proper regard for the rights of this plaintiff, did open its floodgates" in effect charges that defendant acted wilfully. (*Hunter v. Pelham Mills*, 904.)

3. NEGLIGENCE—INSTRUCTIONS.—A request to charge the jury that negligence is the gist of the action, and that they must be satisfied that the damage complained of was caused by defendant's negligence before they can find for plaintiff, is properly refused, for the reason that the court is prohibited from charging upon the facts, and negligence is a mixed question of law and fact. (*Hunter v. Pelham Mills*, 904.)

4. NEGLIGENCE — WHEN NOT A QUESTION OF LAW.—Whether the mate of a vessel, on the master's becoming exhausted and mentally incompetent, is guilty of negligence in not taking command from him, instead of obeying his orders, is a question of fact for the jury which the court should not undertake to determine. (*Williams v. Hays*, 797.)

5. REAL PROPERTY — NEGLIGENCE — PERSONAL INJURY FROM PRAIRIE FIRES—PROXIMATE CAUSE—CONTRIBUTORY NEGLIGENCE.—If an effort is made by a person to save his own property, which is in danger of destruction from fire negligently set by another, and he is burned in so doing, the negligent setting of the fire is the proximate cause of the injury, and the former may, if he was free from negligence, recover for such injuries from the latter; but it is otherwise if he was guilty of contributory negligence by rashly, recklessly, and unnecessarily exposing himself to danger. (*Berg and Andseth v. Great Northern Ry. Co.*, 524.)

6. NEGLIGENCE.—EVIDENCE as to the failure of a railroad train which caused an accident sued for to give the statutory signals upon approaching a public crossing is responsive to an allegation of reckless negligence on the part of the railroad company, and therefore admissible. (*Mack v. South Bound R. R. Co.*, 913.)

See Banks and Banking, 2; Infants; Insane Persons, 2; Limitations of Actions, 7, 8; Municipal Corporations, 23-25; Parent and Child, 5; Railroad Companies; Real Property, 1-4; Telegraph Companies, 1, 2, 5; Warehousemen; Witnesses, 6.

NEGOTIABLE INSTRUMENTS.

1. **NEGOTIABLE INSTRUMENTS.—POSSESSION** of a note by the attorney of a party is the possession of that party. (*Brennan v. Brennan*, 46.)

2. **NEGOTIABLE INSTRUMENTS — PROOF OF NONPAYMENT.**—In an action on a note, the production of the note by plaintiff, with no indorsement of any payment on it is sufficient prima facie proof of nonpayment. (*Brennan v. Brennan*, 46.)

See Corporations, 2; Guaranty, 2.

NEW TRIAL.

1. **JURY TRIAL—ABSENCE OF JUDGE FROM COURTROOM.** The fact that during the trial of a criminal case the judge of the court absented himself from the courtroom, so as to be out of sight and hearing of the proceedings going on therein, is ground for a new trial. (*People v. Tupper*, 44.)

2. **COURT—ABSENCE OF JUDGE—PROCESS OF LAW.**—The judge is a component part of the court, and all that is done in the way of court proceedings during the absence of the judge is in fact done in the absence of the court. A defendant convicted on a trial when the judge of the court has been absent during any part of the proceedings has been deprived of his liberty without due process of law, and is entitled to a new trial. (*People v. Tupper*, 44.)

3. **NEW TRIAL—REDUCING VERDICT.**—There is no error in overruling a motion for a new trial where the amount of the verdict, as voluntarily reduced by the plaintiff, is authorized by the evidence. (*Brunswick v. Tucker*, 92.)

4. **NEW TRIAL—RELATIONSHIP OF JUROR.**—One party to an action is not entitled to a new trial on account of the relationship of a juror to the other, if the former might, by the exercise of diligence, have discovered the relationship before trial. (*Ready v. Manchester Gas Light Co.*, 642.)

5. **NEW TRIAL—RECEIVING VERDICT AFTER DISSENT OF JUROR.**—If unanimity in the verdict of a jury is required by law, the dissent of one juror, when the jury is polled, is as fatal as that of all, and a new trial must be awarded where the verdict is received after such dissent. (*Owens v. Southern Ry. Co.*, 821.)

NOTARY PUBLIC.

See Attachment, 8.

NOTICE.

See Agency, 7; Checks, 9; Dower, 6; Judgment, 1, 18, 19; Officers, 5, 6; Railroad Companies, 9; Telegraph Companies, 4.

NUISANCE.

See Municipal Corporations, 28.

OFFICERS.

1. **OFFICERS.—A PUBLIC OFFICE CANNOT BE THE SUBJECT OF A CONTRACT.** (*Water Commissioners v. Cramer*, 705.)

2. **OFFICERS—CONTRACTS RESPECTING PUBLIC OFFICE.** A board of commissioners of waterworks, empowered by statute to elect a treasurer, and required to elect annually one of their number president of the board, who may, under their direction, have general superintendence of the waterworks and the business of the board, cannot, by written contract, appoint and employ a third per-

son, not a member of the board, as general superintendent of the waterworks and treasurer of the board for a stated period of years at a specified compensation per year. Such contract is ultra vires, and void; and the person appointed thereunder cannot enforce it, because the duties of such appointee are such as are incidental to a public office created by law for a certain term, and cannot be made the subject of a contract extending beyond such term. (*Water Commissioners v. Cramer*, 705.)

3. OFFICERS DE FACTO—COLLATERAL ATTACK.—The title to office of an officer de facto cannot be collaterally attacked. (*State v. Barnard*, 648.)

4. OFFICERS DE FACTO—COLLATERAL ATTACK.—If the face of the commission under which an officer is appointed and the statute under which the commission is issued show no defect in his title, apparent to the people in general, such title and his acts done by virtue thereof, in good faith, cannot be collaterally attacked. (*State v. Barnard*, 648.)

5. OFFICERS—REMOVAL OF—NOTICE—HEARING.—A public officer who has, under the law, a fixed term of office, and is removable only for definite and specified causes, can not be removed without notice and a hearing on the charge or charges preferred against him. (*Coleman v. Glenn*, 108.)

6. OFFICERS—BOARD OF EDUCATION—REMOVAL OF, WHEN A NULLITY.—Members of a county board of education are public officers, having fixed terms. Hence a statute providing for the removal from office of such an officer for inefficiency, incapacity, neglect of duty, or other cause, and which makes no provision for giving him notice, or for allowing him to be heard in his defense, is contrary to the constitutional provision that no person shall be deprived of life, liberty, or property without due process of law, and an order of removal, based upon such a statute, is a mere nullity, especially where no notice was in fact given. (*Coleman v. Glenn*, 108.)

7. OFFICE—CREATION OF—WANT OF AUTHORITY—DE FACTO OFFICER.—An office cannot exist unless it is lawfully created by law. Hence, one who fills an alleged office that has no constitutional or statutory authority for its existence cannot be recognized even as a de facto officer. (*Herrington v. State*, 95.)

8. OFFICE—COUNTY POLICEMAN—WANT OF AUTHORITY TO CREATE.—The commissioners of roads and revenues of a county cannot, without any legislative authority whatever, create the office of county policeman. (*Herrington v. State*, 95.)

9. TORRENS LAND LAW—REGISTRAR'S DUTIES, WHEN MINISTERIAL.—If a statute provides for the determination of titles by a decree of a court of equity and the issuing thereon of a certificate by the registrar of titles, his duties are ministerial merely. (*People v. Simon*, 175.)

See Injunction, 3, 4; Sheriffs.

PARENT AND CHILD.

1. ON THE DEATH OF A MINOR CHILD whose father is dead and whose mother has remarried, the right of recovery for causing such death through negligence vests in her, though the child lived with her and its stepfather, and the latter had assumed toward it the relations of father. (*Hennessey v. Bavarian Brewing Co.*, 554.)

2. DEATH OF MINOR CHILD, RIGHT TO RECOVER FOR. The right given a parent by statute to recover for the death of a minor child, caused by the negligence or other wrong of another, is

the same right which the child would have had had it survived the injury, and hence is not dependent on the fact that the parent is entitled to the services or earnings of the child, nor is it limited to the value of such services. (*Hennessey v. Bavarian Brewing Co.*, 554.)

3. CHILD, DEATH OF MINOR.—A STEPFATHER in whose family a minor child of his wife resides and who has assumed toward it the duties of a father, and is hence entitled to its services and earnings, cannot, under the statutes of Missouri, recover for its death, due to the negligence or other wrong of another. Such a cause of action is vested wholly in the mother, and the damages to which she is entitled are not limited by the fact that she has no right to such services or earnings. (*Hennessey v. Bavarian Brewing Co.*, 554.)

4. NEGLIGENCE CAUSING DEATH—ACTION FOR, BY CHILD, FOR HOMICIDE OF ITS STEPFATHER.—Under a statute authorizing a child to recover for the homicide of a parent, it has no right of action for the homicide of its stepfather. (*Marshall v. Macon Sash etc. Co.*, 140.)

5. NEGLIGENCE OF PARENTS PRECLUDES THEIR RECOVERY FOR INJURIES TO THEIR CHILD.—In an action by a parent on account of the death of his child of tender years, caused by the negligence of the defendant, the parents' negligence, through which the child was exposed to injury, defeats the action. (*Evansville v. Senhenn*, 218.)

PARTIES.

See Execution, 9; Insurance, 4; Judicial Sales, 3; Mortgage, 9; Parent and Child, 1-3; Receivers, 1-4.

PARTITION.

1. COTENANCY—PARTITION OF CHATTELS.—A cotenant of personal as well as real property has a right to partition if that is possible, and, if not, to a regulation of its use equivalent to partition and sale. (*Pickering v. Moore*, 695.)

2. COTENANCY—PARTITION OF PERSONALTY—CONVERSION.—A cotenant of goods divisible by tale, measure, or weight, may, without the consent and against the will of his cotenant, rightfully take and appropriate to his sole use, sell, or destroy so much of them as he pleases, not exceeding his share, and by so doing effect, pro tanto, a valid partition; and his cotenant who prevents him from so doing is guilty of conversion. (*Pickering v. Moore*, 695.)

See Husband and Wife, 10.

PARTNERSHIP.

See Insurance, 6, 7.

PAYMENT.

1. EVIDENCE — PRESUMPTION OF PAYMENT.—After twenty years the law presumes that every debt is paid, no matter how solemn the instrument may be by which such debt is evidenced; and such presumption stands until rebutted. (*Hummel v. Lilly*, 879.)

2. EVIDENCE.—THE LEGAL PRESUMPTION of payment of a debt, arising from lapse of time, is alone sufficient to defeat a recovery, if no promise to pay, or no payment on account, has been made within twenty years. (*Hummel v. Lilly*, 879.)

3. EVIDENCE.—PRESUMPTION OF PAYMENT arising from lapse of time can be rebutted only by such evidence as would be required to take a case out of the operation of the statute of limitations. (*Latimer v. Trowbridge*, 893.)

4. JUDGMENT—REVIVAL—WHAT PLEADING OF PLAINTIFF DOES NOT REBUT PRESUMPTION OF PAYMENT.—In a proceeding to revive a judgment more than twenty years old, a statement by the plaintiff, in his pleadings, that no part of the principal or interest of the debt has ever been paid does not rebut the presumption of payment arising from the lapse of time. (*Hummel v. Lilly*, 879.)

5. JUDGMENT — REVIVAL — WHAT PLEADING OF DEFENDANT DOES NOT REBUT PRESUMPTION OF PAYMENT. If the affidavit of defense, in a proceeding to revive a judgment more than twenty years old, affirmatively sets up the defense of presumption of payment from lapse of time, an additional averment therein that the defendant has not made any "new promise nor paid any money on account of said judgment" does not rebut the presumption of payment. It should be regarded as the negation of any obligation arising from a payment on account, and not as a declaration that the whole debt is due because none of it has been paid. (*Hummel v. Lilly*, 879.)

See Mortgage, 18; Negotiable Instruments, 2.

PERSONAL EXAMINATION.

See Trial, 3.

PERSONAL PROPERTY.

PROPERTY—INTERMIXTURE.—The intentional but innocent intermixture of property of substantially the same quality and value does not change the ownership. (*Pickering v. Moore*, 695.)

PHOTOGRAPHS.

See Evidence, 6, 7.

PHYSICIANS AND SURGEONS.

PRIVILEGED COMMUNICATIONS.—Statements made by the owner of a horse to a veterinary surgeon called to treat the animal are not privileged communications, and are admissible in evidence when they may have an important bearing upon the cause of the death of the horse which is in issue, and in such case their exclusion is prejudicial error. (*Hendershot v. Western Union Tel. Co.*, 813.)

See Limitations of Actions, 4.

PLEADING.

1. PLEADING—CONTRACT REQUIRED BY STATUTE OF FRAUDS TO BE IN WRITING.—The law of pleading does not require a plaintiff, who brings an action for damages on a contract which is required by the statute of frauds to be in writing, to allege in his petition that the contract was in writing, and his failure to do so does not make the petition demurrable. (*Draper v. Macon Dry Goods Co.*, 136.)

2. PLEADING—STATUTE OF FRAUDS AS A DEFENSE—NATURE OF.—The defense of the statute of frauds, like that of a plea of usury, is in the nature of a personal privilege, of which the defendant can avail himself or not, as he sees fit. Such defenses

are not usually a subject-matter of demurrer, but of pleading and proof. (*Draper v. Macon Dry Goods Co.*, 136.)

3. PLEADING—ULTIMATE FACTS.—A paragraph in a pleading in the nature of a statement of evidence not relevant to any issue in the case, and not of ultimate and material facts, is properly stricken out on motion. (*Tisdale v. Major*, 263.)

See Damages, 4, 5; Fraud; Judgment, 5; Justice of the Peace, 1; Negligence, 2; Payment, 4, 5; Receivers, 5; Specific Performance, 2.

PLEDGE.

1. PLEDGE—ABANDONMENT OF.—The lien of a pledge held as collateral security for a mortgage debt is dependent upon possession by the pledgee. If he surrenders it to the sheriff so that he may purchase it at execution sale upon foreclosure of the mortgage, such lien is abandoned and lost, though the sheriff's sale is void, and the pledgee cannot then rely upon his original claim of lien. (*Latto v. Tutton*, 30.)

2. PLEDGE—SHARES OF STOCK—CHANGE OF POSSESSION.—As between the parties to a pledge of shares of corporate stock, the pledge may be effected by indorsement and transfer of the stock certificates, but when that mode of creating a pledge is adopted, it is subject to the rules governing the pledging of other instruments. It must, as against creditors, be accompanied by delivery and a continued, as distinguished from momentary, change of possession. (*McFall v. Buckeye Grangers' etc. Co.*, 47.)

POLICE POWER.

1. CONSTITUTIONAL LAW—POLICE POWER—DUTY OF THE COURTS TO EXAMINE WHETHER A STATUTE IS A PROPER EXERCISE OF.—Where a statute is sought to be upheld as a proper exercise of the police power, the court should examine it for the purpose of ascertaining whether the health, morals, safety, or welfare of the public justifies its enactment. (*People v. Warden of Prison*, 763.)

2. POLICE POWER—REGULATIONS AS TO KEEPING OF DOGS.—The power to regulate the keeping of dogs, and to enforce such regulations by forfeitures, fines, and penalties, is recognized as within the police power. (*Griggs v. Macon*, 134.)

3. POLICE POWER—REGULATIONS AS TO KEEPING OF DOGS—TAX.—A fee of one dollar required by a city ordinance for registering a dog and obtaining a badge, the purpose of which is to evidence the fact of registration, is not, in a strict sense, a "tax," but should be regarded as a police regulation. (*Griggs v. Macon*, 134.)

See Municipal Corporations, 12.

POSSESSION.

See Landlord and Tenant, 1; Negotiable Instruments, 1; Pledge, 1, 2; Writs, 1, 2.

PRESUMPTIONS.

See Appeal, 16; Carriers, 2; Courts, 2; Evidence; Executors and Administrators, 4; Homestead, 2; Insurance, 11, 17; Judgment, 8-10; Payment, 1-5; Railroad Companies, 5; Wills, 2.

PRINCIPAL AND AGENT.

See Agency.

PRIORITY.

See Mortgages, 3, 5-7.

PRIVATE WAYS.

ESTOPPEL—CREATING RIGHT OF WAY BY.—If a landowner, seeking to sell a parcel of his real property, represents to the purchaser that a right of way exists from it over his other real property, he subjects the latter to such right of way, and, though the conveyance subsequently made does not mention such right, the grantor is estopped from denying its existence. (*Mattes v. Frankel*, 804.)

PRIVILEGED COMMUNICATIONS.

See Husband and Wife, 3.

PROCESS.

See Judgment, 7.

PUBLIC CONTRACTS.

See Appeal, 13.

RAILROAD COMPANIES.

1. NEGLIGENCE — TURNABLES — INJURIES TO CHILDREN.—A railroad company which maintains an unguarded turntable upon its own land near a public street is not liable to a child of tender years, who comes upon the land without invitation, and is injured while playing upon or about such turntable. (*Delaware etc. R. R. Co. v. Reich*, 727.)

2. RAILROADS — SPEED OF TRAINS — PERSON NEAR TRACK.—A railroad train does not have to stop or slacken its speed when a person is close to or approaching the track, unless circumstances indicate that he does not, or cannot, see the train, or is going upon the track, or that, if those in charge of the train fail to exercise the care of an ordinary person, some injury may result. (*Mack v. South Bound R. R. Co.*, 913.)

3. NEGLIGENCE — DAMAGES FOR MENTAL SUFFERING ARISING FROM FRIGHT.—Railroad companies are liable in damages for mental suffering or physical injury arising from fright caused by their negligence. (*Mack v. South Bound R. R. Co.*, 913.)

4. NEGLIGENCE—DUTY OF MINOR TO LOOK AND LISTEN. The minority of a person approaching a railroad track does not exempt him from looking and listening for approaching trains. (*Mack v. South Bound R. R. Co.*, 913.)

5. RAILROADS — KILLING STOCK—NEGLIGENCE.—The undisputed killing of stock by a railroad company's train raises, and is sufficient to sustain, the presumption of negligence against it, and such presumption is not destroyed by the mere fact that the circumstances of the killing have been detailed by witnesses. (*Mack v. South Bound R. R. Co.*, 913.)

6. RAILROADS—FEMALE PASSENGERS—ASSAULT BY EMPLOYEE WITH INTENT TO COMMIT RAPE—LIABILITY OF COMPANY.—If a person employed by a railroad company as a baggage-master upon one of its trains assaults a female passenger thereon, with intent to commit a rape upon her, the company is answerable in damages to her for the act. (*Savannah etc. Ry. Co. v. Quo*, 85.)

7. RAILROADS—TICKETS—LIMITATION AS TO TIME.—A railroad ticket, without a limitation as to time, is good for use at

any time within the statute of limitations. (*Boyd v. Spencer*, 146.)

8. RAILROADS—TICKETS—EXPRESS CONTRACT AS TO TIME.—A statement, stamped upon a railroad ticket, showing when it expires, is not binding on the purchaser unless his attention is called to it and he assents to its terms. Otherwise, there is no express contract as to the time of use. (*Boyd v. Spencer*, 146.)

9. RAILROADS—TICKETS—LIMITATION AS TO TIME—NOTICE.—A railroad ticket, for which full fare has been paid, and which has a limitation as to time stamped thereon, but of which the purchaser has no notice at the time of the purchase, entitles him to a passage after the time stamped on the ticket has expired. (*Boyd v. Spencer*, 146.)

10. RAILROADS—TICKETS—LIMITATION AS TO TIME.—THE BURDEN of showing that there was an express contract limiting the use of a railroad ticket to a certain time is on the company. (*Boyd v. Spencer*, 146.)

11. RAILWAYS—TRESPASSER UPON, WHO IS NOT.—A child playing upon a railway track in a public street is not a trespasser. Its right there is equal to that of the railway corporation, except that the latter has a prior right of passage with its cars. (*Krenzer v. Pittsburg etc. Ry. Co.*, 252.)

12. CHILD—CONTRIBUTORY NEGLIGENCE OF.—A boy of seven and a half years, of ordinary intelligence, strength, and activity for that age, and who knew that engines and cars were liable to pass over a railroad track where he sat and, if they did pass, that he would be run over and injured, is guilty of negligence in going to sleep on the track, and, if injured by a train of cars being run over him, cannot recover, though the persons in charge of the train were also negligent. (*Krenzer v. Pittsburg etc. Ry. Co.*, 252.)

13. RAILWAYS—NEGLIGENCE UPON TRACKS OF.—The act of falling asleep upon a railway track is such contributory negligence as will preclude a recovery in case of accident, unless the servants of the railway company, after becoming aware of the dangerous condition of the sleeper, fail to exercise due care toward him. This is true, though he is a boy only seven and a half years of age, if he is of average intelligence for that age, and knows that engines and cars run on the track, and the liability of being injured by them. (*Krenzer v. Pittsburg etc. Ry. Co.*, 252.)

14. NEGLIGENCE—CONTRIBUTORY—WHEN DOES NOT APPEAR AS A MATTER OF LAW.—An engineer who, at a point about three hundred feet distant from a crossing, stops his train and blows two long blasts as a crossing signal, and, looking out to see that the crossing is clear, then starts toward it with his train, cannot be adjudged guilty of contributory negligence as a matter of law, because he did not send a flagman ahead to see that the crossing was clear, nor, at a later moment, look ahead at a point where he might have seen an approaching train of another road, and did not keep his train under such control that he was able to stop, and thus avoid a collision. Whether he took precautions commensurate with the dangers involved is a question to be determined by the jury from all the evidence. (*Walker v. Brantner*, 344.)

15. EVIDENCE—DECLARATIONS OF INJURED PERSON AS EVIDENCE AGAINST HIS WIDOW SUING TO RECOVER FOR HIS DEATH.—Declarations made after an accident, but on the same or the following day, by an engineer injured by a collision at a railway crossing, are admissible in evidence against his widow in an action brought by her to recover of the railway company on the ground that his injury and subsequent death were due to defendant's negligence. These declarations, so far as they refer to the

circumstances preceding the accident, were, when made, if they tended to show want of care on the part of the decedent, declarations of the person against his interest, and admissible on that ground. (*Walker v. Brantner*, 344.)

16. EVIDENCE—CONVERSATION OF A DECEASED PERSON WITH AN AGENT OF HIS ADVERSARY.—A superintendent of a railway corporation is not precluded from testifying to a conversation between himself and an injured engineer, who subsequently died from his injury, if it does not appear that in holding such conversation the superintendent was authorized to represent the corporation. (*Walker v. Brantner*, 344.)

17. EVIDENCE OF REPUTATION OF AN INJURED PERSON FOR CARE AND PRUDENCE.—In an action to recover compensation for the death of an engineer, claimed to have been due to the negligence of a railroad corporation in whose service he was, in not maintaining a safe and proper track and appliances, evidence of the general reputation on the part of the engineer and his fireman for care and prudence is not admissible to sustain a claim that he was acting with due care at the time of the accident. (*Erb v. Popritz*, 362.)

18. RAILROAD COMPANIES—NEGLIGENT CONSTRUCTION OF EMBANKMENT.—MEASURE OF DAMAGES for injury to crops, caused by the negligent construction of a railway embankment, whereby land is flooded, is the fair value of such crops at the time of their destruction, and the measure of damages to the land thus flooded is the difference in its value immediately before and after such flooding. (*Chicago etc. R. R. Co. v. Emmert*, 602.)

19. RAILROAD COMPANIES—POWERS.—Corporate power of a railway company to hire a road includes the power to make an executory contract for a lease of a road to be constructed within a time, or in a place or manner or form prescribed by the contract. (*Jones v. Concord etc. R. R. Co.*, 650.)

20. STREET RAILWAYS—REGULATION OF SPEED OF.—A statute providing that "no person shall ride through any street, in the compact part of any town, on a gallop, or at a swifter pace than at the rate of five miles an hour," applies to a street railway company whose charter provides that the mayor and aldermen of the city in which its railway is operated may make such regulation as to rate of speed and mode of the use of the railway as the public safety and convenience may require, if the mayor and alderman have not made any such regulation. (*Bly v. Nashua Street Ry.*, 681.)

21. LEGAL TENDER—MUTILATED MONEY AS CAR FARE—EXPULSION OF PASSENGER.—A railway conductor is not bound to accept mutilated money when tendered as car fare, and is justified in ejecting a passenger who tenders it, and refuses to make other payment. (*North Hudson County Ry. Co. v. Anderson*, 703.)

22. CARRIERS—DUTY TO PASSENGERS—ASSUMPTION OF RISKS.—A passenger, by taking his stand upon the outside running-board of a street-car, assumes the risk of such damages as are obviously incident to that position, but the carrier, by accepting him there as a passenger, owes to him a high degree of care. (*Whalen v. Consolidated Traction Co.*, 723.)

See Tender, 2.

RAPE.

See Former Jeopardy, 2, 3.

RATIFICATION.

See Forgery, 10.

REAL PROPERTY.

1. **NEGLIGENCE—DUTY TO TRESPASSING CHILDREN.**—An owner who constructs or places upon land anything which, though necessary for its proper enjoyment, happens to be of a character attractive to children, and at the same time dangerous to them if they yield to the attraction, does not thereby invite them to enter the premises, nor become charged with the duty of using reasonable care to keep them off his premises, or to protect them when they enter as trespassers. (Delaware etc. R. R. Co. v. Reich, 727.)

2. **NEGLIGENCE—DUTY TO TRESPASSING CHILDREN.**—A landowner is under no obligation to a mere licensee or trespasser, even though a child of tender years, to keep his premises in a safe condition; and such child, upon entering, assumes all risk of danger incident to the condition of the premises. (Delaware etc. R. R. Co. v. Reich, 727.)

3. **NEGLIGENCE—PARTITION FENCE—FALL OF—LIABILITY FOR INJURY.**—If the duty to maintain a partition fence is, by private arrangement between two adjoining owners, imposed upon one of them, the other is not answerable to a third person who has been injured by the fence falling upon him. (Quinn v. Crimmings, 420.)

4. **NEGLIGENCE—PARTITION FENCE—FALL OF—CARE AND LIABILITY FOR INJURY.**—The owner of a partition fence is not answerable to a third person who has been injured by its falling upon him, where the owner used the care of a prudent man in maintaining the fence. (Quinn v. Crimmings, 420.)

See Landlord and Tenant, 5, 6; Officers, 9; Specific Performance, 1, 3, 4.

RECEIVERS.

1. **EXECUTION—SUPPLEMENTAL PROCEEDINGS.**—A receiver appointed in proceedings supplemental to execution represents the judgment debtor, and may bring any action relating to property rights that he might bring, and the receiver also represents the judgment creditor in equity, to the extent necessary to bring actions in the nature of creditors' suits to set aside fraudulent transfers. (Ward v. Petrie, 790.)

2. **EXECUTION—SUPPLEMENTAL PROCEEDINGS.**—A receiver appointed in supplemental proceedings does not, by virtue of his appointment and qualification, acquire the legal title to property previously transferred by the judgment debtor in fraud of his creditors, though he may maintain a suit to set aside such a transfer. Until then he has an equitable right, but no title. (Ward v. Petrie, 790.)

3. **EXECUTION—SUPPLEMENTAL PROCEEDINGS—PROPERTY ACQUIRED BY A RECEIVER.**—A receiver appointed in proceedings supplemental to execution does not acquire any right of action belonging to the judgment creditor, other than the right to sue to avoid fraudulent transfers. (Ward v. Petrie, 790.)

4. **EXECUTION—SUPPLEMENTAL PROCEEDINGS.**—A receiver appointed in supplemental proceedings does not acquire the right of the judgment creditor to maintain an action at law for damages suffered from a conspiracy entered into between the judgment debtor and others to prevent the collection of the debt. (Ward v. Petrie, 790.)

5. **DEMURRER—CHALLENGING CAPACITY TO SUE—WHEN UNNECESSARY.**—If a receiver sues upon a cause which did not vest in him, it is not necessary to interpose a demurrer question-

ing his capacity to sue. There is a difference between capacity to sue, which is a right to come into court, and a cause of action, which is the right to relief in court. (*Ward v. Petrie*, 790.)

6. RECEIVER OF NATIONAL COURT—FAILURE TO PRESENT CLAIM TO BEFORE PROPERTY WAS SOLD.—The fact that a national court which appointed a receiver of a railway corporation had made an order requiring all persons having claims or demands against him to present the same to a special master on or before a day designated, and the failure to present the claims as required by such order, do not constitute a bar to the prosecution of an action in a state court against such receiver for personal injuries sustained by an employé, though the receiver had sold the property, the sale had been confirmed, a conveyance made to the purchaser, and the proceeds of the sale disposed of under an order of the court. (*Erb v. Popritz*, 362.)

7. RECEIVERS—PROPERTY IN CUSTODIA LEGIS—INTERFERENCE—LEAVE OF COURT.—Property in the actual or constructive possession of a receiver is in custodia legis, and cannot be interfered with without leave of court. (*Pelletier v. Greenville Lumber Co.*, 837.)

8. RECEIVERS — EXCLUSIVE POSSESSION—NATURE AND OBJECT OF.—A receiver's exclusive possession of property does not interfere with, or disturb, any pre-existing liens, preferences, or priorities. It simply holds the property intact until the relative rights of all parties can be determined, and prevents the sacrifice of assets by a multiplicity of suits and executions. (*Pelletier v. Greenville Lumber Co.*, 837.)

9. RECEIVERS — REMEDY OF JUDGMENT CREDITOR HOLDING PARAMOUNT LIEN.—When a judgment creditor of an insolvent corporation, whose lien is superior not only to the claims of all its other creditors, but even to the original title of the corporation itself, is prejudiced by having a receiver put in his way, his remedy is by a petition and motion in the cause. (*Pelletier v. Greenville Lumber Co.*, 837.)

See Contempt, 6; Execution, 11; Insurance, 19.

RELEASE.

See Suretyship, 7-9.

REMEDIES.

See Habeas Corpus, 5.

REPLEVIN.

ATTACHMENT—REPLEVIN—EVIDENCE.—An officer, from whom property held under attachment has been replevied, may prove all of the attachments under a general denial, although he adds to such denial a special plea of one particular attachment. The special matter may be proved under the general denial, and the officer cannot be compelled to elect under which plea he will introduce proof. (*Horkey v. Kendall*, 623.)

See Banks and Banking, 4.

RES GESTÆ.

See Evidence, 10, 11.

RESTRAINT OF TRADE.

See Contracts, 7-12; Husband and Wife, 7.

RIGHTS IN GROSS.

See Assignment.

RIPARIAN RIGHTS.

See Waters and Watercourses.

SALES.

1. SALE—ANIMAL FIT FOR HUMAN FOOD—"LUMPY JAW"—IMPLIED WARRANTY.—In selling a fat steer to a retail butcher, whose business is to buy and slaughter cattle, and to sell the meat to his customers to be used by them for food, there is no implied warranty that the animal is fit for food, although the seller knows the purpose for which the animal is bought. Hence, the buyer cannot recover on such a warranty, although the animal has a disease called "lumpy jaw," which renders its flesh unwholesome and wholly worthless for food. (*Hanson v. Hartse*, 527.)

2. CONFLICT OF LAWS—CONDITIONAL SALES.—A contract for the conditional sale of chattels in one state, negotiated and completed therein and valid by the law thereof is valid in another state to which the property is subsequently removed, although not executed according to the law of the latter state, unless its enforcement therein would be in contravention of positive law and public interests. (*Cleveland etc. Works v. Lang*, 675.)

3. CONFLICT OF LAWS—ATTACHMENT—CONDITIONAL SALES.—A contract for a conditional sale of chattels in one state, executed therein and valid by its laws, is valid as against the attaching creditors of the vendee in another state, to which the property has subsequently been removed. (*Cleveland etc. Works v. Lang*, 675.)

4. CONFLICT OF LAWS—CONDITIONAL SALES.—The laws of a state respecting conditional sales have no extraterritorial force, and do not apply to such sales made out of the state, when neither the parties nor the subject matters of the contract are within the operation of its laws. (*Cleveland etc. Works v. Lang*, 675.)

5. SALES—CHANGE OF POSSESSION.—A sale cannot be declared as a matter of law not to have been accompanied by a sufficient change of possession when the vendee after the sale examined the property bought, and took away small parts that were likely to be lost or stolen. (*Thompson Mfg. Co. v. Smith*, 679.)

See Attachment, 5.

SEALS.

See Execution, 1.

SEDUCTION.

1. SEDUCTION—PROMISE OF MARRIAGE IN EVENT OF PREGNANCY.—To induce an unmarried woman of previous chaste character to yield her virtue by promise of marriage in event she becomes pregnant may be seduction. Whether a woman of chaste character would so yield, and whether, if she does, it is voluntary, and to gratify her desires, rather than because of such conditional promise, may be considered in connection with all the facts and circumstances shown upon the trial. (*State v. Hughes*, 288.)

2. SEDUCTION—PROMISE OF MARRIAGE IN EVENT OF PREGNANCY.—If a man twenty-two years of age, while paying

his addresses to an unsophisticated country girl seventeen years of age, succeeds in having sexual intercourse with her under his promise to marry her in event of her becoming pregnant, such transaction may constitute seduction, as it cannot be said, as matter of law, that she is unchaste in yielding on the strength of such promise, or that she submits as a result of passion, rather than of the promise. (*State v. Hughes*, 288.)

3. SEDUCTION.—EVIDENCE that a defendant, in a prosecution for seduction, though engaged to marry another, was paying his addresses to the prosecutrix as a suitor, and stated that he "was going to show her a hot time," and, about the time of the alleged seduction, also stated that he was going to her home for sexual intercourse, is admissible in corroboration of the prosecutrix, and as rebuttal when the alleged seduction has been denied. (*State v. Hughes*, 288.)

4. SEDUCTION — EVIDENCE — COMPETENCY OF WITNESS. On a prosecution for seduction, the testimony of the mother of the prosecutrix that she discovered her daughter's pregnancy about four weeks after the alleged seduction, is admissible, if objection is made to the admissibility of the evidence only and not to the competency of the witness. (*State v. Hughes*, 288.)

5. SEDUCTION—EXCESSIVE JUDGMENT.—If a seducer pays his addresses to the prosecutrix for the deliberate purpose of accomplishing her ruin, a sentence of two and one-half years for such seduction is not excessive. (*State v. Hughes*, 288.)

SETOFF.

1. SETOFF—INCREASE OF MARKET VALUE—DAMAGES. An increase in the market value of a plaintiff's property cannot be set off against any compensation to which he is entitled for actual physical injuries to it, nor against damages arising from a diminution of its value for use. (*Farkas v. Towns*, 88.)

2. SETOFF OF INCREASED VALUE AGAINST CLAIM FOR DAMAGES.—The right to set off increased value against a claim for damages is not conferred by law upon a wrongdoer. Hence, if surface water ponds on a lot, and injures it, which injury is caused by the negligence of municipal authorities to keep the drains and sewers of the city in repair, it is no defense for the city to show, against the plaintiff's claim for damages, that the city, in constructing its streets and drains, made improvements which increased the market value of the property affected. (*Brunswick v. Tucker*, 92.)

SHERIFFS.

1. INSANE PERSONS—SHERIFF'S INSANITY—EFFECT OF. A sheriff's right to exercise the duties of his office ceases when he becomes insane. (*Somers v. Board of Commissioners*, 834.)

2. INSANE PERSONS—INSANITY OF SHERIFF—RIGHTS OF SURETIES.—Upon the official declaration of a sheriff's insanity, his sureties have no more rights than they would have in case of his death. (*Somers v. Board of Commissioners*, 834.)

3. SHERIFFS AS TAX COLLECTORS—FAILURE TO FILE BOND—EFFECT OF.—If a sheriff has not renewed his bond, his sureties have no right to collect taxes for the year in which such bond is required, whether the nonexistence of the bond is caused by the sheriff's failure to exhibit tax receipts at the time required, or by his insanity. (*Somers v. Board of Commissioners*, 834.)

4. SHERIFFS—DEPUTIES OF, ARE AGENTS—TERMINATION OF AGENCY BY SHERIFF'S INSANITY.—A sheriff's dep-

uty is merely his agent, and such agency is terminated by the official ascertainment of the sheriff's insanity. (*Somers v. Board of Commissioners*, 834.)

5. INSANE PERSONS—ELECTION OF TAX COLLECTOR UPON SHERIFF'S INSANITY.—Upon the official declaration of a sheriff's insanity, during his term of office, the county commissioners have power to elect a tax collector for the ensuing year unless, and until, the sheriff is restored to reason. (*Somers v. Board of Commissioners*, 834.)

6. INSANE PERSONS—RIGHT TO COLLECT TAXES AFTER SHERIFF BECOMES INSANE.—Neither a sheriff's deputy nor his bondsmen have a right of action to compel the county commissioners to give them the tax list for the year following that in which the sheriff has been officially ascertained to be insane. The sheriff's bondsmen, in case of his insanity, have a right to collect the current list, but after that it becomes the duty of the tax collector chosen by the county commissioners to collect the taxes. (*Somers v. Board of Commissioners*, 834.)

7. INSANE PERSONS—EFFECT OF FAILURE TO DECLARE OFFICE OF SHERIFF VACANT, AFTER HE BECOMES INSANE.—While county commissioners have a right to declare the office of sheriff vacant upon his insanity, their failure to do so merely authorizes the coroner to perform the duties of sheriff proper, and does not east upon him the right to collect taxes. (*Somers v. Board of Commissioners*, 834.)

See *Insane Persons*, 1.

SPECIFIC PERFORMANCE

1. SPECIFIC PERFORMANCE—PURCHASE OF REAL ESTATE—WHAT TITLE MUST BE SHOWN.—In order to maintain a suit for specific performance against a purchaser of real estate, the plaintiff must show that the title is good beyond a reasonable doubt; but the mere possibility or suspicion of a defect is not enough to relieve a purchaser from liability under his contract. (*Conley v. Finn*, 399.)

2. SPECIFIC PERFORMANCE—PURCHASER OF REAL ESTATE.—A TITLE BY ADVERSE POSSESSION may be so clearly proved and be so free from doubt as to be a proper foundation for a decree for specific performance against the purchaser. (*Conley v. Finn*, 399.)

3. SPECIFIC PERFORMANCE—PURCHASER OF REAL ESTATE—CHAIN OF TITLE—DELAY IN RECORDING DEED—ADVERSE POSSESSION.—If one agrees to purchase land, but refuses to complete the purchase on the ground that a deed, in the chain of title, nearly sixty years back, was not acknowledged and recorded until twenty years after its date, and he is sued for specific performance, and defends upon the ground that the plaintiff does not offer to give a good title, it must be held that the failure to acknowledge and record the deed mentioned does not make the plaintiff's title so doubtful and uncertain that the defendants ought not to be compelled to take the property and pay for it, particularly where there is nothing to show that the deed was not delivered on the day of its date, and there is evidence to show that the grantee's title, if he had any, has passed, by mesne conveyances, to the plaintiff, as well as evidence to show a title by adverse possession. (*Conley v. Finn*, 399.)

4. SPECIFIC PERFORMANCE—AGREEMENT TO CONVEY LAND.—A statute providing that an agreement "to perform an act which the party has not the power lawfully to perform," or to pre-

cure the act or consent of the wife of the contracting party, or of any third person," cannot be specifically enforced; has no application, where a wife, though she could not be compelled in the first instance to carry out the terms of an agreement made by her husband, has accepted a conveyance made in pursuance of such agreement and as the consideration therefor, and has retained its benefits. In such case she must either restore the benefits received or perform the conditions of the agreement. (*Simons v. Bedell*, 35.)

5. SPECIFIC PERFORMANCE—RATIFICATION OF AGREEMENT TO CONVEY LAND.—A person's acceptance and retention of the benefits of a conveyance, made to him in consideration of an agreement made in his behalf to convey land to his grantor, is a ratification of such agreement, and such grantee cannot retain its benefits and repudiate its obligations. On the contrary, equity may compel the performance of such obligations. (*Simons v. Bedell*, 35.)

6. SPECIFIC PERFORMANCE AGAINST MARRIED WOMAN—UNACKNOWLEDGED AGREEMENT.—A statute providing that no estate passes in the real property of a married woman, unless by grant separately acknowledged by her, does not apply to prevent specific performance of her agreement to convey, when she has accepted a voluntary conveyance made to her on condition that she convey to the grantor's husband other land to which she shall succeed as the grantor's heir. (*Simons v. Bedell*, 35.)

7. ESTATES OF DECEDENTS—AGREEMENT TO CONVEY LAND—DECLARATIONS OF DEFENDANT AS EVIDENCE.—If a decedent's mother conveyed her daughter land in contemplation of the latter's marriage, and the latter, before her death, conveyed part of it back to the mother on condition that the mother and decedent's father should convey to the decedent's husband another part of the wife's realty upon her death, a conversation regarding such property, had with the mother before her daughter's marriage, is admissible in an action by the husband to compel a conveyance of the promised land. (*Simons v. Bedell*, 35.)

8. SPECIFIC PERFORMANCE—DIFFICULTY OF SUPERVISING.—Though a contract is of such a character that the difficulty of supervising its performance may induce the court not to undertake to compel a specific performance, yet the court may interpose by injunction to restrain one of the parties to the contract from violating the negative and severable covenants thereof. (*Standard Fashion Co. v. Siegel-Cooper Co.*, 749.)

9. SPECIFIC PERFORMANCE—DIFFICULTY OF SUPERVISING CANNOT BE URGED BY DEMURRER.—If a complaint states a good and sufficient contract for specific performance, a demurrer thereto cannot be sustained on the ground that the contract is one the supervising of the performance of which the court cannot undertake because of difficulty. The court will not, on demurrer, undertake to decide the extent to which it will undertake to supervise the performance of the contract. (*Standard Fashion Co. v. Siegel-Cooper Co.*, 749.)

STARE DECISIS.

STARE DECISIS.—An inconsiderate judgment inadvertently establishing a rule of law, without consideration of the real question involved and decided, will not be followed when it does not establish a rule of property, and the adherence to it would be productive of more evil than would follow the adoption of a better and sounder rule. (*Evansville v. Senhenn*, 218.)

STATES.

See Injunction.

STATUTE OF FRAUDS.

See Estoppel, 2; Fraudulent Conveyances, 3; Pleading, 1, 2; Vendor and Purchaser.

STATUTE OF LIMITATIONS.

See Limitations of Actions.

STATUTES.

1. CONSTITUTIONAL LAW — PAYMENT OF WAGES BY CORPORATION.—A statute providing that "every corporation doing business in this state shall pay the mechanics and laborers employed by it the wages earned by and due them, weekly or monthly, on such day in each week or month as shall be selected by such corporation," is unconstitutional as inhibited special legislation, attempting to provide for the creation of liens in favor of a special class of laborers, and a mere arbitrary classification not founded on natural differences, nor differences defined by the constitution. (*Slocum v. Bear Valley Irr. Co.*, 68.)

2. CONSTITUTIONAL LAW — TORRENS LAND LAW.—The fact that the proceedings in court to ascertain title for the purpose of registration may take place without any other than a constructive service against a person in interest who is a resident of the state does not render the whole law unconstitutional. (*People v. Simon*, 175.)

3. CONSTITUTIONAL LAW — TORRENS LAND LAW.—A statute providing that when land is held subject to a trust, condition, or limitation, the original certificate of title shall contain the words "in trust," or "upon condition," or "with limitations," as the case may be, that when the land is transferred, the registrar shall not issue a new certificate, nor shall any transfer or charge upon or dealing with the land be made unless pursuant to the order of some court or upon the written opinion of two examiners, that such a transfer, charge, or dealing is in accordance with the true intent and meaning of the trust, condition, or limitation, whereupon he shall proceed to register the title, and such registration shall be conclusive in favor of the grantee and those claiming under him in good faith and for valuable consideration, does not confer upon the registrar forbidden judicial functions. (*People v. Simon*, 175.)

4. CONSTITUTIONAL LAW — JUDICIAL POWER WHICH MAY BE GRANTED TO A MINISTERIAL OFFICER.—The mere fact that an officer is required by law to inquire into the existence of certain facts and to apply the law thereto in order to determine what his official conduct shall be, and that these acts may affect private rights, does not constitute an exercise of judicial powers, strictly speaking. (*People v. Simon*, 175.)

5. CONSTITUTIONAL LAW — CONFERRING JUDICIAL AUTHORITY ON AN OFFICER NOT A MEMBER OF THE JUDICIARY.—A legislature is not prohibited from vesting some judicial functions in persons who do not hold judicial offices. Certain functions of a quasi judicial character may, by statute, be vested in ministerial officers. (*People v. Simon*, 175.)

6. TORRENS LAND SYSTEM — DUTIES WHICH MAY BE DEVOLVED ON THE REGISTRAR.—A statute which provides: 1. For the determination of titles by a court of competent jurisdiction and the issuing of a certificate thereon by the registrar of titles; and 2. That he must keep a record, to be known as the registry of titles, in which must be entered the original and all subsequent certificates of title and such notation as to liens, encumbrances, and the like as are required to show the condition of the title, and that

the registrar, on it appearing to him that a person intending to create a charge or to make a transfer as to the title of the estate proposed to be transferred or against which he proposes to create a lien, shall enter upon the folium of the registry and upon the owner's certificate a memorial of the lien, in case a lien is to be created, and make out and register a new certificate if the title is to be transferred, does not confer forbidden judicial powers on such registrar. (*People v. Simon*, 175.)

7. CONSTITUTIONAL LAW—TORRENS LAND LAW.—The fact that after the initial registration, an owner may be deprived of his property without due process of law does not establish that the act is unconstitutional, for the state has the power to provide the terms and conditions upon which land may be acquired and held by individuals, and the methods of its acquisition and transfer. (*People v. Simon*, 175.)

8. CONSTITUTIONAL LAND LAW—TORRENS LAND LAW—LIMITATIONS UPON ACTIONS.—A provision of a statute providing for the determination of titles and the issuing of certificates thereof, and that all persons having an interest in the land, whether served with process or not, must, within two years after the entry of the decree, appear and file an answer, otherwise it shall be binding upon them, may, as to all persons having merely a right of action, be sustained as a statute of limitations. (*People v. Simon*, 175.)

9. CONSTITUTIONAL LAW—CONSTRUCTION OF STATUTES.—Whenever a statute can be so construed as to avoid conflict with the constitution and give force to the law, such construction will be adopted by the courts. (*People v. Simon*, 175.)

10. CONSTITUTIONAL LAW—LOCAL OPTION.—The provisions of the statute known as the Torrens land law, providing that it shall take effect only after a favorable vote by counties, is not an attempt to delegate legislative power. (*People v. Simon*, 175.)

11. STATUTORY LAW.—IF A STATUTE OF A STATE HAS RECEIVED A CONSTRUCTION by its highest court, this construction will ordinarily be accepted by the courts of other states, though they would, upon finding similar language in a statute of their own, give it a different and even a reverse construction. (*Bell v. Farwell*, 194.)

12. CONSTITUTIONAL LAW—AMENDATORY STATUTES.—An act, not complete in itself, and, in effect, amendatory of other acts, must expressly recite and repeal the acts amended. Otherwise it is void. (*Horkey v. Kendall*, 623.)

13. STATUTES—CONFLICT—CONSTRUCTION.—Special provisions in a statute relating to a particular subject matter must prevail over general provisions in other statutes in conflict therewith. (*State v. Cornell*, 629.)

14. STATUTES—CONFLICT—CONSTRUCTION.—If a statute relates specifically to the subject of issuing bonds to enable counties to participate in interstate expositions, the provisions therein as to the vote necessary to carry that class of bonds prevails over provisions of general statutes in conflict therewith, for the reason that it is a special law in relation to a particular subject. (*State v. Cornell*, 629.)

15. CONSTITUTIONAL LAW—TAKING PROPERTY WITHOUT DUE PROCESS OF LAW, WHAT IS.—A law which annihilates the value of property, or restricts its use or takes away any of its essential attributes, is forbidden and rendered void by the provision of the constitution declaring that a citizen shall not be deprived of his property without due process of law. A law which interferes

with property by depriving the owner of the profitable and free use of it, or hampers him in the application of it to the purposes of trade, or imposes conditions upon the right to hold or use it, may seriously impair its value, against which the constitution is a protection. [Per O'Brien, Judge.] (People v. Hawkins, 738.)

16. CONSTITUTIONAL LAW—STATUTE REQUIRING PERSONS SELLING GOODS MANUFACTURED IN A PRISON TO DISCLOSE THEIR HISTORY.—A statute requiring all articles made by prison labor or in any establishment in which convict labor is employed, before being sold or exposed for sale, to be branded, labeled or marked, so as to show that they are convict made, is unconstitutional. It is an inexcusable and intolerable invasion of the rights and liberty of the citizen. [Per O'Brien, Judge.] (People v. Hawkins, 738.)

17. CONSTITUTIONAL LAW — PROVISION RESPECTING PRISON LABOR.—The provision of the constitution of the state of New York declaring that the legislature shall, by law, provide for the occupation and employment of prisoners sentenced to the several state prisons, and that no persons in such prisons shall be required or allowed to work at any trade, industry, or occupation wherein or whereby his work, or the product or profit thereof, shall be farmed out, contracted, given, or sold to any person, firm, or corporation, but that the provision shall not be construed to prevent the legislature from providing that convicts may work for, and the product of their labor be disposed of to, the state or any political division thereof, or for or to any public institution owned, managed, or controlled by the state or any political division thereof, does not authorize the enactment of a statute forbidding the sale of any wares produced by prison labor unless so stamped as to disclose that fact. [Per O'Brien, Judge.] (People v. Hawkins, 738.)

18. CONSTITUTIONAL LAW—TICKET BROKERAGE—STATUTES PROHIBITING.—A statute undertaking to make it a crime for a person to sell or offer for sale any passage ticket for passage or conveyance upon any vessel or railway train, unless he is an authorized agent of the owners or consignees of such vessel or corporation running such trains, provided that the authorized agent of any transportation company may purchase from the properly authorized agent of any other transportation company a ticket for a passenger, to whom he may sell a ticket to travel from any point on the line for which he is a properly authorized agent, so as to enable such passenger to travel to the place or junction from which his ticket shall read, is unconstitutional and void. (People v. Warden of Prison, 763.)

See Contempt, 1; Corporations, 20, 21; Evidence, 5; Insurance, 5; Interstate Commerce; Judicial Sales, 5; Mechanics' Liens, 2, 4; Mortgage, 17; Municipal Corporations, 1-3, 5, 6, 11; Officers, 6; Police Power, 1; Railroad Companies, 20; Witnesses.

STREETS.

See Highways; Municipal Corporations.

SURETYSHIP.

1. GUARDIAN AND WARD—ACCOUNTING—LIABILITY OF SURETY.—A surety on a guardian's bond who voluntarily becomes a party to a proceeding upon an accounting to determine the amount due from the guardian to his ward, does not thereby conclusively admit his liability on the bond. (Perkins v. Cheney, 495.)

2. GUARDIAN AND WARD—LIABILITY OF SURETIES—STATUTE OF LIMITATIONS—ESTOPPEL.—If, on the applica-

tion of the sureties of a guardian to perfect an appeal from the guardian's accounting, the court makes an order denying the request of the ward that the appellants be required to give bond to pay any sum found due the estate, as action on the bond might be barred by limitation, and such denial of the request is placed "on the ground that, in the opinion of the court, the action would not be barred, and that such bond is not required in the interest of justice, nor for the protection of the estate, such order does not estop the sureties from pleading the statute of limitations on their bond, if the bar was complete before such appeal. (*Perkins v. Cheney*, 495.)

3. SURETYSHIP—STATUTE OF LIMITATIONS—NEW PROMISE.—The duty of a surety to see that his principal performs the contract guaranteed subsists as a moral obligation after the statute of limitation has run against the legal right to enforce it, and it is sufficient consideration to support a new promise that the pre-existing obligation of the principal will be fulfilled. (*Perkins v. Cheney*, 495.)

4. SURETYSHIP—STATUTE OF LIMITATIONS—NEW PROMISE.—A verbal acknowledgment or new promise by a surety is sufficient to revive his liability barred by the statute of limitations. (*Perkins v. Cheney*, 495.)

5. SURETYSHIP—STATUTE OF LIMITATIONS—NEW PROMISE.—A verbal acknowledgment or new promise by a surety on a guardian's bond, that he will pay whatever is found to be due from his principal, is sufficient to revive his liability barred by the statute of limitations. (*Perkins v. Cheney*, 495.)

6. SURETYSHIP—CONSIDERATION OF PROMISE TO PAY—EXTENSION OF TIME AS.—An extension of the time of payment is a sufficient consideration for the promise of a third party, as surety, to pay the debt. (*Hooper v. Pike*, 512.)

7. SURETYSHIP—RELEASE—REVIVAL OF LIABILITY BY NEW PROMISE.—If a surety has been released by an extension of the time of payment without his consent, he may, without any new consideration, revive his liability by a new promise, at least if it is in writing. (*Hooper v. Pike*, 512.)

8. SURETYSHIP—RELEASE—REVIVAL OF LIABILITY BY ACKNOWLEDGMENT.—After a surety has been released by an extension of the time of payment, without his consent, an absolute and unqualified acknowledgment of the liability in writing will revive it, and imply a new promise. (*Hooper v. Pike*, 512.)

9. SURETYSHIP—RELEASE—WAIVER OF STATUTE OF LIMITATIONS BY ACKNOWLEDGMENT OF LIABILITY.—An absolute acknowledgment of liability, on the part of a surety who has been released by an extension of the time of payment, without his consent, waives the statute of limitations after the same has run. (*Hooper v. Pike*, 512.)

See Guardian and Ward, 5, 6; Sheriffs, 2, 3, 6.

TAXATION.

1. TAXATION.—WAYS AND MEANS ARE PROVIDED FOR THE TAXATION of property held for charitable purposes, when there is a general statute directing the assessment and taxation of all real property not exempt therefrom. (*St. Louis v. Wenneker*, 561.)

2. PROPERTY HELD IN TRUST BY A MUNICIPAL CORPORATION for a purpose which any other trustee might execute, as where the trust is subject to supervision and the trustee to

change by the courts, is not property of the city, and hence not exempt from taxation as municipal property. (*St. Louis v. Wenneker*, 561.)

3. MUNICIPAL CORPORATIONS, PROPERTY HELD IN TRUST BY, TAXATION OF.—Property devised to a city, to be held in trust to furnish relief to all poor emigrants and travelers on the way to settle in the west, is not exempt from taxation under a constitution declaring that the property of all cities, counties, and other municipal corporations shall be exempt from taxation, and also exempting lots in any such city or within one mile thereof to the extent of one acre, and other lots to the extent of five acres, with the buildings thereon, when used exclusively for religious worship, for schools, or for purposes purely charitable. (*St. Louis v. Wenneker*, 561.)

4. TAXATION.—AN ASSESSMENT FOR THE PURPOSE OF TAXING REAL PROPERTY MUST BE IN THE NAME OF THE OWNER, if known. If property has been devised to a municipal corporation in trust for a specific purpose, the assessment of it to "Mullanphy Emigrant Relief Fund" is void, though Mullanphy was the donor of the fund, and the trust was to be for the relief of poor emigrants. (*St. Louis v. Wenneker*, 561.)

5. TAXATION FOR PUBLIC PURPOSE.—The legislature may authorize taxation for a public purpose, but a tax imposed for an object in its nature essentially private is void. (*State v. Cornell*, 629.)

6. TAXATION—PUBLIC PURPOSE.—It is for the legislature in the first instance to decide whether the object for which a tax is to be used or raised is a public purpose; but its determination of the question is not conclusive. (*State v. Cornell*, 629.)

7. TAXATION—PUBLIC PURPOSE—VALIDITY.—In order to declare a tax invalid on the ground that it is not imposed for the benefit of the public, the absence of a public interest in the purpose for which the money is raised by taxation must be so clear and palpable as to be immediately perceptible to every mind. (*State v. Cornell*, 629.)

8. TAXATION—INTERSTATE EXPOSITIONS—PUBLIC PURPOSE.—A statute authorizing counties to participate in interstate expositions, to issue bonds for that purpose, and to provide for the levy of a tax for their payment, is not unconstitutional as authorizing taxation for a private interest and not for a public purpose, and an appropriation of the money arising from the sale of such bonds for the erection and maintenance of suitable buildings and for county exhibits at such expositions, is also for a public purpose and not unconstitutional. (*State v. Cornell*, 629.)

See *Municipal Corporations*, 21, 22; *Police Power*, 8.

TELEGRAPH COMPANIES.

1. TELEGRAPH COMPANIES—NEGLIGENT DELAY IN DELIVERING MESSAGE.—A delay of five hours on the part of a telegraph company in delivering a message, the urgency of which is known to it, is negligence, when it attempts to find the addressee down town, and at his office, but fails to leave notice there or to visit his residence within the free delivery limits, where he might have been found. (*Hendershot v. Western Union Tel. Co.*, 318.)

2. TELEGRAPH COMPANIES—NEGLIGENT DELAY IN DELIVERING MESSAGE—PROXIMATE CAUSE.—Negligent delay of five hours in the delivery of a telegraph message reading "Bravo is sick; come and fetch Miller at once," when the telegraph com-

pany knows that Bravo is a valuable horse, and that Miller is a veterinary surgeon, is the proximate cause of the death of the horse, when it is shown that had the veterinary surgeon reached the horse five hours earlier his chances of recovery would have been greater, and that in all reasonable probability he would have been saved. (*Hendershot v. Western Union Tel. Co.*, 313.)

3. TELEGRAPH COMPANIES—DELAY IN DELIVERING MESSAGE — REMOTENESS. — Damages claimed against a telegraph company for the death of a horse, due to the company's delay in delivering a message, are within the contemplation of the contract, and not too remote, when the company knew from the nature of the message that promptness was required. (*Hendershot v. Western Union Tel. Co.*, 313.)

4. TELEGRAPH COMPANIES—DAMAGES FOR DELAY IN DELIVERING MESSAGE—NOTICE.—A telegraph message reading, "Bravo is sick; come and fetch Miller at once," it being known to the telegraph company that Bravo was a valuable horse, and that Miller was a veterinary surgeon, is notice to the company of the damages that may result from delay in delivering the message, especially when it was a "hurry message" and the company was asked to send it promptly. (*Hendershot v. Western Union Tel. Co.*, 313.)

5. TELEGRAPH COMPANIES—DELAY IN DELIVERING MESSAGE—CONTRIBUTORY NEGLIGENCE.—In an action to recover damages for the death of a horse, caused by the delay of a telegraph company in delivering a message requesting the attendance of a veterinary surgeon, the sole issue is whether such death was attributable to delay in treatment, caused by the failure to deliver the message, regardless of negligence in the treatment of the horse after the dispatch was delivered. (*Hendershot v. Western Union Tel. Co.*, 313.)

TENDER.

1. LEGAL TENDER—MUTILATED MONEY.—The rules of the United States treasury department, with regard to the redemption of mutilated money, do not make such money legal tender. (*North Hudson County Ry. Co. v. Anderson*, 703.)

2. LEGAL TENDER—MUTILATED MONEY AS CAR FARE.—If paper money is tendered a railway conductor as car fare, he has a right to demand an entire bill, and is not bound to accept one from which a portion has been torn, especially if any part is absent which might aid in determining whether the bill is genuine. (*North Hudson County Ry. Co. v. Anderson*, 703.)

3. LEGAL TENDER—MUTILATED MONEY.—The absence of a piece one inch and a quarter by one inch and a half in dimensions from the corner of a dollar bill makes it mutilated money, and renders it insufficient and invalid as legal tender. (*North Hudson County Ry. Co. v. Anderson*, 703.)

See Mortgage, 13.

TORRENS LAND LAW.

See Statutes, 2, 3, 6-8, 10.

TRADEMARKS.

TRADEMARKS—DECEPTION.—A trademark placed upon shoes, which represents them to have been made by the "Old Colony Shoe Co., Rockland, Mass.," a place having a reputation for making fine shoes, when, in fact, there is no such company in existence, and

the shoes were not made at Rockland, but at another place, and by another company, is calculated to deceive the public as to the manufacturer of the article and the place where it is manufactured, and one using it is not entitled, in a court of equity, to any relief against one who uses the same deceptive trademark on the same character of goods. (*Coleman etc. Co. v. Danneberg Co.*, 143.)

See Injunction, 1.

TRADE SECRETS.

See Contracts, 11; Injunction, 8.

TRESPASS.

TRESPASS—MEASURE OF DAMAGES.—In trespass quare clausum fregit for taking animals *ferae naturae*, the landowner can recover for the trespass only. (*Beach v. Morgan*, 692.)

See Railroad Companies, 11.

TRIAL.

1. **TRIAL—NONSUIT.**—If there is evidence tending to prove every material allegation of the complaint, a nonsuit cannot be granted. (*Mack v. South Bound R. R. Co.*, 913.)

2. **NONSUIT.—IT IS ERROR TO GRANT** a nonsuit where the record shows that the plaintiff has made out a *prima facie* case. (*Boyd v. Spencer*, 146.)

3. **PERSONAL EXAMINATION OF A PARTY OR HIS SECRECTIONS.**—Where a plaintiff in an action for personal injuries claims that they have caused a dislocation of his kidneys, producing secretions of albumen and sugar in the urine, the court should, on motion of the defendant, require the plaintiff to produce, at or in advance of the trial, as the court may order, specimens of the plaintiff's urine, that it may be examined and analyzed by proper physicians and experts. (*Cleveland etc. Ry. Co. v. Huddleson*, 238.)

4. **PRACTICE.—EXCLUSION OF EVIDENCE** as to who were present at the execution of certain receipts by a testator whose will is contested, is harmless error, if the execution of such receipts is undisputed. (*Manatt v. Scott*, 293.)

5. **TRIAL.—INTERROGATORIES** submitted to the jury calling for material facts to be determined, although some of those called for are not ultimate, is not prejudicial error. (*Manatt v. Scott*, 293.)

6. **TRIAL—FINDING NOT PREJUDICIAL.**—An erroneous finding by the trial court that a tenant in common has conveyed his interest in the land in dispute is cured by another finding that such interest has been reconveyed to him. (*Bader v. Dyer*, 322.)

7. **TRIAL—POLL OF JURY—RIGHT OF JUROR TO DISSENT.**—Any juror may dissent from a verdict to which he has agreed in the jury-room at any time before it is received and entered up. (*Owens v. Southern Ry. Co.*, 821.)

8. **TRIAL—USE OF PHOTOGRAPHS—ORDER OF PROOF—CURING OF ERROR.**—The order of testimony rests largely in the discretion of the trial judge, and initial errors may be cured by subsequent proof. Hence, although witnesses are erroneously permitted to indicate to a jury, upon a photograph, the exact place of an accident, without any preliminary proof that the photograph represents the place, the error is cured by the production of such proof before the photograph is formally admitted in evidence. (*Beardslee v. Columbia Township*, 888.)

9. EVIDENCE, OTHERWISE INCOMPETENT, becomes competent when received without objection. (*Latimer v. Trowbridge*, 893.)

10. TRIAL.—NONSUIT cannot be granted when there is any competent or legal evidence supporting the cause of action. (*Hunter v. Pelham Mills*, 904.)

See Appeal; Instructions.

TROVER.

EVIDENCE—PROOF OF AGREEMENT OUTSIDE OF LEASE—BUILDING AS PERSONAL PROPERTY OF LESSEE—STATUTE OF FRAUDS.—In an action of tort for the conversion of a building on leased land, evidence tending to show an agreement between the lessor and the lessee, outside of the lease, that the building should be and remain the personal property of the lessee, is admissible, for there is nothing which requires such an agreement to be in writing. (*Ryder v. Faxon*, 417.)

See Partition, 2.

TRUSTS.

1. TRUSTS.—THE DUTY OF A TRUSTEE is to perform the manner he has undertaken according to the provisions of, and in the manner directed by, the deed of trust. (*Davenport v. Gannon*, 827.)

2. TRUST FUNDS, RETENTION OF CHARACTER OF.—Trust funds invested by trustees in the hands of third persons having knowledge of their character, still remain impressed with the obligation of the trust in the hands of the holder, and are subject to be reclaimed and restored to the trust fund. (*Warren v. Union Bank of Rochester*, 777.)

3. A TRUSTEE OR GUARDIAN CANNOT BIND the estate he represents to any use of its funds by contracts with third persons who have knowledge of the character of the property transferred, except in the ordinary and usual course of administration of the trust, and in furtherance of its object. (*Warren v. Union Bank of Rochester*, 777.)

See Guardian and Ward; Taxation, 2, 3.

UNDUE INFLUENCE.

See Wills, 2, 3, 11, 12.

USAGE.

See Custom.

USURY.

1. USURY—NATIONAL BANKS.—The defense of usury is good in an action by a national bank to recover unpaid interest, when the contract rate exceeds that prescribed by the national banking act. (*Tomblin v. Higgins*, 596.)

2. THE DEFENSE OF USURY CANNOT BE SUSTAINED unless there was a loan or forbearance of money. (*Orvis v. Curtiss*, 810.)

3. USURY — TRANSACTIONS RESPECTING DEALING IN STOCKS.—If an agreement is entered into whereby a firm of brokers are to purchase a specified amount of stocks and furnish a designated amount of money therefor, and they and the person for whose account the stocks are purchased are to be entitled to share equally

in the profits of the transaction, except that he guarantees that the profits shall reach a sum specified, which sum is in excess of the amount which might lawfully be charged for interest on the advances made, the transaction is not tainted with usury, because there is no borrowing or lending of money, but only an agreement to deal in stocks. (*Orvis v. Curtiss*, 810.)

VACANT AND UNOCCUPIED.

See Insurance, 14-16.

VENDOR AND PURCHASER.

STATUTE OF FRAUDS.—A PAROL PROMISE by a grantee of land to reconvey it is void under the statute of frauds. (*Poppe v. Poppe*, 508.)

See Evidence, 11.

WAGES.

See Statutes, 1.

WAIVER.

See Courts, 1; Insurance, 3, 12.

WAREHOUSEMAN.

BAILOR AND BAILEE—OWNERS OF STORAGE WAREHOUSE, LIABILITY FOR UNFITNESS OF.—If the owners of a cold-storage warehouse, before opening it, issue a circular advertising it as free from taint, but in its construction use hard pine boards in the inside, and another person obtains the right to put eggs therein, and, both during the construction and afterward, has ample opportunities to observe its structure and the use of such timber, and has experience in shipping and keeping eggs, while the owners of the warehouse were without experience, and the eggs are damaged by contracting the taint of such boards, all the parties are negligent, and hence there can be no recovery for the damage to the eggs. (*Parker v. Union Ice and Salt Co.*, 383.)

WARRANTY.

See Sales, 1.

WATERED STOCK.

See Corporations, 14, 16.

WATERWORKS AND WATER COMPANIES.

1. WATER COMPANIES — UNREASONABLE AND VOID RULE AS TO PAYMENT OF WATER RATES.—A rule or regulation of a water company, organized for the purpose of supplying the inhabitants of a town with water, which provides that the water may be shut off from consumers in all cases of nonpayment of water rates, would be unreasonable and void, if so construed as to permit the water to be shut off because a former occupant had not paid his bill for water. (*Turner v. Revere Water Co.*, 432.)

2. WATER COMPANIES—WATER RATES—NONLIABILITY OF SUBSEQUENT USERS FOR DEBTS OF FORMER OCCUPANT.—One man is not obliged to pay another's debt, and a water rate is not, without authority of a statute, a charge or lien upon the land. Hence, a tenant of premises is not answerable for a debt

of the owner, and a water company, incorporated for the purpose of supplying the inhabitants of a town with water, has no right to shut off water from a tenant of premises in such town, until arrears due for water from the owner are paid. (*Turner v. Revere Water Co.*, 432.)

WATERS AND WATERCOURSES.

1. **WATERS AND WATERCOURSES—SURFACE WATER.**—The flood waters or overflow of a natural stream or river when out of its banks and flowing from foothill to foothill is part of the natural stream, and not mere surface water. (*Chicago etc. R. R. Co. v. Emmert*, 602.)

2. **WATERS AND WATERCOURSES.—SURFACE WATER** is that which is diffused over the surface of the ground, derived from falling rains or melting snow, and it continues to be such until it reaches some well-defined channel in which it is accustomed to, and does flow with other waters, whether derived from the surface or springs, and it then becomes a running water stream and ceases to be surface water. (*Chicago etc. R. R. Co. v. Emmert*, 602.)

3. **A RIPARIAN OWNER** is entitled to a reasonable use of the water passing through his land, either for his own purposes, or for sale to others, or both. The reasonableness of such use is a question of fact for the jury. (*Gillis v. Chase*, 645.)

4. **WATERS—MODE OF MEASUREMENT.**—The grantee of a right to take from a "bulkhead and flume the quantity of water which shall be discharged therefrom through an aperture of two hundred square inches at the gate, under fifteen feet head," is entitled to the constant flow of exactly that quantity at all stages of the water, and the size of the aperture must be increased or diminished accordingly as the head rises or falls, above or below, fifteen feet. (*Cummings v. Blanchard*, 664.)

5. **WATERS—MODE OF MEASUREMENT.**—The grantee of a right to take from a "bulkhead and flume the quantity of water which shall be discharged therefrom through an aperture of two hundred square inches at the gate, under a fifteen feet head," may be required to construct a gate at the aperture with a gauge thereon, showing at any given head an infringement of the grantor's rights. (*Cummings v. Blanchard*, 664.)

6. **WATERS—MODE OF MEASUREMENT.**—Under a grant of the right to take from a "bulkhead and flume the quantity of water which shall be discharged therefrom through an aperture of two hundred square inches at the gate, under fifteen feet head," such head is to be measured with the water at rest in the flume. (*Cummings v. Blanchard*, 664.)

7. **WATERS AND WATERCOURSES—DAMS—RELEASE OF WATER IN TIME OF FLOOD.**—The owner of a dam has the right to raise the floodgates therein only for the protection of his own property from immediate and impending danger, when such necessity is caused by a sudden rise in the stream which could not have been anticipated by ordinary prudence and foresight. (*Hunter v. Pelham Mills*, 904.)

8. **WATERS AND WATERCOURSES—DAMS.**—A dam must be so constructed as to be capable of receiving, if necessary, the water that would originate by such pressure and such rains as would be reasonably expected by a man of ordinary prudence and foresight. (*Hunter v. Pelham Mills*, 904.)

9. **WATERS, SURFACE—DIVERSION OF—LIABILITY FOR INJURY—CIVIL-LAW RULE.**—If a lower and adjacent landowner elevates his land, and thus turns surface water, which naturally

flows over it, back upon the upper proprietor, or so obstructs the natural flow of such water as to prevent its escaping from the dominant estate, he is answerable to such neighboring proprietor for any damages resulting to the latter in consequence of his act, including compensation for the diminution, if any, in the market value of the property thus injured. (*Farkas v. Towns*, 88.)

WILLS.

1. **WILLS—CONTEST—EVIDENCE.**—When a will is attacked, on the ground of want of capacity in the testator arising from old age, infirmity, and senile dementia, the testimony of one who has been the friend of the testator, as to a sudden dislike taken by the latter for such friend, is admissible as tending to show senile dementia. (*Manatt v. Scott*, 293.)

2. **WILLS—CAPACITY—DECLARATIONS AS EVIDENCE.**—If the validity of a will is contested on the ground of incapacity and undue influence, declarations made by the testator before the execution of the will, as to what the devisees and the proponents of the will told him detrimental to the contestants, are admissible as bearing on the capacity of the testator and undue influence exerted over him. (*Manatt v. Scott*, 293.)

3. **WILLS—UNDUE INFLUENCE—EVIDENCE.**—If the validity of a will is contested on the ground of incapacity and undue influence, an inventory and final account of the aged testatrix, as executrix of her husband's estate, executed by her, but prepared by the proponent and devisee of the will, which fails to refer to property of great value included in such estate, is admissible to show that she was not aware of the extent of her property, and that the proponent concealed property from her and from the court, and exerted an undue influence over her. (*Manatt v. Scott*, 293.)

4. **WILLS—WANT OF CAPACITY—NONEXPERT EVIDENCE.**—If a will is contested on the ground of want of mental capacity in the testator, a request to a nonexpert witness to state any difference in the testator's actions and appearance, indicating mental strength or weakness, at the time he last saw him, as compared with the time when he first saw him, does not call for an opinion without detailing the facts to the jury, and is admissible. (*Manatt v. Scott*, 293.)

5. **WILLS—EVIDENCE—HARMLESS ERROR.**—If, in an action contesting the validity of a will on the ground of want of mental capacity and senile dementia, the proponent introduces evidence of the commencement of a suit by the contestants against the testator in order to explain his feelings against them, the admission in evidence of the circumstances of such suit is harmless error. (*Manatt v. Scott*, 293.)

6. **WILLS—WANT OF MENTAL CAPACITY—EVIDENCE.**—In an action contesting the validity of a will on the ground of want of mental capacity in the testator, his sworn answer to a suit against him, alleging that he was very weak at the time of the execution of the contract in suit, unable to read or write, or to transact business intelligently, is admissible in evidence as bearing upon the condition of his mind at the time of making his will. (*Manatt v. Scott*, 293.)

7. **WILLS.—TESTAMENTARY INCAPACITY DOES NOT NECESSARILY REQUIRE** that the testator shall actually be insane or of unsound mind. Weakness of intellect, whether arising from extreme old age, from disease, or great bodily infirmities or suffering, or from all of these combined, may render the testator incapable of making a valid will, providing such weakness really

incapacitates him from knowing or appreciating the nature, effect or consequences of the act he is engaged in performing. (*Manatt v. Scott*, 293.)

8. WILLS — TESTAMENTARY INCAPACITY.—Although a sound and disposing mind in the testator is necessary to the execution of a valid will, yet eccentricity, peculiarity, oddity, or the like, or weakness of mind ordinarily attendant upon old age, do not of themselves necessarily establish lack of testamentary capacity. (*Manatt v. Scott*, 293.)

9. WILLS—MENTAL CAPACITY—EVIDENCE—INEQUITIES of a will may be taken into consideration in determining the mental capacity of the testator, or whether undue influence has been exercised, but apparent inequality and inequity in the provisions of a will do not alone warrant the presumption of mental incapacity or undue influence, and should be considered only as circumstances in connection with other facts bearing on the condition of the testator's mind. (*Manatt v. Scott*, 293.)

10. WILLS—EVIDENCE—INEQUALITIES or inequities in a will not appearing on its face may be shown by evidence establishing the relationship and financial condition of the testator's heirs. (*Manatt v. Scott*, 293.)

11. WILLS—MENTAL INCAPACITY—UNDUE INFLUENCE—EVIDENCE.—A will which bestows property on the wealthy and overlooks the claims to bounty of those who are poor, in like relationship to the testator, does not commend itself as reasonable or natural, and it is a circumstance suggesting a disordered mind or the effect of undue influence. (*Manatt v. Scott*, 293.)

12. WILLS—MENTAL CAPACITY—UNDUE INFLUENCE—QUESTION FOR JURY, WHEN.—If, in an action contesting the validity of a will for want of mental capacity in the testator, and undue influence exerted upon him, the evidence on these issues is conflicting, they should be submitted to the jury for determination, and its decision is final. (*Manatt v. Scott*, 293.)

13. WILLS—HUSBAND OF DEVISEE AS WITNESS.—A beneficial devise in a will to the wife of one of the three subscribing witnesses renders her husband incompetent as such witness, and makes the will invalid. (*Hodgman v. Kittredge*, 661.)

14. WILLS—IMMATERIALITY OF FORM.—The form of a will is not material if a testamentary intention is apparent from the face of the paper. (*Gaston's Estate*, 874.)

15. WILLS—CONSTRUCTION OF—GENERAL RULE.—Whether a writing was intended to be a disposition of property after death must be determined from the language of the paper itself, and the circumstances surrounding its execution and preservation. (*Gaston's Estate*, 874.)

16. WILLS—EVINCING TESTAMENTARY DISPOSITION.—A testamentary disposition of property may be evinced by the word "wish," as well as the word "will," at the commencement of a will. (*Gaston's Estate*, 874.)

17. WILLS—CERTAINTY—DEFINITENESS.—A writing will be interpreted and enforced as a will if it is definite enough to be capable of such interpretation and enforcement. (*Gaston's Estate*, 874.)

18. WILLS—EXTRINSIC EVIDENCE TO IDENTIFY PROPERTY AND LEGATEES.—Parol evidence may be heard to identify the property and legatees named by a testatrix in a will. (*Gaston's Estate*, 874.)

19. WILLS—FORM—DEFINITENESS—PAROL EVIDENCE.—A paper as follows:

"Dec. 18 1898
it my wish

two
that Mrs. Weller the A houses and
lots the ten acers for the four
boys Ern Frank Lue and Paul
Mrs Weller pay Eliz Mell 1500
Mr Shipply pay to Poty
Johnston 500 his debt and
Callie Abell 500 dollars
Mrs Shipply the other 500
Lucid 500 Chatty Uncel 500
My sisters 4000 apeace
Mary Abell Agness Snodgrass
Mary E. Anderson 1000
Ed Weller keeps what he got
Lone to pay Evert Abell 500
And keep the blance

"E. J. GASTON,"

written by an illiterate person, in lead pencil, on the back of a gas receipt, found after the decedent's death in a bureau drawer, and dated two years before her death, at a time when she had excellent business capacity, is a will, and sufficiently definite to be interpreted and enforced as such where it appears that the property and persons mentioned therein are capable of being identified by parol evidence. (Gaston's Estate, 874.)

See Executors and Administrators, 6.

WITNESSES.

1. WITNESSES—COMPETENCY OF WIFE.—In an action by a widow against the administrator of her husband's estate, in which she claims title to land by virtue of a conveyance alleged to have been made to her by her husband, she is a competent witness to testify that the deed under which she claims was delivered to her by her husband in his lifetime. Such action is not "upon a claim or demand against the deceased" within the meaning of a statute making parties in interest, or the assignors of parties to such action, incompetent as witnesses to testify to any matter of fact occurring before the death of such deceased. (Poulson v. Stanley, 73.)

2. WITNESSES.—A JUROR IS NOT INCOMPETENT to testify as a witness solely on account of having been impaneled and sworn in the case, if he is otherwise competent. (Savannah etc. Ry. Co. v. Quo, 85.)

3. WITNESSES—EXPERT EVIDENCE.—A hypothetical question propounded to an expert witness, if founded on facts which the evidence tends to establish, is admissible, and it is not essential that such facts should have been proven to actually exist. (Manatt v. Scott, 293.)

4. WITNESSES—COMPETENCY.—A wife who is present at a conversation between her husband and a deceased person, but does not participate therein, is competent as a witness, although her husband is prohibited by statute from testifying to such conversation. (Dettmer v. Behrens, 826.)

5. WITNESSES—OPINION OF—WHEN NOT ADMISSIBLE. Witnesses who were not present when a locomotive was derailed should not be allowed to give their opinions as to the cause of the derailment and whether it resulted from a defective track. (Erb v. Popritz, 862.)

6. WITNESSES—ACCIDENT—OPINIONS OF NONEXPERTS AS EVIDENCE OF CONTRIBUTORY NEGLIGENCE.—It is error, in an action to recover damages of a township for personal injuries alleged to have been caused by a dangerous and unguarded place in a road, to admit the opinion of a nonexpert witness as evidence of contributory negligence, such opinion being founded upon a hypothetical question containing facts concerning the horses, harness, wagon, and the load. (*Beardslee v. Columbia Township*, 883.)

See Appeal, 11; Criminal Law, 5, 6; Seduction, 4; Wills, 18.

WRITS.

1. POSSESSION, WRIT OF, WHO MAY BE EVICTED UNDER.—Persons who are not defendants in an action of ejectment, and who were not in possession before it was instituted, or who claim under titles distinct and independent from or to the title litigated, cannot be evicted under the writ. (*Atwood v. State*, 393.)

2. POSSESSION, WRIT OF, WHETHER MAY REQUIRE OFFICER TO MAINTAIN PLAINTIFF IN POSSESSION.—In an action in which a plaintiff has recovered judgment for the possession of real property, while a writ may properly issue requiring an officer to put plaintiff in possession, there is no authority for any other writ or order of the court requiring or authorizing the officer to maintain the plaintiff in possession. (*Atwood v. State*, 393.)

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